CHAPTER 5

Unfair Trade Practices

CROSS REFERENCES

Bad Faith Assertion of Patent Infringement Act, authority of Attorney General, civil penalties, bond, see Section 39‑4‑130.

Vacation time sharing plans, resale services and providers, consumer protections, unfair trade practices, fees, see Section 27‑32‑55.

ARTICLE 1

General Provisions

**SECTION 39‑5‑10.** Short title; definitions.

This article may be cited as the “South Carolina Unfair Trade Practices Act.”

As used in this article,

(a) “Person” shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.

(b) “Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(c) “Documentary material” shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(d) “Examination” of documentary material shall include the inspection, study or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.

HISTORY: 1962 Code Section 66‑71; 1971 (57) 369.

RESEARCH REFERENCES

ALR Library

18 ALR, Federal 2nd Series 223 , Construction and Application of Class Action Fairness Act of 2005, Pub. L. 109‑2, 119 Stat. 4 (2005).

29 ALR, Federal 7 , What Constitutes “Good Cause” Allowing Federal Court to Relieve Party of His Default Under Rule 55(C), of Federal Rules of Civil Procedure.

26 ALR 6th 249 , Validity, Construction, and Application of State Statutory Provisions Prohibiting Sale of Gasoline Below Cost.

48 ALR 6th 511 , Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts‑Pyramid or Ponzi or Referral Sales Schemes.

66 ALR 6th 351 , Validity, Construction and Application of State Laws Concerning, Relating To, or Encompassing Disclosure of and Tampering With Motor Vehicle Odometer‑Validity of Statutory Provisions, Construction of Statute and...

117 ALR 5th 155 , Right to Private Action Under State Consumer Protection Act‑Preconditions to Action.

23 ALR 5th 241 , Excessiveness or Inadequacy of Attorney’s Fees in Matters Involving Commercial and General Business Activities.

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36 Am. Jur. Proof of Facts 3d 221, Proof of Statutory Unfair Business Practices.

74 Am. Jur. Proof of Facts 3d 63, Scams and Cons.

119 Am. Jur. Proof of Facts 3d 407, State Law Remedies Against Credit Card Company.

127 Am. Jur. Proof of Facts 3d 141, Proof Under Class Action Fairness Act.

155 Am. Jur. Proof of Facts 3d 153, Proof of Facts in Suit Regarding False or Misleading Statements by Tax Preparation Service.

126 Am. Jur. Trials 1, Products Liability of Pharmaceutical Manufacturers for Antipsychotic Drugs.

127 Am. Jur. Trials 487, Litigation Concerning Unsubstantiated Health Claims Regarding Food and Beverages.

S.C. Jur. Action Section 15, Exclusive or Cumulative Remedies.

S.C. Jur. Advertising Section 8, Unfair Trade Practices.

S.C. Jur. Appeal and Error Section 77, Pleadings.

S.C. Jur. Appeal and Error Section 78, Pre‑Trial Motions and Orders.

S.C. Jur. Appeal and Error Section 80, Directed Verdict Motions.

S.C. Jur. Appeal and Error Section 82, Post‑Verdict and Post‑Trial Motions.

S.C. Jur. Appeal and Error Section 83, Argument in the Briefs.

S.C. Jur. Arbitration Section 8, Stay of Judicial Proceedings.

S.C. Jur. Attorney and Client Section 64, South Carolina Unfair Trade Practices Act.

S.C. Jur. Civil Conspiracy Section 11, Unfair Trade Practices.

S.C. Jur. Civil Conspiracy Section 15, Evidence.

S.C. Jur. Hospitals Section 32, Governmental Regulation.

S.C. Jur. Intellectual Property Section 16, State Law Governs Rights that Are Not Equivalent to the Exclusive Rights Under the Federal Copyright Statute.

S.C. Jur. Limitation of Actions Section 52, Trade and Commerce.

S.C. Jur. Private Business Franchises and Business Opportunities Section 50, State Antitrust Laws.

S.C. Jur. South Carolina Rules of Civil Procedure Section 50.0, Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

S.C. Jur. South Carolina Rules of Civil Procedure Section 56.2, Discussion.

S.C. Jur. Time Sharing Section 5, Initial Regulation.

S.C. Jur. Unfair Trade Practices Act Section 3, Unfairness or Deception.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

S.C. Jur. Unfair Trade Practices Act Section 5, Trade or Commerce.

S.C. Jur. Unfair Trade Practices Act Section 6, Persons Covered.

S.C. Jur. Unfair Trade Practices Act Section 14, Violations of Other Laws.

S.C. Jur. Witnesses Section 70, Value.

Treatises and Practice Aids

11 Causes of Action 267, Cause of Action for Violation of State Deceptive Trade Practices or Consumer Protection Statutes in Connection With Sale of Motor Vehicle.

54 Causes of Action 2d 111, Cause of Action for Violation of State Consumer Protection or Deceptive Trade Practices Statute in Connection With Real Estate Transaction.

65 Causes of Action 2d 205, Cause of Action by Consumers Against Manufacturers And/Or Sellers of Energy Drinks Under State Consumer Protection Statutes.

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1978 Survey: Contracts: installment sales contracts. 29 S.C. L. Rev. 69.

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Annual Survey of South Carolina Law: Business Law: Securities Regulation and the Unfair Trade Practices Act. 33 S.C. L. Rev. 1, August 1981.

Annual survey of South Carolina law, torts law. 42 S.C. L. Rev. 255 (Autumn 1990).

Consumer Protection and the Proposed “South Carolina Unfair Trade Practices Act.” 22 S.C. L. Rev. 767.

Impact on public necessary to invoke unfair trade practices act. 39 S.C. L. Rev. 6, Autumn 1987.

Internet solutions to consumer protection problems, 49 S.C. L. Rev. 887, Summer 1998.

The South Carolina Unfair Trade Practices Act and the void‑for‑vagueness doctrine. 40 S.C. L. Rev. 641 (Spring 1989).

Unfair and deceptive trade practices in construction litigation and arbitration. 40 S.C. L. Rev. 977 (Summer 1989).

NOTES OF DECISIONS

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1. In general

Factor for determining whether to set aside default against treated wood products company, based on company’s alleged personal responsibility for default, weighed in favor of setting aside default in private school’s action for negligence and violation of South Carolina Unfair Trade Practices Act (SCUTPA) arising from damage to school caused by fire retardant chemicals produced and sold by company; company’s service process agent admittedly mishandled process and offered some explanation for why process documents were forwarded to incorrect party. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. (C.A.4 (S.C.) 2010) 616 F.3d 413. Federal Civil Procedure 2444.1

Factor for determining whether to set aside default against treated wood products company, related to whether private school would be prejudiced by alleged delay in proceedings if default against company were set aside, was at best neutral in school’s action for negligence and violation of South Carolina Unfair Trade Practices Act (SCUTPA) arising from damage to school caused by fire retardant chemicals produced and sold by company; at time that company moved to set aside default, lengthy time period between damages trial and final judgment was reasonably foreseeable given magnitude of school’s claims against what was then two distinct defendants and character of defenses asserted. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. (C.A.4 (S.C.) 2010) 616 F.3d 413. Federal Civil Procedure 2444.1

Hospital’s peer review action which resulted in suspension of physician’s staff privileges based on allegations that he had sexually abused his adopted daughter, was not taken “in the conduct of any trade or commerce” within meaning of South Carolina Unfair Trade Practices Act since it did not occur in the conduct of advertising, offering for sale, sale or distribution of any services and any property and any other thing of value;” instead, the peer review action was an internal hospital review taken to protect patients. Moore v. Williamsburg Regional Hosp. (C.A.4 (S.C.) 2009) 560 F.3d 166, certiorari denied 130 S.Ct. 201, 558 U.S. 875, 175 L.Ed.2d 127. Antitrust And Trade Regulation 272

South Carolina courts have consistently rejected speculative claims of adverse public impact and require evidentiary proof of such effects. Therefore, advertising agency’s claim is rejected where agency offered no evidence in the record to support the proposition of competing agencies practice of double billing to inflate costs to the advertisers and hence to consumers, and offered no basis other than sheer speculation to conclude that the total advertising cost of the affected companies rose as a result of the alleged practices of the competing agency. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

In anti‑trust action brought by billboard company against competitor and city which adopted rezoning ordinances restricting billboards, cause of action under unfair trade practices act, Sections 39‑5‑10 et seq., could not be maintained where company alleged that competitor was engaged in unfair practice of double‑billing for renting billboard space, but cited no evidence in the record demonstrating that the injury suffered by company had an adverse impact on the public interest. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Mere breach of commercial contract, without more, is not actionable under unfair trade practices act, Sections 39‑5‑10, et seq., which act is not available to redress a private wrong where public interest is not affected; thus, even if billboard company’s alleged unfair practices may have amounted to fraud between commercial parties, such practices are not actionable under unfair trade practices act, since higher total advertising costs which allegedly resulted from such practice was simply a private injury suffered by purchasing advertisers. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

There were no factual allegations in borrowers’ complaint, as required to state claim against lender’s parent corporation and that corporation’s parent, under South Carolina Unfair Trade Practices Act (SCUTPA), on such theories as agency and joint venture, in connection with loan. Mincey v. World Savings Bank, FSB, 2008, 614 F.Supp.2d 610. Antitrust And Trade Regulation 358

Online sellers and online resellers of hotel rooms, who advertised their services, and provided consumers with hotel rooms in exchange for monetary consideration, when consumers visited their websites, engaged in “trade or commerce,” within the meaning of the South Carolina Unfair Trade Practices Act (SCUTPA). City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 226

City and town were “legal entities” authorized to bring action under South Carolina Unfair Trade Practices Act (SCUTPA), where city and town had received prior approval of state Attorney General to bring action. City of Charleston, SC v. Hotels.com, LP, 2007, 487 F.Supp.2d 676. Antitrust And Trade Regulation 289

For claims to be actionable under South Carolina’s Unfair Trade Practices Act, alleged unfair trade practice must affect the public interest, which impact may be made if practice has potential for repetition; thus, even though oil company had decided to sell its service stations in South Carolina, service station owners’ allegation that company violated South Carolina Unfair Trade Practices Act, by its lease requirements with respect to operating service stations 24 hours a day, was actionable where it was possible that there were past violations which had the potential for repetition. Wingard v. Exxon Co., U.S.A., 1992, 819 F.Supp. 497.

In action brought by common carrier against its competitors in trucking market, where carrier was unable to show harm to competition from alleged deceptive and unfair trade practices, carrier did not have claim under South Carolina’s Unfair Trade Practices Act; case presented only a disappointed competitor with no impact upon the public interest, and thus, plaintiff carrier’s claims of unfair and deceptive practices were not actionable under Act. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454.

Keogh doctrine, which bars collateral attack of tariffs subject to regulation by Interstate Commerce Commission (ICC), applied to bar common carrier’s claim under South Carolina’s Unfair Trade Practices Act against its competitors in trucking industry, where: (1) Interstate Commerce Act provided adequate remedy to carrier, (2) carrier’s damages would be speculative, and (3) carrier would be required to show both that it was harmed by rates that were set and that ICC would have approved rates that would not have been harmful if alleged deceptive acts had not occurred. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454. Antitrust And Trade Regulation 282

Charging interest for prepayment of mortgage loan which had been used for the construction and maintenance of a shopping center is trade or commerce within ambit of South Carolina Unfair Trade Practices Act (UTPA) because it involves sale of property and affects public interest due to possibility that defendants could repeat their improper practices; furthermore, UTPA covers transactions between businesses or commercial entities, including insurance companies engaged in business other than insurance. McTeer v. Provident Life and Acc. Ins., 1989, 712 F.Supp. 512.

South Carolina Unfair Trade Practices Act (SCUTPA) is not available to redress a private wrong; unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA. Woodson v. DLI Properties, LLC (S.C. 2014) 406 S.C. 517, 753 S.E.2d 428. Antitrust and Trade Regulation 151

South Carolina Unfair Trade Practices Act (SCUTPA) prohibited former patients from bringing class action suit for damages against hospital for violations of SCUTPA; statute provides that any person who suffered a loss as a result of an unfair act or practice could “bring an action individually, but not in a representative capacity.” Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Parties 35.67

Purchaser’s computation of diminution in value of residential property from allegedly undisclosed proposed roadway expansion near property was devoid of rational basis and nothing more than pure conjecture, and therefore was not competent admissible evidence of existence or amount of damages for alleged breach of contract, breach of contract with a fraudulent act, breach of fiduciary duty, negligence, negligent misrepresentation, and violation of the Unfair Trade Practices Act (UTPA), by purchaser’s real estate agent, vendor’s agent, and agents’ employer, where purchaser relied on sale and list prices of non‑comparable properties to calculate diminution in her property’s value and all appraisals and offers received on purchaser’s property indicated that property in fact appreciated after purchase and refurbishing. Gauld v. O’Shaugnessy Realty Co. (S.C.App. 2008) 380 S.C. 548, 671 S.E.2d 79, rehearing denied, certiorari denied. Evidence 501(7)

Investor’s claims against brokerage for negligence and violation of the Unfair Trade Practices Act (UTPA) after investor’s funds were transferred electronically to a third party without his authorization or consent were not within the contemplation of investor’s agreement to arbitrate controversies arising out of or relating to accounts or transactions with brokerage, and, thus, were not subject to arbitration; allegations were legally distinct from the contractual relationship between the parties. Hatcher v. Edward D. Jones & Co., L.P. (S.C.App. 2008) 379 S.C. 549, 666 S.E.2d 294. Alternative Dispute Resolution 413

In negligence action brought against manufacturer of fire retardant by private school which had wood roof trusses treated by the retardant that were in danger of failing, private school could recover purely economic losses in tort from manufacturer, and the economic loss rule would not apply, if manufacturer owed a duty of care to the school, if a breach of industry standards served as evidence of the breach of that duty, and if the breach of that duty was accompanied by a clear, serious and unreasonable risk of bodily injury or death; however, if manufacturer merely breached industry standards without an accompanying breach of a legal duty owed, economic loss rule would prohibit school from recovering purely economic damages. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. (S.C. 2008) 379 S.C. 181, 666 S.E.2d 247. Products Liability 156; Products Liability 217

Statute which provided that gambler who lost more than $50 in one sitting could bring action to recover that sum, and statute that allowed third party to sue to recover gambler’s losses if gambler did not seek recovery, did not provide exclusive remedy for gambling losses, and habitual gamblers could attempt to recover losses they sustained on video poker machines under Video Game Machines Act (VGMA) and South Carolina Unfair Trade Practices Act (SCUTPA); statutes were not repugnant to or incapable of a reasonable reconcilement with VGMA, statutes and VGMA promoted same goal of limiting excessive gambling, SCUTPA expressly stated that remedies it provided were cumulative and supplementary to other remedies provided by law, and as statutes were passed in 1712 it could not be said they were intended to pre‑empt all future remedies for persons injured by unlawful gambling activities. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Gaming And Lotteries 285

For purposes of the South Carolina Unfair Trade Practices Act (SCUTPA), which makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, an act is “unfair” when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is “deceptive” when it has a tendency to deceive. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 135(1); Antitrust And Trade Regulation 136

Habitual gamblers’ private cause of action under the South Carolina Unfair Trade Practices Act (SCUTPA) for gambling losses against video poker operators who violated the Video Gaming Machines Act (VGMA) by offering the special inducement of jackpots in excess of statutory cap of $125 was not barred by “regulated industry” exception to SCUTPA, though cap may have been poorly enforced by the state, absent showing that any relevant state agency or authority had done anything to suggest that cap could be circumvented. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 152; Antitrust And Trade Regulation 476

Video poker operators’ practices to evade statutory limit of $125 on jackpots constituted “unfair” or “deceptive” practices prohibited by the South Carolina Unfair Trade Practices Act (SCUTPA); offering of jackpots in excess of statutory limit was inherently misleading unless clarification was provided, to the extent any player learned of conditions on payout at a later time there was an inherent misrepresentation, and schemes to evade detection that limit was being violated, such as making payments over a series of days or to proxies and names known to be false, were unethical. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 476

In habitual gamblers’ South Carolina Unfair Trade Practices Act (SCUTPA) action against video poker operators, defense of in pari delicto, or in equal fault, was not available to operators; though players signed documents to evade statutory limit of $125 on jackpots, operators were licensed to operate in a regulated area of the law and would be held to a greater knowledge and understanding of the laws than their customers, particularly as the laws were designed to protect players from their own bad judgment. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 485

Clear evidence of involvement, knowledge and profit from the prohibited activity of evading statutory limit on jackpots was enough to hold both lessors and lessees of video poker games responsible for the resulting unfair and deceptive activities, for purposes of habitual gamblers’ South Carolina Unfair Trade Practices Act (SCUTPA) action against video poker operators. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 291

Fact that unfair and deceptive trade practices used by video poker operators to evade limit on jackpots were so frequent, common and pervasive that no operator could compete without violating the law could not be a defense for operators, in habitual gamblers’ South Carolina Unfair Trade Practices Act (SCUTPA) action; what is necessary to compete can never be defined in terms of keeping up with competitors who are themselves in violation of the law. Johnson v. Collins Entertainment Co., Inc. (S.C. 2002) 349 S.C. 613, 564 S.E.2d 653. Antitrust And Trade Regulation 485

Evidence of landlord’s treatment of prior tenants and his attempts to keep their security deposits was admissible in tenant’s action alleging that landlord violated Unfair Trade Practice Act (UTPA) to show that landlords practices affected persons other than parties to transaction and were capable of repetition, and to show that landlord’s withholding of tenants’ security deposits was for pretextual reasons. Burbach v. Investors Management Corp. Intern. (S.C.App. 1997) 326 S.C. 492, 484 S.E.2d 119. Antitrust And Trade Regulation 368

Leases created by contract to grant tenant right to use and enjoy property fall within definition of “trade and commerce” subject to Unfair Trade Practice Act (UTPA). Burbach v. Investors Management Corp. Intern. (S.C.App. 1997) 326 S.C. 492, 484 S.E.2d 119. Antitrust And Trade Regulation 146(1)

Even if medical laboratory services are considered professional services, they constitute a “trade” within meaning of Unfair Trade Practices Act. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 257

Provision of any service constitutes “commerce” within meaning of Unfair Trade Practices Act, which does not exclude professional services from its definition. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 146(1); Antitrust And Trade Regulation 255

The holding that the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., does not apply to acts that take place in an employer‑employee relationship is not limited to at‑will employment situations. Davenport v. Island Ford, Lincoln, Mercury, Inc. (S.C.App. 1995) 320 S.C. 424, 465 S.E.2d 737. Antitrust And Trade Regulation 252

In private actions under the Unfair Trade Practices Act (UTPA), directors and officers are not liable for the corporation’s unfair trade practices unless they personally commit, participate in, direct or authorize the commission of a violation of the UTPA. Plowman v. Bagnal (S.C. 1994) 316 S.C. 283, 450 S.E.2d 36, rehearing granted, adhered to on rehearing. Antitrust And Trade Regulation 291

The defendant’s failure to convey the registration papers of a horse to the horse’s buyer was not actionable under the Unfair Trade Practices Act (UTPA) where the conduct at issue was not readily susceptible to repetition and thus did not rise to the required level of having an impact on public interest; a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the UTPA. Perry v. Green (S.C.App. 1993) 313 S.C. 250, 437 S.E.2d 150. Antitrust And Trade Regulation 151

The city did not violate the South Carolina Trade Practices Act, Sections 39‑5‑10 et seq. nor did it breach its contract for the supply of water with the plaintiffs in charging plaintiffs more for water than it charged residents within the corporate limits, because the city council set the water rates to be charged and it was undisputed that the rate charged non‑residents was more than that charged residents. Calcaterra v. City of Columbia (S.C.App. 1993) 315 S.C. 196, 432 S.E.2d 498.

A railroad’s removal and consequent refusal to reinstall a crossing on the adjoining landowner’s property did not constitute a violation of the South Carolina Unfair Trade Practices Act, Section 39‑5‑10, et seq., because the railroad’s actions did not constitute trade or commerce as defined by Section 39‑5‑10(b). Foggie v. CSX Transp., Inc. (S.C. 1993) 313 S.C. 98, 315 S.C. 17, 431 S.E.2d 587, rehearing denied. Antitrust And Trade Regulation 146(1)

The South Carolina Unfair Trade Practices Act, Sections 39‑5‑10 et seq., is unavailable to redress private wrongs if the public interest is unaffected; an unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the Act’s embrace. Ardis v. Cox (S.C.App. 1993) 314 S.C. 512, 431 S.E.2d 267, rehearing denied, certiorari denied. Antitrust And Trade Regulation 151

A deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the South Carolina Unfair Trade Practices Act, Sections 39‑5‑10 et seq. Ardis v. Cox (S.C.App. 1993) 314 S.C. 512, 431 S.E.2d 267, rehearing denied, certiorari denied. Antitrust And Trade Regulation 147

The buyer of underground gasoline storage tanks failed to establish that his claim constituted a violation of the South Carolina Unfair Trade Practices Act, Sections 39‑5‑10 et seq., where the buyer merely alleged that the vendor intentionally breached a contract which was within a commercial setting. Ardis v. Cox (S.C.App. 1993) 314 S.C. 512, 431 S.E.2d 267, rehearing denied, certiorari denied.

A cause of action was stated against a mortgage corporation for a violation of the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., where an attorney alleged that the corporation advised his client that his services as a loan closer would be unacceptable to it, and the client in consequence hired another attorney; legal services come within the definition of “commerce” given in Section 39‑5‑10. Camp v. Springs Mortg. Corp. (S.C.App. 1991) 307 S.C. 283, 414 S.E.2d 784, certiorari granted, affirmed in part, reversed in part 310 S.C. 514, 426 S.E.2d 304, rehearing denied. Antitrust And Trade Regulation 209; Antitrust And Trade Regulation 256

Even a truthful statement may be deceptive if it has a capacity or tendency to deceive. Young v. Century Lincoln‑Mercury, Inc. (S.C.App. 1989) 302 S.C. 320, 396 S.E.2d 105, affirmed in part, reversed in part 309 S.C. 263, 422 S.E.2d 103. Antitrust And Trade Regulation 136

In order to be actionable under the Unfair Trade Practices Act, an unfair or deceptive act or practice must have an impact upon the public interest. The Act is not available to redress a private wrong where the public interest is not affected. Additionally, a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act. Columbia East Associates v. Bi‑Lo, Inc. (S.C.App. 1989) 299 S.C. 515, 386 S.E.2d 259. Antitrust And Trade Regulation 151

A supermarket chain’s breach of its commercial lease agreement by its cessation of operation and refusal to sublease to a competing supermarket chain did not impact upon the public interest and, therefore, was not actionable under the Unfair Trade Practices Act. Columbia East Associates v. Bi‑Lo, Inc. (S.C.App. 1989) 299 S.C. 515, 386 S.E.2d 259.

A commercial nursery’s breach of a warranty that all stock was “true to name,” which was printed in the nursery’s price catalog and on invoices to all customers, in supplying mislabeled fruit trees to a peach grower, impacted on the public interest because of the potential for repetition by publication of these misrepresentations to other consumers. Haley Nursery Co., Inc. v. Forrest (S.C. 1989) 298 S.C. 520, 381 S.E.2d 906.

A mere breach of contract does not constitute a violation of the Unfair Trade Practices Act. South Carolina Nat. Bank v. Silks (S.C.App. 1988) 295 S.C. 107, 367 S.E.2d 421. Antitrust And Trade Regulation 147

Insurance company’s conversion of note and mortgage, being unconnected with transaction constituting either trade or commerce, while admittedly unfair, is not kind of unfair or deceptive method, act, or practice declared unlawful by Section 39‑5‑20. Connolly v. People’s Life Ins. Co. of South Carolina (S.C.App. 1988) 294 S.C. 355, 364 S.E.2d 475, reversed 299 S.C. 348, 384 S.E.2d 738. Antitrust And Trade Regulation 146(1)

Padding bills for auto repair is unfair trade practice and affects public interest because of its potential for repetition. Barnes v. Jones Chevrolet Co., Inc. (S.C.App. 1987) 292 S.C. 607, 358 S.E.2d 156. Antitrust And Trade Regulation 151

Mere breach of contract does not constitute violation of Unfair Trade Practices Act, such that nightclub operator’s deliberate or intentional refusal to permit owner of coin‑operated video game machines to utilize premises of its nightclub for effective display and operation of video machines in breach of its contract with owner of video machines, without more, does not constitute violation of Unfair Trade Practices Act. Key Co., Inc. v. Fameco Distributors, Inc. (S.C.App. 1987) 292 S.C. 524, 357 S.E.2d 476. Antitrust And Trade Regulation 272

The obvious purpose of the language “shall include any trade or commerce directly or indirectly affecting the people of this state,” as appearing in Section 39‑5‑10, is to circumscribe the kind of trade or commerce in the conduct of which an unfair or deceptive act or practice can serve as a basis for an Unfair Trade Practice Act action. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688.

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

A complaint containing allegations of unfair or deceptive acts or practices on the part of the defendant which allegedly damaged the plaintiff did not state a claim under the unfair trade practices act, where the complaint nowhere alleged any facts demonstrating that those acts or practices adversely affected the public. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688.

Unfair deceptive acts or practices in the conduct of trade and or commerce have an impact upon the public interests if the acts and or practices have the potential for repetition. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

The question of whether price discrimination violates the Unfair Trade Practices Act, Sections 39‑5‑10 to 39‑5‑560, being a question of first impression in South Carolina, should not be decided on demurrer; rather, the case should be fully developed and tried on its merits. Jackson v. Atlantic Soft Drink Co., Inc. (S.C. 1985) 286 S.C. 577, 336 S.E.2d 13. Appeal And Error 1177(2)

Federal Motor Vehicle Information and Cost Savings Act (15 USCA Sections 1981‑1991) does not supercede or otherwise limit consistent state law remedies for false odometer disclosures and therefore does not conflict with the remedies provided under the South Carolina Unfair Trade Practices Act. State ex rel. McLeod v. Fritz Waidner Sports Cars, Inc. (S.C. 1980) 274 S.C. 332, 263 S.E.2d 384. States 18.61

2. Burden of proof

To recover under the Unfair Trade Practices Act (UTPA), a plaintiff must prove a violation of the UTPA, proximate cause, and damages. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. (S.C. 2008) 379 S.C. 181, 666 S.E.2d 247. Antitrust And Trade Regulation 134

An unfair or deceptive act affecting the public interest, as an element of an action alleging a violation of the Unfair Trade Practices Act (SCUTPA), may be satisfied by proof of facts demonstrating the potential for repetition of the defendant’s actions. Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc. (S.C.App. 2008) 379 S.C. 31, 664 S.E.2d 83. Antitrust And Trade Regulation 151

3. Jury questions

Issue of whether car dealership violated Unfair Trade Practices Act (SCUTPA) was for jury in action by decedent’s estate arising after dealership failed to obtain credit life insurance for decedent as provided for under contract for sale of car, resulting in repossession of the car after decedent’s death; president of dealership was unclear in responding to inquiries about the existence of safeguards to ensure that unapplied premiums would be refunded, giving rise to an inference that dealership lacked internal protections to prevent the reoccurrence of this conduct in the future, and in addition, the conduct complained of had continued for approximately three years without action. Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc. (S.C.App. 2008) 379 S.C. 31, 664 S.E.2d 83. Antitrust And Trade Regulation 363

4. Privity

A remote purchaser who used but did not purchase a product directly from the defendant and nonetheless suffered a loss as a result of the defendant’s unfair or deceptive acts can obtain relief under the Unfair Trade Practices Act (UTPA), as there is not a general privity requirement for UTPA claims. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. (S.C. 2008) 379 S.C. 181, 666 S.E.2d 247. Antitrust And Trade Regulation 292

5. Jurisdiction

State of South Carolina, in its role as parens patriae, pursued quasi‑sovereign interest in its cases seeking to protect its citizens against price‑fixing conspiracies and upholding integrity of South Carolina law on allegations of violation of State’s Antitrust Act and its Unfair Trade Practices Act (SCUTPA), and thus Class Action Fairness Act (CAFA) minimal diversity requirement was not satisfied, since State’s Attorney General had statutory authority to pursue such claims; although South Carolina sought restitution on behalf of certain of its citizens, such relief was incidental to State’s overriding interests and substance of proceedings, those citizens were not named plaintiffs, and State’s pursuit of other remedies inured to benefit of State’s treasury. AU Optronics Corp. v. South Carolina (C.A.4 (S.C.) 2012) 699 F.3d 385, certiorari denied 134 S.Ct. 999, 187 L.Ed.2d 850. Removal Of Cases 2

Federal district court did not have diversity subject matter jurisdiction over removed actions that had been brought by State of South Carolina against citizens of Taiwan, Korea, Texas, and California, alleging violations of State’s Antitrust Act and its Unfair Trade Practices Act (SCUTPA), since South Carolina was not citizen of any state for purposes of diversity jurisdiction. AU Optronics Corp. v. South Carolina (C.A.4 (S.C.) 2012) 699 F.3d 385, certiorari denied 134 S.Ct. 999, 187 L.Ed.2d 850. Removal Of Cases 29

Trial court did not lack subject matter jurisdiction to hear claims brought against hospital by former patients, claiming violations of South Carolina Unfair Trade Practices Act (SCUTPA), and unjust enrichment, based on patients’ allegations that they received unauthorized therapeutic cardiac catheterizations (TCC), in violation of State Certification of Need and Health Facility Licensure Act (CON Act); while Department of Health and Environmental Control (DHEC) had exclusive subject matter jurisdiction to determine whether a violation had occurred, it did not have subject matter jurisdiction to hear civil claims for damages resulting from those violations. Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Antitrust And Trade Regulation 282; Implied And Constructive Contracts 120

6. Transactions

Transaction for sale of real property in which vendor’s brokerage firm and its licensee failed to disclose existence of competing offer to prospective purchasers, even though prospective purchasers and vendor had exchanged several offers and counteroffers and had set meeting date to finalize an agreement, and in which vendor ultimately sold property to another purchaser did not affect the public interest, as required to support prospective purchasers’ South Carolina Unfair Trade Practices Act (SCUTPA) claim against brokerage firm and licensee. Woodson v. DLI Properties, LLC (S.C. 2014) 406 S.C. 517, 753 S.E.2d 428. Antitrust and Trade Regulation 151

Regulatory exception, which provides that South Carolina Unfair Trade Practices Act (SCUTPA) does not apply to “actions or transactions permitted under laws administered by any regulatory body,” exempts an entity from liability where its actions are lawful or where it “does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations.” Code 1976, Sections Sections 39‑5‑10, et seq., Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Antitrust And Trade Regulation 152

7. Regulated industries

Regulated industries exception to the Unfair Trade Practices Act (UTPA) did not apply to action by former client against law firm. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Antitrust and Trade Regulation 152

8. Error

Trial court’s error in granting a directed verdict to law firm on former client’s Unfair Trade Practices Act (UTPA) claim on the basis that the UTPA did not apply to the legal profession was not reversible error, where former client alleged the same facts for its UTPA claim as in the legal malpractice claim, i.e., the deceptive acts of law firm, which the jury rejected. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Appeal and Error 1061.4

9. Collusion

There was no evidence of an arrangement or collusion between online auction host and online auction conductor to drive up auction prices, so as to support auction participants’ claim that host engaged in an unfair or deceptive act or practice under South Carolina’s Unfair Trade Practices Act (UTPA). Simmons v. Danhauer & Associates LLC (C.A.4 (S.C.) 2012) 477 Fed.Appx. 53, 2012 WL 1237795, Unreported. Antitrust and Trade Regulation 466

There was no evidence that online auction host’s challenged conduct in making an arrangement or colluding with auction conductor to drive up auction prices was a proximate cause of auction participants’ alleged damages, as required to support participants’ claim against host under South Carolina’s Unfair Trade Practices Act (UTPA). Simmons v. Danhauer & Associates LLC (C.A.4 (S.C.) 2012) 477 Fed.Appx. 53, 2012 WL 1237795, Unreported. Antitrust and Trade Regulation 466

There was no evidence that online auction host’s challenged conduct in making an arrangement or colluding with auction conductor to drive up auction prices impacted the public interest, as required to support participants’ claim against host under South Carolina’s Unfair Trade Practices Act (UTPA). Simmons v. Danhauer & Associates LLC (C.A.4 (S.C.) 2012) 477 Fed.Appx. 53, 2012 WL 1237795, Unreported. Antitrust and Trade Regulation 466

10. Trade or commerce

Physician peer review actions are not trade or commerce actionable under South Carolina’s Unfair Trade Practices Act (SCUTPA). Hein‑Muniz v. Aiken Regional Medical Centers, 2012, 905 F.Supp.2d 729, affirmed 532 Fed.Appx. 342, 2013 WL 3359277. Antitrust and Trade Regulation 146(1)

For purposes of South Carolina Unfair Trade Practices Act (SCUTPA), Board of Dentistry’s promulgation of emergency regulation concerning restrictions on dental hygienists’ provision of preventative dental care to children in school setting did not constitute “trade or commerce,” and thus Board did not violate SCUTPA; promulgation of regulation did not involve advertisement, sale, or distribution of services or property within business context. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Antitrust and Trade Regulation 146(1)

11. Persons

Operator of fireworks store could bring action against competitor as an individual under the South Carolina Unfair Trade Practices Act (SCUTPA) for alleged unfair trade practices committed by competitor’s fireworks store, despite competitor’s claim that the business was owned by two different corporations and not him individually as a sole proprietor, where competitor was the sole shareholder of the two corporations, and SCUTPA allowed suits against corporate officers or controlling persons within a corporate entity on a showing that the person in some way participated in or directed the tortious act. Neeltec Enterprises, Inc. v. Long (S.C.App. 2013) 402 S.C. 524, 741 S.E.2d 767. Antitrust and Trade Regulation 291

12. Directors and officers

In private actions under the South Carolina Unfair Trade Practices Act (SCUTPA), directors and officers are not liable for the corporation’s unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the SCUTPA. Neeltec Enterprises, Inc. v. Long (S.C.App. 2013) 402 S.C. 524, 741 S.E.2d 767. Antitrust and Trade Regulation 291

13. Arbitration

Although the arbitration agreement between purchaser and car dealership stated that Federal Arbitration Act (FAA) would apply to the arbitration of purchaser’s claims under Unfair Trade Practices Act (UTPA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, circuit court did not err in applying the South Carolina Uniform Arbitration Act’s (UAA) confirmation provision because the confirmation statute was procedural, not substantive. Henderson v. Summerville Ford‑Mercury Inc. (S.C. 2013) 405 S.C. 440, 748 S.E.2d 221. Alternative Dispute Resolution 116

14. Standing

Insured’s allegations that insurance company that sold disability insurance group policy and underwriter violated her statutorily‑created rights under the South Carolina Unfair Trade Practices Act (SCUTPA) were insufficient to establish standing to bring putative class action against insurer and underwriter for allegedly fraudulent insurance practices; although insured claimed that defendants’ practices violated SCUTPA, claim was based on theory that defendants violated state insurance law when they set up an unlawful group and collected premiums on a policy that had not been approved, but SCUTPA expressly exempted from its own scope unfair trade practices pertaining to the business of insurance, and expressly prohibited class actions. Smith v. Catamaran Health Solutions, LLC, 2016, 205 F.Supp.3d 699. Insurance 1515; Insurance 3417

**SECTION 39‑5‑20.** Unfair methods of competition and unfair or deceptive acts or practices unlawful; application of interpretations of Federal act.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

HISTORY: 1962 Code Section 66‑71.1; 1971 (57) 369.

CROSS REFERENCES

Failure to make required disclosure of physical condition of building proposed to be converted from rental units to condominiums constituting violation of this chapter, see Section 27‑31‑430.

Privacy of genetic information, penalties, see Section 38‑93‑90.

Pyramid promotional schemes prohibited, see Section 39‑5‑730.

Unfair trade practices relating to claims against automobile insurance policies, see Section 38‑77‑341.

Use of assumed name in conduct of business to intentionally misrepresent geographic origin or location as unlawful trade practice, see Section 39‑5‑37.

Violation of any provision of Chapter 79 of Title 44 (“Physical Fitness Services Act”) is considered a violation of this section, see Section 44‑79‑120.

Violation of Chapter 36 of Title 34, governing loan brokers, constitutes unfair trade practice under this chapter, see Section 34‑36‑80.

Violations of Business Opportunity Sales Act constituting unfair trade practice under this section, see Section 39‑57‑80.

LIBRARY REFERENCES

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Sections 225 et seq.

RESEARCH REFERENCES

ALR Library

61 ALR 6th 387 , Obligation of Online Travel Companies to Collect and Remit Hotel Occupancy Taxes.

117 ALR 5th 155 , Right to Private Action Under State Consumer Protection Act‑Preconditions to Action.

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41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

36 Am. Jur. Proof of Facts 3d 221, Proof of Statutory Unfair Business Practices.

79 Am. Jur. Proof of Facts 3d 1, Proof of Facts Establishing a Claim for Trade Libel or Product Disparagement Under S43(A) of the Lanham Act, 15 U.S.C.A. Section 1125(a).

79 Am. Jur. Proof of Facts 3d 199, Proof of a Claim Involving Alleged Violation of State Consumer Protection or Similar Statute Against Physician or Attorney.

152 Am. Jur. Proof of Facts 3d 409, Liability of Businesses to Governments and Consumers for Breach of Data Security for Consumers’ Information.

69 Am. Jur. Trials 119, Bank Liability for Negligence in Lending and Breach of Loan Agreement.

S.C. Jur. Advertising Section 8, Unfair Trade Practices.

S.C. Jur. Limitation of Actions Section 52, Trade and Commerce.

S.C. Jur. Private Business Franchises and Business Opportunities Section 6, Federal Trade Commission Regulation.

S.C. Jur. Unfair Trade Practices Act Section 2, Scope.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

S.C. Jur. Unfair Trade Practices Act Section 5, Trade or Commerce.

S.C. Jur. Unfair Trade Practices Act Section 9, Actual Damages.

S.C. Jur. Unfair Trade Practices Act Section 14, Violations of Other Laws.

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LAW REVIEW AND JOURNAL COMMENTARIES

An analysis of the dilution section of the Restatement (Third) of Unfair Competition, 47 S.C. L. Rev. 629 (Summer 1996).

Annual Survey of South Carolina Law: Business Law: Securities Regulation and the Unfair Trade Practices Act. 33 S.C. L. Rev. 1, August 1981.

Annual survey of South Carolina law, torts law. 42 S.C. L. Rev. 255 (Autumn 1990).

Consumer Protection and the Proposed “South Carolina Unfair Trade Practices Act.” 22 S.C. L. Rev. 767.

The expansion of trade secrecy protection and the mobility of management employees: A new problem for the law, 47 S.C. L. Rev. 659 (Summer 1996).

Filling two gaps in the Restatement (Third) of Unfair Competition: Mixed‑use trademarks and the problem with Vanna, 47 S.C. L. Rev. 783 (Summer 1996).

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Impact on public necessary to invoke unfair trade practices act. 39 S.C. L. Rev. 6 (Autumn 1987).

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Unfair and deceptive trade practices in construction litigation and arbitration. 40 S.C. L. Rev. 977 (Summer 1989).

United States Supreme Court Annotations

Advertising of “free gifts” and representations as to price of goods as unfair method of competition or practice within Section 5(a) of the Federal Trade Commission Act (15 USC Section 45(a)). 15 L Ed 2d 865.

State action, state did not clearly articulate its intent to allow hospital authorities to engage in anticompetitive activity by acquiring hospitals, see F.T.C. v. Phoebe Putney Health System, Inc., 2013, 133 S.Ct. 1003, 568 U.S. 216, 185 L.Ed.2d 43. Antitrust and Trade Regulation 903

Attorney General’s Opinions

A penalty provision taking effect if the lender does not handle the permanent loan in a loan agreement between “Bank” and “Contractor” may violate the South Carolina Unfair Trade Practices Act, and/or the Sherman Act, subjecting “Bank” to civil and criminal liability. 1976‑77 Op Atty Gen, No 77‑209, p 161.

NOTES OF DECISIONS

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1. In general

District court should have abstained, under Burforddoctrine, from hearing habitual gamblers’ suit alleging that South Carolina video poker operators had violated payout limit and other statutory provisions governing gambling, even though gamblers also asserted claims under Racketeer Influenced and Corrupt Organizations Act (RICO); regulation of gambling was at heart of State’s police power, RICO claims rested on state law, and court’s use of its “inherent equitable power” to grant injunction supplanted legislative, administrative, and judicial processes of South Carolina. Johnson v. Collins Entertainment Co., Inc. (C.A.4 (S.C.) 1999) 199 F.3d 710, rehearing and suggestion for rehearing en banc denied 204 F.3d 573. Federal Courts 2596; Federal Courts 2626; Federal Courts 2652

Reasons supporting Burford abstention from claim for injunctive relief against South Carolina video poker operators also supported stay of claims for damages pending resolution by state courts of disputed questions of state law; state courts had not yet determined whether plaintiffs’ gambling losses could constitute “unlawful debt” actionable under Racketeer Influenced and Corrupt Organizations Act (RICO), or whether violations of Video Game Machines Act were actionable as state common law offenses of fraud, negligent misrepresentation, unjust enrichment, and the like. Johnson v. Collins Entertainment Co., Inc. (C.A.4 (S.C.) 1999) 199 F.3d 710, rehearing and suggestion for rehearing en banc denied 204 F.3d 573. Federal Courts 2634; Federal Courts 2652

In order to bring an action under the Unfair Trade Practices Act (UTPA), the plaintiff must demonstrate: (1) that the defendant engaged in an unlawful trade practice; (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice; and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C.A.4 (S.C.) 1998) 149 F.3d 283. Antitrust And Trade Regulation 134

Gasoline wholesaler’s sales of gasoline to retailer at wholesale prices above retail prices for gasoline sold by wholesaler’s subsidiary to public did not constitute unfair method of competition or unfair or deceptive trade practice in violation of South Carolina Unfair Trade Practices Act (UTPA), as a matter of law, where wholesaler sold gasoline wholesale in relevant marketplace at the same price to all of its wholesale customers, including to its subsidiary, where there was no evidence that wholesaler engaged in pricefixing, and where there was no evidence of adverse impact on public interest. Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C.A.4 (S.C.) 1998) 149 F.3d 283. Antitrust And Trade Regulation 460

In anti‑trust action brought by billboard company against competitor and city which adopted rezoning ordinances restricting billboards, cause of action under unfair trade practices act, Sections 39‑5‑10 et seq., could not be maintained where company alleged that competitor was engaged in unfair practice of double‑billing for renting billboard space, but cited no evidence in the record demonstrating that the injury suffered by company had an adverse impact on the public interest. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Mere breach of commercial contract, without more, is not actionable under unfair trade practices act, Sections 39‑5‑10, et seq., which act is not available to redress a private wrong where public interest is not affected; thus, even if billboard company’s alleged unfair practices may have amounted to fraud between commercial parties, such practices are not actionable under unfair trade practices act, since higher total advertising costs which allegedly resulted from such practice was simply a private injury suffered by purchasing advertisers. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Verdict in favor of billboard company against competitor based on South Carolina Unfair Trade Practices Act was erroneously overturned by trial court because jury’s finding of conspiracy to restrain competition was tantamount to finding that underlying conduct had an impact upon public interest, which would bring competitor’s actions within Act. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1989) 891 F.2d 1127, rehearing denied, certiorari granted 110 S.Ct. 3211, 496 U.S. 935, 110 L.Ed.2d 659, reversed 111 S.Ct. 1344, 499 U.S. 365, 113 L.Ed.2d 382, on remand 974 F.2d 502.

Liquor distiller’s termination of liquor wholesaler’s distributorship could not form basis for Unfair Trade Practices Act violation where termination was business decision and not wrongful and termination of distributorship did not have any impact on public interest but affected only parties to trade or commercial transaction, such that trial court erred in submitting case to jury. Richland Wholesale Liquors v. Glenmore Distilleries Co. (C.A.4 (S.C.) 1987) 818 F.2d 312.

Failure of pest exterminator to discover termite infestation which was present and visible does not establish violation of Unfair Trade Practices Act where all that is shown is that exterminator’s representative was negligent or incompetent; service person does not violate unfair trade practice statute merely by performing job poorly or overlooking something which should have attracted his attention; statutory prohibition of deceptive practices does not reach puffing of vendor’s product or authorize award of damages on basis of testimony from competitor that product is ineffective. Clarkson v. Orkin Exterminating Co., Inc. (C.A.4 (S.C.) 1985) 761 F.2d 189.

South Carolina Unfair Trade Practices Act (Code Section 39‑5‑20) is not pre‑empted by application of federal antitrust laws. Bostick Oil Co., Inc. v. Michelin Tire Corp., Commercial Div. (C.A.4 (S.C.) 1983) 702 F.2d 1207, certiorari denied 104 S.Ct. 242, 464 U.S. 894, 78 L.Ed.2d 232. Antitrust And Trade Regulation 132; States 18.84

To maintain a private cause of action under South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff must establish: (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Antitrust and Trade Regulation 134

In order to establish a South Carolina Unfair Trade Practices Act (SCUTPA) violation, a plaintiff must demonstrate (1) that the defendant has engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Williams v. Preiss‑Wal Pat III, LLC, 2014, 17 F.Supp.3d 528. Antitrust and Trade Regulation 134

Personal representatives of the estate of an individual who was beaten to death while visiting resident at apartment complex failed to state a claim against the complex for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), based on representations about the safety of the complex, absent allegations that the loss individual suffered came as a result of the alleged deceptive advertising practices and that the alleged unlawful trade practice had an adverse impact on the public interest. Williams v. Preiss‑Wal Pat III, LLC, 2014, 17 F.Supp.3d 528. Antitrust and Trade Regulation 151; Antitrust and Trade Regulation 161

To succeed on a claim under South Carolina’s Unfair Trade Practices Act, plaintiff must show that the defendant’s actions adversely affected the public interest, which can be shown if the acts or practices have the potential for repetition. Lewis v. Omni Indem. Co., 2013, 970 F.Supp.2d 437. Antitrust and Trade Regulation 151

To state a claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), the plaintiff must allege: (1) that the defendant engaged in an unlawful trade practice; (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice; and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc., 2013, 966 F.Supp.2d 604. Antitrust and Trade Regulation 134

Home security services provider’s limitation of liability in its services contract with homeowner was not an unlawful trade practice within the meaning of the South Carolina Unfair Trade Practices Act (SCUTPA); contract clearly warned that provider was not an insurer, and that no fire alarm system was completely effective. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 297

Marketing materials of home security services provider were not misleading such that they would give rise to an action under the South Carolina Unfair Trade Practices Act (SCUTPA), following damage to a customer’s home from a fire, where materials neither promised to insure, nor suggested acceptance of unlimited liability for, customers’ losses, guarantees on provider’s website did not relate to fire protection, and website did not suggest that fire alarm systems were infallible. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 163

Even a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the South Carolina Unfair Trade Practices Act (SCUTPA). Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 147

Under the South Carolina Unfair Trade Practices Act (SCUTPA), unfair trade practices are practices which are offensive to public policy or which are immoral, unethical, or oppressive while a deceptive practice is one which has a tendency to deceive. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 135(1); Antitrust and Trade Regulation 136

A plaintiff seeking to maintain an unfair trade practices claim under the South Carolina Unfair Trade Practices Act (SCUTPA) must establish: (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 134

For a plaintiff to recover under the South Carolina Unfair Trade Practices Act (SCUTPA), he or she must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s). Mickalis Pawn Shop, LLC v. Bloomberg, 2007, 482 F.Supp.2d 707. Antitrust And Trade Regulation 134

Genuine issues of material fact as to whether hospital engaged in unfair or deceptive conduct as result of its refusal to grant medical staff privileges to osteopathic physicians, and whether public interest was harmed thereby precluded summary judgment in osteopathic physicians’ suit against hospital for violation of South Carolina Unfair Trade Practices Act (SCUTPA). Welchlin v. Tenet Healthcare Corp., 2005, 366 F.Supp.2d 338. Federal Civil Procedure 2491.9

Under South Carolina law, corporate officers may be held liable for corporation’s unfair trade practices if they personally commit, participate in, direct, or authorize commission of violation of Unfair Trade Practices Act. U.S. v. RCS Corp., 2005, 366 F.Supp.2d 332. Corporations And Business Organizations 1970

South Carolina Unfair Trade Practices Act (SCUTPA) was not limited solely to instances of consumer protection or antitrust activity. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510.

In order for an unfair or deceptive act or practice to be covered under South Carolina Unfair Trade Practices Act (SCUTPA), the unfair or deceptive act or practice must impact the public interest. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510. Antitrust And Trade Regulation 151

Under the South Carolina Unfair Trade Practices Act, a trade practice is “unfair” when it is offensive to the public policy or when it is immoral, unethical, or oppressive. Williams‑Garrett v. Murphy, 2000, 106 F.Supp.2d 834. Antitrust And Trade Regulation 135(1)

Past practices can serve as the predicate for a violation of the South Carolina Unfair Trade Practices Act. Williams‑Garrett v. Murphy, 2000, 106 F.Supp.2d 834. Antitrust And Trade Regulation 150

Because only unfair acts or practices that adversely affect the public interest come under the Unfair Trade Practices Act, a deliberate or intentional breach of contract, without more, does not constitute a violation of the UTPA. Wilson Group, Inc. v. Quorum Health Resources, Inc., 1995, 880 F.Supp. 416.

Plaintiff health‑care corporation did not satisfy the public impact requirement where it failed to show that its patients suffered inferior care or lost confidence in the corporation as a result of defendant’s breach of contract, but merely alleged that revenue lost as a result of the breach of contract would have resulted in better care and greater confidence. Wilson Group, Inc. v. Quorum Health Resources, Inc., 1995, 880 F.Supp. 416.

In action brought by service station owners against oil company, challenging lease requirements that they remain open 24 hours a day, 24‑hour provision did not violate South Carolina’s Unfair Trade Practices Act; under Section 39‑5‑20(a), unfair practice in the conduct of any trade or commerce is unlawful, and such practice is unfair when it is offensive to public policy or is immoral, unethical, or oppressive; thus, no violation of this section occurred, where 24‑hour provision did not violate public policy of South Carolina, and where dealers not only failed to produce any evidence of an unfair trade practice, but also failed to make any showing that 24‑hour provision at issue, contained in lease of service station located in city of approximately 100,000, is immoral, unethical, or oppressive. Wingard v. Exxon Co., U.S.A., 1992, 819 F.Supp. 497.

For claims to be actionable under South Carolina’s Unfair Trade Practices Act, alleged unfair trade practice must affect the public interest, which impact may be made if practice has potential for repetition; thus, even though oil company had decided to sell its service stations in South Carolina, service station owners’ allegation that company violated South Carolina Unfair Trade Practices Act, by its lease requirements with respect to operating service stations 24 hours a day, was actionable where it was possible that there were past violations which had the potential for repetition. Wingard v. Exxon Co., U.S.A., 1992, 819 F.Supp. 497.

Under South Carolina’s Unfair Trade Practices Act finding of unfair trade practice generally involves misrepresentation made to a consumer; thus, in action brought by service station owners against oil company, challenging lease requirements that they remain open 24 hours a day, an unfair trade practice was not to be inferred from conduct of oil company where there was no element of misrepresentation upon execution of perfectly valid contracts with dealers, each of whom entered into his lease as an experienced businessman with full knowledge of all material terms, including the 24‑hour provision. Wingard v. Exxon Co., U.S.A., 1992, 819 F.Supp. 497.

To succeed on a claim under the Unfair Trade Practices Act, a person must demonstrate that the alleged unfair or deceptive practices affect the public interest, and where there is insufficient evidence for a rational jury to find a conspiracy to restrain trade all that is present in the case is a disappointed competitor with no impact upon the public interest and no evidence which shows any acts committed by the defendant were unfair or deceptive in any way. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454. Antitrust And Trade Regulation 151; Antitrust And Trade Regulation 369

A disappointed competitor unable to show harm to competition from the alleged deceptive and unfair trade practices does not have a claim. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454. Antitrust And Trade Regulation 138

In action brought by common carrier against its competitors in “less than truckloads” trucking market, alleging anti‑trust conspiracy as well as violations of South Carolina’s Unfair Trade Practices Act, carrier failed to establish that competitors’ alleged anti‑competitive conduct constituted a violation of Section 39‑5‑20(a), where there was insufficient evidence for the jury to find either a conspiracy to restrain trade or any acts committed by competitors which were unfair or deceptive in any way. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454.

In action brought by common carrier against its competitors in trucking market, where carrier was unable to show harm to competition from alleged deceptive and unfair trade practices, carrier did not have claim under South Carolina’s Unfair Trade Practices Act; case presented only a disappointed competitor with no impact upon the public interest, and thus, plaintiff carrier’s claims of unfair and deceptive practices were not actionable under Act. Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, 1992, 805 F.Supp. 1277, affirmed 998 F.2d 1009, certiorari denied 114 S.Ct. 553, 510 U.S. 993, 126 L.Ed.2d 454.

Claim under Section 39‑5‑20(a) must allege behavior that affects public interest; courts in interpreting provision are to be guided by Federal Trade Commission Act and federal judicial interpretations of Act; and, while relationship between parties in instant case did not violate Sherman Act, and termination by defendants of lease and agreement was not “wrongful” under South Carolina common‑law principles, it is difficult to see how statute is implicated by legitimate consignment relationship and its necessary termination, and while FTC Act reaches more broadly than Sherman Act, and interpretations of FTC Act are to be used in applying state statute, plaintiff failed to show how circumstances of case bring it within reach of FTC Act, instead plaintiff simply argued that termination of agreement was “unfair;” but, statute does not prohibit all business activities that someone may consider unfair, and although possibly unfair from plaintiff’s perspective, neither consignment arrangement nor termination of sublease and agreement can be considered violation of statute. Miller v. W.H. Bristow, Inc., 1990, 739 F.Supp. 1044.

Scope of the South Carolina UTPA (Sections 39‑5‑10 et seq.) is limited to “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” as provided by Section 39‑5‑20, and definitions of the terms “trade” or “commerce” in 39‑5‑10, though illustrative of acts intended to fall within UTPA, do not include alleged defamatory act complained of in instant case, in which plaintiffs complained that defendants television station, Better Business Bureau, and camera merchant and the business for which he worked, produced and broadcast segment on television station alleging defendants perpetrated deceptive merchandising practices, including advertising low prices and adding charges when equipment was ordered by telephone, crediting charge cards before delivery, and using “bait and switch” tactics. Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc., 1989, 738 F.Supp. 1499.

Manufacturer of “NO SPOT” demineralized car wash system may recover for competitor’s misappropriation of copyrighted logo and computer program used in system. Manufacturer, however, was not entitled to treble damages because misappropriation of logo and computer program is not shown to be willful. Raco Car Wash Systems, Inc. v. Smith, 1989, 730 F.Supp. 695, 14 U.S.P.Q.2d 1785, appeal dismissed 929 F.2d 694. Antitrust And Trade Regulation 393; Trademarks 1658

With respect to unfair trade claim under state law, Section 39‑5‑140(a) creates private right of action for persons damaged by acts or practices declared unlawful by Section 39‑5‑20; this cause of action is limited to those unfair or deceptive acts or practices that affect public interest; thus, unfair or deceptive act or practice that affects only parties to transaction is beyond act’s embrace. Drs. Steuer and Latham, P.A. v. National Medical Enterprises, Inc., 1987, 672 F.Supp. 1489, affirmed 846 F.2d 70.

In order to establish cause of action under the South Carolina Unfair Trade Practices Act, plaintiff must establish that defendant engaged in unfair or deceptive acts or practices affecting the public interest while conducting any trade or commerce. In re Riley (Bkrtcy.D.S.C. 2012) 478 B.R. 736. Antitrust and Trade Regulation 134

Lack of evidence of adverse impact on any public interest precluded contractor’s liability on subcontractor’s claim that contractor violated South Carolina Unfair Trade Practices Act (SCUTPA) by hiring subcontractor’s employees, using audit information for improper purposes, and blacklisting subcontractor from future subcontracting opportunities. Project Control Services, Inc. v. Westinghouse Savannah River Co., Inc. (C.A.4 (S.C.) 2002) 35 Fed.Appx. 359, 2002 WL 1020695, Unreported, certiorari denied 123 S.Ct. 618, 537 U.S. 1045, 154 L.Ed.2d 516. Antitrust And Trade Regulation 151

Apartment property manager’s statements to tenant that indicated apartment complex was a safe and secure place did not constitute unfair or deceptive acts so as to render landlords and managers liable under Unfair Trade Practices Act for injuries sustained by tenant who was abducted from complex parking lot and forced to withdraw money from her bank account. Wright v. PRG Real Estate Management, Inc. (S.C.App. 2015) 413 S.C. 276, 775 S.E.2d 399, rehearing denied. Antitrust and Trade Regulation 161

For purposes of South Carolina Unfair Trade Practices Act (SCUTPA), Board of Dentistry’s promulgation of emergency regulation concerning restrictions on dental hygienists’ provision of preventative dental care to children in school setting did not constitute “trade or commerce,” and thus Board did not violate SCUTPA; promulgation of regulation did not involve advertisement, sale, or distribution of services or property within business context. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Antitrust and Trade Regulation 146(1)

For purposes of South Carolina Unfair Trade Practices Act (SCUTPA), an act is “deceptive” when it has a tendency to deceive. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Antitrust and Trade Regulation 136

For purposes of South Carolina Unfair Trade Practices Act (SCUTPA), an act is “unfair” when it is offensive to public policy or when it is immoral, unethical, or oppressive. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Antitrust and Trade Regulation 135(1)

To recover in an action under the South Carolina Unfair Trade Practices Act (SCUTPA), the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce, (2) the unfair or deceptive act affected the public interest, and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Antitrust and Trade Regulation 134

To recover in an action under the Unfair Trade Practices Act (UTPA), the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce, (2) the unfair or deceptive act affected the public interest, and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Antitrust and Trade Regulation 134

Purchaser’s failure to close on property at time designated in contract with real estate developer, even if deliberate, without more, did not constitute violation of Unfair Trade Practices Act, inasmuch as such failure amounted to nothing more than breach of contract. D.R. Horton, Inc. v. Wescott Land Co., LLC (S.C.App. 2012) 398 S.C. 528, 730 S.E.2d 340, rehearing denied, affirmed in part as modified, vacated in part 410 S.C. 319, 764 S.E.2d 701. Antitrust and Trade Regulation 198

Company that placed pool tables, foosball machines, and other games in bars and restaurants did not suffer damages under Unfair Trade Practices Act (UTPA) and thus could not prevail on UTPA claim that was brought against competitors, whose machines used reflexive payout, which allowed machine, unbeknownst to players, to make adjustments to game’s outcome to stay within payback percentage; company did not show that use of reflexive payout was cause of any lost revenue, and primary reason that competitors’ machines hurt company’s business was that competitors’ machines were easy to play. Collins Holding Corp. v. Defibaugh (S.C.App. 2007) 373 S.C. 446, 646 S.E.2d 147, rehearing denied. Antitrust And Trade Regulation 239

Evidence was sufficient to establish truck dealer’s failure to disclose to buyer that pickup truck had been wrecked and repaired was unfair or deceptive, in trial of buyer’s Unfair Trade Practices Act (UTPA) claim against dealer; instead of informing buyer about the extent of the damage dealer stated that damage buyer had observed was the result of a shopping cart or car door, dealer told buyer that truck would be under whatever factory warranty was applicable when dealer knew that some of the truck’s parts had been replaced and were no longer covered by the factory warranty, dealer told buyer that the previous owner just wanted another truck when buyer asked why previous owner no longer wanted it, and dealer did not show buyer truck’s previous title indicating that insurance company had owned it. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 193

An act is “unfair” under the Unfair Trade Practices Act (UTPA) when it is offensive to public policy or when it is immoral, unethical, or oppressive. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 135(1)

Whether an act or practice is unfair or deceptive within the meaning of the Unfair Trade Practices Act (UTPA) depends on the surrounding facts and the impact of the transaction on the marketplace. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 136

Even a truthful statement may be deceptive under the Unfair Trade Practices Act (UTPA) if it has a capacity or tendency to deceive. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 136

Under the Unfair Trade Practices Act (UTPA), a plaintiff can recover treble damages where the use or employment of the unfair or deceptive act or practice was a willful or knowing violation. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 393

To recover in an action under the Unfair Trade Practices Act (UTPA), the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 134; Antitrust And Trade Regulation 151

A “deceptive act” under the Unfair Trade Practices Act (UTPA) is any act which has a tendency to deceive. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 136

Assuming retail grocers and store managers terminated their relationship with manufacturer of barbecue sauce solely because of manufacturer’s political and religious views, which included manufacturer’s use of Confederate flag on barbecue sauce labels, such decision to terminate the relationship was not an “unfair act” in violation of South Carolina Unfair Trade Practices Act (SCUTPA). Bessinger v. Bi‑Lo, Inc. (S.C.App. 2005) 366 S.C. 426, 622 S.E.2d 564, certiorari denied. Antitrust And Trade Regulation 260

Mortgagee bank’s promise to loan mortgagors an amount “not to exceed $160,000 or 80% of the appraised value, whichever is less” and subsequent appraisal of land at $200,000 did not constitute a practice that adversely affected the public interest in violation of Unfair Trade Practices Act (UTPA), despite mortgagors’ claim that bank deliberately over‑estimated value of property and set out to loan them $160,000; record contained only unproven allegations and inferences of impropriety to suggest that bank deliberately set out to loan money secured by insufficient collateral, and there was no logical reason why bank would intentionally make loans for an amount in excess of the collateral’s value and risk substantial losses in the event of default. Robertson v. First Union Nat. Bank (S.C.App. 2002) 350 S.C. 339, 565 S.E.2d 309, rehearing denied, certiorari denied, certiorari dismissed as improvidently granted 357 S.C. 191, 592 S.E.2d 625. Antitrust And Trade Regulation 151

State’s cause of action against contractor for unfair trade practices was not viable; transactions under the Consolidated Procurement Code are exempt from the Unfair Trade Practices Act (UTPA). Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office (S.C. 2001) 346 S.C. 158, 551 S.E.2d 263, rehearing denied. Antitrust And Trade Regulation 152

South Carolina does not recognize a cause of action for common law trade dress infringement independent of the Lanham Act or South Carolina’s Unfair Trade Practices Act (UTPA). Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1554

To be actionable under the Unfair Trade Practices Act (UTPA), the unfair or deceptive act or practice must have an impact upon the public interest; unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Antitrust And Trade Regulation 151

Condom marketer violated Unfair Trade Practices Act (UTPA), thus warranting trebling of damages in action by competitor; marketer willfully appropriated competitor’s marks and packaging, so that marketer’s package was exact copy, including trademarks, of competitor’s product, this left consumer with no way of knowing truth about source of item in question, and marketer testified that he sold approximately 48,000 condoms, each of which was deceptive. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1658

Evidence supported finding that condom marketer’s willful appropriation of competitor’s marks and packaging, so that marketer’s package was exact copy, caused competitor’s damages, for purposes of competitor’s action against marketer for common law trademark infringement and violation of Unfair Trade Practices Act (UTPA); competitor’s profits on East Coast were down during time in which marketer sold his virtually identical product, competitor’s East Coast profits increased after it obtained injunction against marketer, and competitor had to lower price of its product to compete. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1630

Condom marketer provided sufficient evidence of lost profits in its action against competitor for common law trademark infringement and violation of Unfair Trade Practices Act (UTPA), arising from competitor’s willful appropriation of marketer’s marks and packaging; while marketer’s profits on East Coast were down during relevant time, marketer’s president testified that West Coast market in same period experienced 590% increase in sales, that East Coast market should have performed similarly, and would have, but for competitor’s intentional infringement, and that comparison between East Coast market and Southern California market was reasonable comparison to make, primarily because both were tourist beach resorts. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1660

Limitations period for golf club members’ claims against golf course owners under Unfair Trade Practices Act (UTPA) for allegedly using tee‑time schedule to solicit new members, and then unilaterally revoking schedule, accrued as of date owners announced intention to revoke. Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership (S.C.App. 1998) 331 S.C. 385, 503 S.E.2d 184, rehearing denied, certiorari denied. Limitation Of Actions 95(16)

Even if tee‑time schedule was not a contract, course owners’ alleged use of schedule to solicit business and its subsequent abrogation of its terms could be “unfair and deceptive acts” prohibited by Unfair Trade Practices Act (UTPA). Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership (S.C.App. 1998) 331 S.C. 385, 503 S.E.2d 184, rehearing denied, certiorari denied. Antitrust And Trade Regulation 179

Even if medical laboratory services are considered professional services, they constitute a “trade” within meaning of Unfair Trade Practices Act. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 257

Provision of any service constitutes “commerce” within meaning of Unfair Trade Practices Act, which does not exclude professional services from its definition. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 146(1); Antitrust And Trade Regulation 255

Medical laboratory’s alleged performance of useless tests was not action or transaction that was specifically authorized by any regulatory agency such that laboratory was exempt from liability under Unfair Trade Practices Act. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 152

Plaintiff bringing private cause of action under South Carolina’s Unfair Trade Practices Act must allege and prove that defendant’s actions adversely affected the public interest. Harrington v. Blackston (S.C. 1996) 322 S.C. 470, 473 S.E.2d 47.

If plaintiff bringing private cause of action under South Carolina’s Unfair Trade Practices Act alleges and proves facts demonstrating potential for repetition of defendant’s actions, plaintiff has proven an adverse effect on the public interest and need not allege or prove anything further in relation to the public interest requirement. Harrington v. Blackston (S.C. 1996) 322 S.C. 470, 473 S.E.2d 47.

Plaintiffs may prove potential for repetition, as required for private cause of action under South Carolina’s Unfair Trade Practices Act, by showing, inter alia, same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or by showing the company’s procedures create potential for repetition of the unfair and deceptive acts. Harrington v. Blackston (S.C. 1996) 322 S.C. 470, 473 S.E.2d 47.

Outdoor advertiser, bringing private cause of action under South Carolina’s Unfair Trade Practices Act (UTPA) against competitor that erected billboards so that advertiser’s billboards could not be seen, proved potential for repetition of competitor’s actions as required by UTPA where competitor had blocked more than one of advertiser’s signs in the past, and competitor’s actions deprived advertiser of its long‑term choice of advertisement location. Harrington v. Blackston (S.C. 1996) 322 S.C. 470, 473 S.E.2d 47.

To be actionable under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., the unfair or deceptive acts or practices in the conduct of trade or commerce must have an impact upon the public interest. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21. Antitrust And Trade Regulation 151

Under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., unfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential for repetition. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21. Antitrust And Trade Regulation 151

For an act to have the potential for repetition under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., it must be real and substantial, as opposed to a hypothetical possibility that the defendant’s act would be repeated; consequently, the mere proof that the actor is still alive and engaged in the same business is not sufficient to establish the requirement of potential for repetition. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21.

In an action under the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., the trial court did not err in denying the defendants’ request for attorney’s fees pursuant to Section 39‑5‑20 where the jury found that although the plaintiff’s actions constituted an unfair or deceptive act or practice, the defendants did not suffer any actual damages as a proximate result of the unfair act. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1995) 318 S.C. 471, 458 S.E.2d 431, rehearing denied, certiorari denied.

A claim under the Unfair Trade Practices Act, Sections 39‑5‑10 et seq. is an action at law; consequently, the court will correct any error of law in a master’s ruling, but it must affirm the master’s factual findings unless there is no evidence that reasonably supports the findings. Jefferies v. Phillips (S.C.App. 1994) 316 S.C. 523, 451 S.E.2d 21, rehearing denied.

To be actionable under the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., an unfair or deceptive practice or act must adversely affect the public interest; thus, conduct which only affect the parties to the transaction provides no basis for a UTPA claim. Jefferies v. Phillips (S.C.App. 1994) 316 S.C. 523, 451 S.E.2d 21, rehearing denied. Antitrust And Trade Regulation 151

To prove a claim under the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., the adverse effect on the public must be proved by specific facts; without proof of specific facts disclosing that members of the public were adversely affected by the unfair conduct or that they are likely to be, there is nothing left but a speculative claim of adverse public impact, which will not suffice for a recovery under the UTPA. Jefferies v. Phillips (S.C.App. 1994) 316 S.C. 523, 451 S.E.2d 21, rehearing denied.

The plaintiff did not present evidence that the defendant’s padding of an estimate for structural repairs to the plaintiff’s house affected the public so as to state a claim under the Unfair Trade Practices Act where there was no evidence of other similar action, nor were there any facts to establish or infer that the defendant’s conduct had a potential for repetition, so that it affected the public; the mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element. Jefferies v. Phillips (S.C.App. 1994) 316 S.C. 523, 451 S.E.2d 21, rehearing denied.

A railroad’s removal and consequent refusal to reinstall a crossing on the adjoining landowner’s property did not constitute a violation of the South Carolina Unfair Trade Practices Act, Section 39‑5‑10, et seq., because the railroad’s actions did not constitute trade or commerce as defined by Section 39‑5‑10(b). Foggie v. CSX Transp., Inc. (S.C. 1993) 313 S.C. 98, 315 S.C. 17, 431 S.E.2d 587, rehearing denied. Antitrust And Trade Regulation 146(1)

An attorney, whose client was told by a consumer lender that the attorney was unacceptable to it, failed to state a cause of action against the lender for a violation of the Unfair Trade Practices Act, Section 39‑5‑10 et seq., since the conduct complained of did not describe any action by the lender which was “unfair” or “deceptive” in the context of trade or commerce. Camp v. Springs Mortg. Corp. (S.C. 1993) 310 S.C. 514, 426 S.E.2d 304, rehearing denied. Antitrust And Trade Regulation 209; Antitrust And Trade Regulation 256

A cause of action was stated against a mortgage corporation for a violation of the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., where an attorney alleged that the corporation advised his client that his services as a loan closer would be unacceptable to it, and the client in consequence hired another attorney; legal services come within the definition of “commerce” given in Section 39‑5‑10. Camp v. Springs Mortg. Corp. (S.C.App. 1991) 307 S.C. 283, 414 S.E.2d 784, certiorari granted, affirmed in part, reversed in part 310 S.C. 514, 426 S.E.2d 304, rehearing denied. Antitrust And Trade Regulation 209; Antitrust And Trade Regulation 256

Evidence supported the determination that the promoter of a proposed real estate limited partnership had committed unfair trade practices where the promoter (1) solicited investments to build a motel and told investors that the risk was minimal or non‑existent, (2) accepted a total of $45,000 from investors for a proposed limited partnership which was never actually formed, (3) falsely represented that the money was in escrow and the project was under way, and (4) failed to return any of the money after the project was abandoned; an effect on the public interest can be inferred from the fact that the investment opportunity was offered to different members of the public. Hilton v. South Carolina Public Railways Com’n (S.C. 1992) 307 S.C. 63, 413 S.E.2d 845.

Owners of a membership in a time‑share club, which entitled them to the use of the club property, were entitled to bring an action under the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., against the buyers of the club’s “equity” where the buyers attempted to raise the club dues in violation of the original membership agreement; the acquisition of a lease by purchasing the club’s “equity” constituted trade and commerce within the meaning of the Act. Baker v. Chavis (S.C.App. 1991) 306 S.C. 203, 410 S.E.2d 600.

The lessee of a vehicle, who stopped making payments and was sued by the lessor for breach of contract, was entitled to bring a counterclaim under the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., for the lessor’s failure to disclose that the car was a “gray market” automobile, whether or not the agreement was a true lease as opposed to a sale, since a lease is a “transfer of . . . any motor vehicle or interest therein,” and thus is a covered transaction under the Act. Southern Nat. Leasing Corp. v. Hall (S.C.App. 1991) 306 S.C. 92, 410 S.E.2d 577, certiorari denied.

The trial court improperly granted double recovery of damages to a bookstore owner in an action for servicemark infringement, unfair competition, statutory unfair trade practices, and violation of statutory trademark laws where, based on a finding of servicemark infringement, it also found unfair competition and unfair trade practices by the same conduct, and awarded damages for each of these 3 causes of action. Taylor v. Hoppin’ Johns, Inc. (S.C.App. 1991) 304 S.C. 471, 405 S.E.2d 410.

The exemption in the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., for “ [a]ctions or transactions permitted under laws administered by any regulatory body or officer” did not exclude from UTPA the actions of a car dealer who failed to disclose to buyers that a car had previously been involved in an accident, since the intent of Section 39‑5‑40 was to avoid conflict by excluding “those actions or transactions which are allowed or authorized by regulatory agencies or other statutes”; this interpretation was buttressed by Section 39‑5‑160 providing that “ [t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.” Ward v. Dick Dyer and Associates, Inc. (S.C. 1991) 304 S.C. 152, 403 S.E.2d 310. Antitrust And Trade Regulation 152

An alleged offer of replacement or repurchase by a car dealer who failed to disclose to buyers at the time of purchase that a car had previously been involved in an accident, was no defense to an action brought under the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., since a wrongdoer’s subsequent actions do not affect the alleged wrongdoing at the time of the sale. Ward v. Dick Dyer and Associates, Inc. (S.C. 1991) 304 S.C. 152, 403 S.E.2d 310.

An automobile repair shop’s custom not to notify the owner of an automobile of repair costs above and beyond the first estimate given to the owner when the bill was to be paid by an insurance company but to notify only the insurance company of such additional repair costs, together with the facts that the repair shop told an automobile owner that her automobile could be repaired “as good as new” for $6,900 but subsequently told only the owner’s insurer of additional repair costs in the amount of $2,340.11, constituted an unfair trade practice within the meaning of the Unfair Trade Practices Act. Young v. Century Lincoln‑Mercury, Inc. (S.C.App. 1989) 302 S.C. 320, 396 S.E.2d 105, affirmed in part, reversed in part 309 S.C. 263, 422 S.E.2d 103. Antitrust And Trade Regulation 195

The Unfair Trade Practices Act should not be construed to increase a plaintiff’s burden of proving liability since its purpose is to give additional protection to victims of unfair trade practices, not to make a case harder to prove than it would be under the common law principles. Consistent with this policy, actual knowledge of the principle is not necessary to hold the principle liable for the acts of his or her agents committed within the scope of the agent’s authority. Young v. Century Lincoln‑Mercury, Inc. (S.C.App. 1989) 302 S.C. 320, 396 S.E.2d 105, affirmed in part, reversed in part 309 S.C. 263, 422 S.E.2d 103. Antitrust And Trade Regulation 136; Principal And Agent 159(1)

In order to be actionable under the Unfair Trade Practices Act, an unfair or deceptive act or practice must have an impact upon the public interest. The Act is not available to redress a private wrong where the public interest is not affected. Additionally, a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act. Columbia East Associates v. Bi‑Lo, Inc. (S.C.App. 1989) 299 S.C. 515, 386 S.E.2d 259. Antitrust And Trade Regulation 151

A supermarket chain’s breach of its commercial lease agreement by its cessation of operation and refusal to sublease to a competing supermarket chain did not impact upon the public interest and, therefore, was not actionable under the Unfair Trade Practices Act. Columbia East Associates v. Bi‑Lo, Inc. (S.C.App. 1989) 299 S.C. 515, 386 S.E.2d 259.

The Unfair Trade Practices Act does not apply to an employer‑employee relationship. Miller v. Fairfield Communities, Inc. (S.C.App. 1989) 299 S.C. 23, 382 S.E.2d 16, certiorari dismissed 302 S.C. 518, 397 S.E.2d 377.

A jury verdict in favor of a defendant on a cause of action for fraud and against the defendant on a cause of action for violation of the Unfair Trade Practices Act was not internally inconsistent since proof of common law fraud is not required to establish a violation of the Act. Dowd v. Imperial Chrysler‑Plymouth, Inc. (S.C.App. 1989) 298 S.C. 439, 381 S.E.2d 212. Antitrust And Trade Regulation 365

A car dealer’s conduct was a deceptive trade practice under the Unfair Trade Practices Act where the dealer told a purchaser that a car had been leased as a part of a fleet when, in fact, the car had been maintained by the dealer for daily rentals. Dowd v. Imperial Chrysler‑Plymouth, Inc. (S.C.App. 1989) 298 S.C. 439, 381 S.E.2d 212. Antitrust And Trade Regulation 193

“Unfair methods of competition” as well as “unfair or deceptive acts or practices” must have an adverse impact on the public interest in order to be actionable under the Unfair Trade Practices Act. Florence Paper Co. v. Orphan (S.C. 1989) 298 S.C. 210, 379 S.E.2d 289.

A private club had no cause of action under the Unfair Trade Practices Act against merchants that allegedly conspired to prevent the club from opening a restaurant since the public interest was unaffected by the merchants’ alleged actions. LaMotte v. Punch Line of Columbia, Inc. (S.C. 1988) 296 S.C. 66, 370 S.E.2d 711. Conspiracy 8

A mere breach of contract does not constitute a violation of the Unfair Trade Practices Act. South Carolina Nat. Bank v. Silks (S.C.App. 1988) 295 S.C. 107, 367 S.E.2d 421. Antitrust And Trade Regulation 147

The actions of a car dealer which had lawful possession of a repossessed car, in allowing a prospective purchaser to remove the car from the lot and drive it during some or all of the 10‑day redemption period set forth in the notice of repossession did not constitute a conversion under Section 37‑5‑111 or a violation of the Unfair Trade Practices Act where the owner did not make an effort to pay the redemption price during the 10‑day period. Kirby v. Horne Motor Co. (S.C.App. 1988) 295 S.C. 7, 366 S.E.2d 259. Conversion And Civil Theft 134

There was proof that a seller of a steam‑pressure cleaning machine made a misrepresentation in the conduct of trade where the seller knew that the purchaser wanted to use the machine at his place of business and elsewhere in the community and failed to tell the purchaser that the machine had special water pressure requirements. Potomac Leasing Co. v. Bone (S.C.App. 1988) 294 S.C. 494, 366 S.E.2d 26. Antitrust And Trade Regulation 162

Insurance company’s conversion of note and mortgage, being unconnected with transaction constituting either trade or commerce, while admittedly unfair, is not kind of unfair or deceptive method, act, or practice declared unlawful by Section 39‑5‑20. Connolly v. People’s Life Ins. Co. of South Carolina (S.C.App. 1988) 294 S.C. 355, 364 S.E.2d 475, reversed 299 S.C. 348, 384 S.E.2d 738. Antitrust And Trade Regulation 146(1)

Complaint alleging dealer misrepresentations that car was “new demonstrator” and “had all the bugs worked out” constituted unfair and deceptive acts in violation of statute; proof of common‑law fraud is not required to establish UTPA violation. Inman v. Ken Hyatt Chrysler Plymouth, Inc. (S.C. 1988) 294 S.C. 240, 363 S.E.2d 691, on subsequent appeal 303 S.C. 10, 397 S.E.2d 774.

**SECTION 39‑5‑20 is not unconstitutionally vague, despite contention that it does not specify what acts are unlawful.** Inman v. Ken Hyatt Chrysler Plymouth, Inc. (S.C. 1988) 294 S.C. 240, 363 S.E.2d 691, on subsequent appeal 303 S.C. 10, 397 S.E.2d 774.

Issue of alleged unfair competition was matter for jury to decide based upon its assessment of testimony where, among other things, there was some evidence from which jury could reasonably infer that competitor was engaged in effort to drive outdoor advertiser out of business in particular county. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc. (S.C.App. 1987) 294 S.C. 169, 363 S.E.2d 390.

Padding bills for auto repair is unfair trade practice under Act, as padding auto repair bills affects public interest because of its potential for repetition. Barnes v. Jones Chevrolet Co., Inc. (S.C.App. 1987) 292 S.C. 607, 358 S.E.2d 156. Antitrust And Trade Regulation 151

Mere breach of contract does not constitute violation of Unfair Trade Practices Act, such that nightclub operator’s deliberate or intentional refusal to permit owner of coin‑operated video game machines to utilize premises of its nightclub for effective display and operation of video machines in breach of its contract with owner of video machines, without more, does not constitute violation of Unfair Trade Practices Act. Key Co., Inc. v. Fameco Distributors, Inc. (S.C.App. 1987) 292 S.C. 524, 357 S.E.2d 476. Antitrust And Trade Regulation 272

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

Unfair deceptive acts or practices in the conduct of trade and or commerce have an impact upon the public interests if the acts and or practices have the potential for repetition. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

A complaint containing allegations of unfair or deceptive acts or practices on the part of the defendant which allegedly damaged the plaintiff did not state a claim under the unfair trade practices act, where the complaint nowhere alleged any facts demonstrating that those acts or practices adversely affected the public. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688.

The term “willful” as used in Section 39‑5‑110 creates a statutory standard of willfulness different from the common law standard and, for purposes of Section 39‑5‑110, conduct is willful if the defendant should have known it violates Section 39‑5‑20, the standard being not one of actual knowledge, but of constructive knowledge, so if, in the ordinary exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Unfair Trade Practices Act, then such conduct is “willful” within the meaning of the statute. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Violation of Section 39‑5‑20 by defendant corporation and 2 of its directors was willful since a person exercising due diligence to determine whether defendant corporation’s membership program violated the law would have no doubt that it constituted a pyramid scheme prohibited by Section 39‑5‑30. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Penalties were properly assessed individually against officers, directors and principal shareholders of a corporation whose membership program constituted a pyramid scheme. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Shippers of furniture and household goods could not recover under supplemental agreement with an interstate motor common carrier since, even if the supplemental agreement constituted an unfair or deceptive trade practice, their agreement was authorized by regulations and tariffs administered by the Interstate Commerce Commission, and, thus, exempted from the South Carolina unfair trade practice law by Section 39‑5‑40(a). Carr v. United Van Lines, Inc. (S.C.App. 1986) 289 S.C. 194, 345 S.E.2d 734. Antitrust And Trade Regulation 152

Payees’ demurrer to counterclaim in action on note should not have been sustained where the counterclaim contained allegations which, if proven, stated a claim under the Unfair Trade Practice Act and, therefore, raised issues of novel impression that required a record to be made in the lower court to enable the appellate courts to properly review them. Vaughan v. Kalyvas (S.C.App. 1986) 288 S.C. 358, 342 S.E.2d 617.

The question of whether price discrimination violates the Unfair Trade Practices Act, Sections 39‑5‑10 to 39‑5‑560, being a question of first impression in South Carolina, should not be decided on demurrer; rather, the case should be fully developed and tried on its merits. Jackson v. Atlantic Soft Drink Co., Inc. (S.C. 1985) 286 S.C. 577, 336 S.E.2d 13. Appeal And Error 1177(2)

Under Section 39‑5‑20(a) and (b), plaintiff need not prove the elements of common law deceit in order to establish a violation of the South Carolina Unfair Trade Practices Act, since, under the statute, there is no need to show that a claim or representation was intended to deceive, but only that it had the capacity, effect, or tendency to deceive. State ex rel. McLeod v. C & L Corp., Inc. (S.C.App. 1984) 280 S.C. 519, 313 S.E.2d 334.

Window dealer’s alleged losses were not proximately caused by window manufacturer’s purported mislabeling of its windows, and thus manufacturer was not liable for alleged losses under Lanham Act and South Carolina Unfair Trade Practices Act (SCUTPA); retail pricing of manufacturer’s windows resulted from multiple factors beyond cost of production, many of which were controlled by window dealer and its competitors. Muhler Co., Inc. v. Ply Gem Holdings, Inc. (C.A.4 (S.C.) 2016) 637 Fed.Appx. 746, 2016 WL 519085. Antitrust and Trade Regulation 24; Antitrust and Trade Regulation 164

1.5. Construction and application

Under South Carolina law, grill seller’s claims against buyer for breach of contract, breach of contract accompanied by a fraudulent act, fraudulent representation, negligent misrepresentation, and violations of North and South Carolina Unfair Trade Practices Laws were within the scope of the parties’ contract, and thus subject to its forum selection clause, since all of the claims specifically referenced the contract and buyer’s alleged failure to abide by it. Sagittarius Sporting Goods Company, Ltd v. LG Sourcing, Inc., 2016, 162 F.Supp.3d 531. Contracts 206

Standard for liability for trademark infringement under South Carolina Unfair Trade Practices Act (UTPA), like that of Lanham Act, is likelihood of consumer confusion. Johnson v. Sosebee, 2005, 397 F.Supp.2d 706. Trademarks 1421

In action by State against pharmaceutical company under South Carolina Unfair Trade Practices Act (SCUTPA) based on company’s sales and marketing of atypical antipsychotic drug, although State had burden of proving company’s representations with regard to sales and marketing of antipsychotic medication had a tendency to deceive, the State was not required to show actual deception or that those representations caused any appreciable injury‑in‑fact or adversely impacted the marketplace. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 222

The Unfair Trade Practices Act’s (UTPA) regulated industries exemption did not apply to UTPA action brought by second real estate agent against first real estate agent for allegedly replacing second agent’s contracts with first agent’s contracts, and excluding second agent from commissions to which he would otherwise have been entitled, despite the regulation of licensed real estate agents by the Department of Labor, Licensing, and Regulation, absent a showing by first agent as to how the Department specifically allowed for, or authorized her actions. Hennes v. Shaw (S.C.App. 2012) 397 S.C. 391, 725 S.E.2d 501. Antitrust and Trade Regulation 152

A “deceptive act” under the Unfair Trade Practices Act (UTPA) is any act which has a tendency to deceive. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 136

Facts necessary to establish that car dealership violated Unfair Trade Practices Act were not inconsistent with facts required to establish that car dealership violated Uniform Commercial Code (UCC), and thus customers were entitled to bring claims against car dealership under both statutes; car dealership violated Unfair Trade Practices Act by deceiving customers concerning their credit approval and having customers sign both an unconditional sales contract and a conditional bailment agreement, and violated UCC by failing to give customers notice of sale of repossessed collateral. Singleton v. Stokes Motors, Inc. (S.C. 2004) 358 S.C. 369, 595 S.E.2d 461, rehearing denied. Antitrust And Trade Regulation 193; Secured Transactions 242.1

Mortgagee did not engage in “unlawful trade practice” under South Carolina Unfair Trade Practices Act (SCUTPA) when it allegedly reported to credit bureaus that mortgage was in foreclosure, inasmuch as it was not wholly unreasonable for mortgagee to believe that reference of defaulted mortgage loan to its internal foreclosure department had placed account in foreclosure, and therefore such communication could not be seen as immoral, unethical, or oppressive. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 69 Fed.Appx. 585, 2003 WL 21480586, Unreported. Antitrust And Trade Regulation 214; Credit Reporting Agencies 3

Mortgagee bank’s alleged conduct in falsely reporting to credit reporting agencies that mortgage was in foreclosure did not constitute an “unfair trade practice,” within meaning of the South Carolina Unfair Trade Practices Act (SCUTA), absent showing that mortgagee knew the foreclosure information was false. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 65 Fed.Appx. 893, 2003 WL 21213703, Unreported, rehearing granted, on rehearing 69 Fed.Appx. 585, 2003 WL 21480586. Credit Reporting Agencies 3

1.8. Preemption

Consumers’ state law claims against national bank were not preempted as they related to bank’s alleged practice of collecting overdraft fees for transactions that did not actually overdraw the account; requiring that bank refrain from assessing overdraft fees when the relevant account contained enough money to cover the transaction would not prevent bank from exercising its federally‑conferred deposit‑taking powers, nor would it significantly interfere with the bank’s exercise of those powers, because there was no indication that requiring it to refrain from such a practice would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress or the Office of the Comptroller of the Currency (OCC). In re TD Bank, N.A., 2015, 150 F.Supp.3d 593, motion to certify appeal denied 2016 WL 7320864. Banks And Banking 233; States 18.19

Allegation that manufacturer of generic drug metoclopramide failed to incorporate into its labeling Food and Drug Administration (FDA) approved warnings added to brand‑name labeling relating to use of the drug in geriatric patients and long‑term use stated claim, under South Carolina Unfair Trade Practices Act, that was not preempted by federal law governing drug labeling requirements. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Antitrust and Trade Regulation 132; States 18.84

2. Evidence

Exclusion of evidence that contractor’s auditors involved in initial audits of subcontractor’s accounting books and records were not licensed certified public accountants was not abuse of discretion in action between contractor and subcontractor for, inter alia, breach of subcontracts, given that auditors were not public accountants engaged to audit subcontractor, so as to trigger licensing provision in generally accepted government accounting standards (GAGAS), but rather were contractor employees exercising contractor’s rights pursuant to subcontracts to inspect subcontractor’s accounting books and records. Project Control Services, Inc. v. Westinghouse Savannah River Co., Inc. (C.A.4 (S.C.) 2002) 35 Fed.Appx. 359, 2002 WL 1020695, Unreported, certiorari denied 123 S.Ct. 618, 537 U.S. 1045, 154 L.Ed.2d 516. Contracts 322(2)

Trial court did not abuse its discretion by refusing to admit pickup truck buyer’s loan application into evidence to establish that buyer represented that the truck’s value between $15,000 and $16,000, in trial of truck buyer’s Unfair Trade Practices Act (UTPA) claim against truck dealer for selling truck without disclosing that it had been wrecked and repaired, as trial court ruled that buyer’s representation regarding the truck’s value could be elicited by testimony without entering the loan document, thereby avoiding a potential hearsay problem. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Evidence 353(7)

Trial court did not abuse its discretion by refusing to admit pickup truck into evidence, in trial of truck buyer’s Unfair Trade Practices Act (UTPA) claim against truck dealer for selling truck without disclosing that it had been wrecked and repaired, as court admitted a number of photographs of the truck, jurors were allowed to review the photographs as they deliberated, jurors heard testimony regarding the condition of the truck both before and after the accident, and admitting the truck itself would have been cumulative. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Evidence 194; Trial 56

Evidence was sufficient to establish truck dealer’s failure to disclose to buyer that pickup truck had been wrecked and repaired was unfair or deceptive, in trial of buyer’s Unfair Trade Practices Act (UTPA) claim against dealer; instead of informing buyer about the extent of the damage dealer stated that damage buyer had observed was the result of a shopping cart or car door, dealer told buyer that truck would be under whatever factory warranty was applicable when dealer knew that some of the truck’s parts had been replaced and were no longer covered by the factory warranty, dealer told buyer that the previous owner just wanted another truck when buyer asked why previous owner no longer wanted it, and dealer did not show buyer truck’s previous title indicating that insurance company had owned it. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 193

3. Public interest requirement

Conduct that affects only the parties to the transaction and not the public interest provides no basis for a claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA). Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc., 2013, 966 F.Supp.2d 604. Antitrust and Trade Regulation 151

South Carolina Unfair Trade Practices Act (SCUTPA) relief is not available to redress a private wrong where the public interest is unaffected. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 151

Under the South Carolina Unfair Trade Practices Act (SCUTPA), the potential for repetition, required for showing that an allegedly unfair act has an adverse impact on the public, is generally demonstrated in one of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company’s procedures create a potential for repetition of the unfair and deceptive acts. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 149; Antitrust and Trade Regulation 151

Under the South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff may show that unfair or deceptive acts or practices have an impact upon the public interest by demonstrating a potential for repetition. Bahringer v. ADT Sec. Services, Inc., 2013, 942 F.Supp.2d 585. Antitrust and Trade Regulation 151

Allegations that sellers and resellers of hotel rooms told online consumers that they were collecting certain money as taxes, that consumers were paying those “taxes,” and that sellers and resellers then kept a substantial portion of that money as profit involved precisely the type of behavior that South Carolina Unfair Trade Practices Act (SCUTPA) was intended to punish and deter, and allowing municipalities’ case to go forward would not extend a SCUTPA cause of action to ordinary tax cases. City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 179

Grocery store chains did not violate South Carolina Unfair Trade Practices Act (SCUTPA) by ceasing to stock manufacturer’s barbecue sauce, after manufacturer’s owner asserted his First Amendment rights by speaking out in opposition to removal of Confederate flag from state capitol; exercise of contractual right not to do business with particular vendor was not “unfair act” giving rise to SCUTPA liability, and dispute was private in nature, lacking a necessary adverse impact on public interest. Bessinger v. Food Lion, Inc., 2003, 305 F.Supp.2d 574, affirmed 115 Fed.Appx. 636, 2004 WL 2634528, certiorari denied 125 S.Ct. 2270, 544 U.S. 1044, 161 L.Ed.2d 1080. Antitrust And Trade Regulation 151; Antitrust And Trade Regulation 260

South Carolina Unfair Trade Practices Act’s (SCUTPA) “public interest” requirement may be satisfied if the alleged unfair or deceptive acts or practices have the potential for repetition; potential for repetition may be shown (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company’s procedures create a potential for repetition of the unfair and deceptive acts. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510. Antitrust And Trade Regulation 151

Plaintiff in a South Carolina Unfair Trade Practices Act (SCUTPA) action is required only to allege and prove those facts sufficient to demonstrate potential for repetition; at that point, plaintiff has proven an adverse effect on the public interest sufficient to recover under the SCUTPA. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510. Antitrust And Trade Regulation 151

Evidence was sufficient to support finding that defendant’s conduct violated the “public interest” requirement of South Carolina Unfair Trade Practices Act (SCUTPA); defendant’s failure to pay what it owed under the assigned risk plan adversely affected other insurers, companies, and their insureds by way of increased premium rates, defendant’s actions enabled it to compete within the employee leasing industry with the unfair advantage of having low workers’ compensation premiums, defendant misled some clients as to whether they had workers’ compensation insurance coverage placing company and the uninsured clients at risk, defendant deceived another insurer, and the Georgia Assigned Risk Plan when it tried to obtain new coverage in Georgia, and defendant’s offer of the sale of its stock was predicated upon a grossly underestimated liability to insurer for workers’ compensation premiums. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510. Antitrust And Trade Regulation 369

An act is an “unfair act,” under the South Carolina Unfair Trade Practices Act (SCUTPA), when it is offensive to public policy or when it is immoral, unethical, or oppressive. Bessinger v. Bi‑Lo, Inc. (S.C.App. 2005) 366 S.C. 426, 622 S.E.2d 564, certiorari denied. Antitrust And Trade Regulation 135(1)

An impact on the public interest sufficient to support claim under Unfair Trade Practices Act may be shown if the acts or practices have the potential for repetition. Singleton v. Stokes Motors, Inc. (S.C. 2004) 358 S.C. 369, 595 S.E.2d 461, rehearing denied. Antitrust And Trade Regulation 151

Under South Carolina law, a plaintiff satisfies the public interest element of South Carolina Unfair Trade Practices Act (UTPA) by proving that the conduct at issue had the potential for repetition; no further proof is required. RFT Management Co., LLC v. Powell (C.A.4 (S.C.) 2015) 607 Fed.Appx. 238, 2015 WL 1567854. Antitrust and Trade Regulation 151

Mortgagors failed to establish public interest element of claim against mortgagee for engaging in unlawful trade practice under South Carolina Unfair Trade Practices Act (SCUTPA), which required evidence showing potential for repetition of unfair or deceptive act, when mortgagors merely produced pleadings in similar case, in that bare allegations in that case’s complaint, offered without further evidentiary support, did not establish adverse impact on public interest. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 69 Fed.Appx. 585, 2003 WL 21480586, Unreported. Antitrust And Trade Regulation 369

Mortgagor did not establish that any unfair trade practices by mortgagee bank had an adverse impact on the public interest, as required to prove violation of the South Carolina Unfair Trade Practices Act (SCUTPA), absent showing of potential for repetition of the unfair or deceptive act. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 65 Fed.Appx. 893, 2003 WL 21213703, Unreported, rehearing granted, on rehearing 69 Fed.Appx. 585, 2003 WL 21480586. Antitrust And Trade Regulation 151

4. Repetition of act, public interest requirement

Tile wholesaler failed to provide any specific facts demonstrating that its exclusive sales agent and sales representatives had conducted the same kind of actions in the past or that their procedures or business practices created a potential for repetition in the future, as required to state a claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA). Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc., 2013, 966 F.Supp.2d 604. Antitrust and Trade Regulation 151

The plaintiff in a South Carolina Unfair Trade Practices Act (SCUTPA) action is required only to allege and prove those facts sufficient to demonstrate potential for repetition; at that point, the plaintiff has proven an adverse effect on the public interest sufficient to recover under the SCUTPA. Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc., 2013, 966 F.Supp.2d 604. Antitrust and Trade Regulation 151

Potential of unfair or deceptive acts for repetition, for purposes of adverse impact upon the public element of a claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), can be demonstrated by either showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or showing the company’s procedures created a potential for repetition of the unfair and deceptive acts. Ameristone Tile, LLC v. Ceramic Consulting Corp., Inc., 2013, 966 F.Supp.2d 604. Antitrust and Trade Regulation 151

Potential for repetition, of kind sufficient under South Carolina law to show that alleged unfair or deceptive acts or practices affect the public interest and are actionable under the South Carolina Unfair Trade Practices Act, may be proven by showing: (1) that same kind of actions occurred in past, thus making it likely that they will continue to occur absent deterrence; or (2) that defendant’s procedures created potential for repetition of unfair and deceptive acts. In re Riley (Bkrtcy.D.S.C. 2012) 478 B.R. 736. Antitrust and Trade Regulation 151

Plaintiff can establish that acts complained of had impact on public interest, as required to support cause of action under the South Carolina Unfair Trade Practices Act, by establishing that such acts or practices have potential for repetition. In re Riley (Bkrtcy.D.S.C. 2012) 478 B.R. 736. Antitrust and Trade Regulation 151

Evidence was sufficient to establish truck dealer’s failure to disclose to buyer that pickup truck had been wrecked and repaired had the potential for repetition and thus that dealer’s deceptive act affected the public interest, in trial of buyer’s Unfair Trade Practices Act (UTPA) claim against dealer; dealer admitted he often bought vehicles with damage at insurance auctions and repaired them to sell, there was evidence that dealer did not always disclose to his customers that they were buying wrecked and repaired vehicles, and dealer testified he had not changed his way of doing business as a result of being sued by buyer. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 151; Antitrust And Trade Regulation 193

A plaintiff proves an adverse effect on public interests, for purposes of a claim under the Unfair Trade Practices Act (UTPA), if he proves facts that demonstrate the potential for repetition. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 151

The “potential for repetition,” such that an unfair or deceptive act or practice has an impact on the public interest making the act actionable under the Unfair Trade Practices Act (UTPA), may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company’s procedures create a potential for repetition of the unfair and deceptive acts. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 151

Potential for repetition of unfair or deceptive act or practice, as will establish impact upon public interest sufficient to support claim under Unfair Trade Practices Act, may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company’s procedures created a potential for repetition of the unfair and deceptive acts. Singleton v. Stokes Motors, Inc. (S.C. 2004) 358 S.C. 369, 595 S.E.2d 461, rehearing denied. Antitrust And Trade Regulation 151

5. Arbitration

Agency agreement under which agency was permitted to sell insurance on behalf of insurers and which contained arbitration provision was not an insurance policy, and thus arbitration of claims brought by insureds and competing agents for unfair trade practices alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents, was not precluded by the exception in the South Carolina Arbitration Act that expressly invalidated provisions for arbitration in insurance policies. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 121

Insurers did not waive their right to compel arbitration in actions brought by insureds and competing agents for unfair trade practices alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents, even though insurers took some actions that could have taken advantage of the judicial system or availed themselves of circuit court’s assistance; actions had only been pending for anywhere from six to 11 months prior to insurers seeking to compel arbitration, actions had not progressed much beyond the filing of pleadings and dismissal motions, the parties had not engaged in extensive discovery, and insureds and agents were unable to show anything beyond mere inconvenience caused by delay. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 182(2)

Tort claims against agents and insurers brought by insureds and competing agents for unfair trade practices alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents, were not outrageous torts that were unforeseeable to a reasonable consumer, as required to find that claims were not encompassed by arbitration provision in agency agreement under which agency was permitted to sell insurance on behalf of insurers. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 143

Tort claims against agents and insurers brought by insureds and competing agents for unfair trade practices alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents, were encompassed by arbitration clause in agency agreement that allowed arbitration if “any dispute or disagreement arises in connection with the interpretation” of agreement; agents had no authority to sell insurance on behalf of insurers in the absence of agreement, and agreement governed insurer’s duties to train, investigate, supervise, and audit agents. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 143

Agency agreement under which agency was permitted to sell insurance on behalf of insurers and which contained arbitration provision was enforceable despite lack of signature by agency, in actions brought by insureds and competing agents against agency for unfair trade practices, where agents sold insurance policies on behalf of insurers, and the agreement, along with predecessor agreements, provided the sole source of authorization for them to do so. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 133(2); Insurance 1626

Vehicle purchaser’s Unfair Trade Practices Act claim alleging that he was victim of a “bait and switch” fell within scope of arbitration agreement in purchase agreement with auto dealership; purchaser alleged that, upon completion of sale, dealership presented truck to him that was not same truck purchaser had test driven, and arbitration agreement provided that dispute of any kind with regard to negotiations and provisions of sale were subject to arbitration. Partain v. Upstate Automotive Group (S.C. 2010) 386 S.C. 488, 689 S.E.2d 602, rehearing denied. Alternative Dispute Resolution 145

Arbitration clause in vehicle purchase agreement between purchaser and auto dealership did not apply in purchaser’s Unfair Trade Practices Act action because the alleged actions of dealership constituted illegal and outrageous acts unforeseeable to a reasonable consumer in context of normal business dealings; purchaser alleged that he was the victim of a “bait and switch,” in that when he arrived to pick up his vehicle, he was presented with a different vehicle than he had agreed to purchase. Partain v. Upstate Automotive Group (S.C. 2010) 386 S.C. 488, 689 S.E.2d 602, rehearing denied. Alternative Dispute Resolution 145

Challenge to arbitration clause as a violation of public policy by precluding punitive damages was premature prior to arbitration in suit alleging fraud and violation of the Unfair Trade Practices Act (UTPA); the arbitrator needed to decide whether the UTPA was violated and the statutory treble damages were punitive or compensatory damages, it was unclear how the arbitrator would rule on merits or claim for punitive damages, and the issues were thus not ripe. Carolina Care Plan, Inc. v. United HealthCare Services, Inc. (S.C. 2004) 361 S.C. 544, 606 S.E.2d 752, rehearing denied. Alternative Dispute Resolution 213(1)

6. Persons liable

Under South Carolina law, mortgage servicer was not liable for allegedly unconscionable loan agreement brokered by mortgage brokers, where servicer did not employ mortgage brokers that worked with mortgagors, it did not author the loan agreements, and it was not involved with the loan transaction at time it was entered into between mortgagors and mortgagee. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Mortgages And Deeds Of Trust 1225

Mortgagors did not rely on a false representation made by mortgage servicer that misled them with regard to impact of adjustable interest rate, as required to state a claim for negligent misrepresentation under South Carolina law arising out of the servicing of their adjustable rate loan, where servicer did not become involved with servicing of the loan until approximately two years after mortgagors entered into the loan agreement with mortgagee, and all servicer did was send mortgagors a billing statement pursuant to terms of the loan agreement. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Mortgages And Deeds Of Trust 780

Mortgage servicer was not liable under the South Carolina Unfair Trade Practices Act for mortgagee’s alleged conduct in failing to disclose terms of the loan, steering mortgagors into higher interest rates that they could not afford, and making loans without considering mortgagors’ ability to repay, where servicer did not become involved with servicing of the note and mortgage until approximately two years after mortgagors entered into the loan agreement with mortgagee, and servicer did not have any part in creating the allegedly unconscionable loan. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Consumer Credit 33.1

Any allegedly irregular practices upon part of original mortgage lender, in connection with alleged “robo‑signing” of mortgage assignments by individual without authority to do so, would not support cause of action against assignee pursuant to the South Carolina Unfair Trade Practices Act, where no evidence was presented to show that assignee had engaged in any unfair or deceptive acts or practices. In re Riley (Bkrtcy.D.S.C. 2012) 478 B.R. 736. Antitrust and Trade Regulation 209

In private actions under the Unfair Trade Practices Act (UTPA), directors and officers are not liable for the corporation’s unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA. BPS, Inc. v. Worthy (S.C.App. 2005) 362 S.C. 319, 608 S.E.2d 155. Antitrust And Trade Regulation 291; Corporations And Business Organizations 1970

Corporation’s president would be personally liable for unfair trade practices that he personally committed. BPS, Inc. v. Worthy (S.C.App. 2005) 362 S.C. 319, 608 S.E.2d 155. Antitrust And Trade Regulation 291; Corporations And Business Organizations 1970

6.5. Bankruptcy proceedings

Even assuming that allegations in bankrupt mortgage borrower’s complaint, regarding lender’s failure to comply with terms of modification agreement negotiated between parties, adequately asserted claim for breach of loan modification agreement, such allegations were insufficient to state plausible claim against lender for allegedly violating the South Carolina Unfair Trade Practices Act (SCUTPA), absent allegation of any specific acts by lender that were offensive to public policy or immoral, unethical, oppressive, or that had tendency to deceive. In re Russo‑Chestnut (Bkrtcy.D.S.C. 2014) 522 B.R. 148. Antitrust and Trade Regulation 358

To extent that Chapter 7 debtor had prepetition cause of action against assignee of his mortgage for alleged violations of the South Carolina Unfair Trade Practices Act, cause of action belonged to bankruptcy estate, and was subject to administration by trustee; debtor did not have standing to pursue it. In re Riley (Bkrtcy.D.S.C. 2012) 478 B.R. 736. Bankruptcy 2154.1; Bankruptcy 2553

7. Duty to disclose

Truck dealer had a duty to disclose to pickup truck buyer that truck had been wrecked and repaired, for purposes of buyer’s Unfair Trade Practices Act (UTPA) claim against dealer, where dealer intended for his customers to repose trust and confidence in his representations concerning the vehicles he sold them, and before he purchased truck buyer repeatedly questioned dealer and his employees about the truck’s condition, warranty on truck and truck’s observable defects, indicating he relied upon the trustworthiness of dealer’s representations. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 193

Whether truck dealer had a duty to inform pickup truck buyer that truck had been wrecked and repaired was a question of law for the trial court, in buyer’s Unfair Trade Practices Act (UTPA) action against dealer. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 363

8. Private cause of action

South Carolina Unfair Trade Practices Act (SCUTPA) prohibited former patients from bringing class action suit for damages against hospital for violations of SCUTPA; statute provides that any person who suffered a loss as a result of an unfair act or practice could “bring an action individually, but not in a representative capacity.” Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Parties 35.67

8.5. Parties

Manufacturer’s alleged misrepresentation that roofing shingles would last for 30 years was not made to named plaintiffs, as required to support their claim in homeowners’ class action for violation of South Carolina Unfair Trade Practices Act (SCUTPA); named plaintiffs neither purchased the shingles at issue nor received any direct communications from manufacturer regarding the duration of the shingles that they did purchase. Brooks v. GAF Materials Corp., 2014, 41 F.Supp.3d 474. Antitrust and Trade Regulation 292

A South Carolina Unfair Trade Practices Act (SCUTPA) claim cannot be brought in a representative capacity, as SCUTPA prohibits the survival of a cause of action after a plaintiff’s death. Williams v. Preiss‑Wal Pat III, LLC, 2014, 17 F.Supp.3d 528. Abatement and Revival 58(.5); Antitrust and Trade Regulation 290

9. Pleadings

Consumers’ allegations concerning national bank’s overdraft policies were sufficient to state claim against bank under various state consumer protection statutes; federal banking law did not expressly permit bank to assess overdraft fees when sufficient funds remained in the account, plausible reading of account agreement could cause reader to be misled about the mechanics of the overdraft policy, and consumers adequately alleged causation in that the bank’s alleged misrepresentations directly related to the assessment of overdraft fees, the alleged harm. In re TD Bank, N.A., 2015, 150 F.Supp.3d 593, motion to certify appeal denied 2016 WL 7320864. Banks And Banking 263; Banks And Banking 270(.5)

District court would deny second request for leave to amend complaint in action by personal representatives of the estate of individual, who was beaten to death while visiting resident at apartment complex, alleging apartment complex was negligent and violated the South Carolina Unfair Trade Practices Act (SCUTPA); representatives had sufficient time to formulate and reformulate their claims between filing of the initial complaint and the amended complaint, and further leave to amend would not result in anything new. Williams v. Preiss‑Wal Pat III, LLC, 2014, 17 F.Supp.3d 528. Federal Civil Procedure 1838

Patient’s allegation that he incurred medical costs, lost earnings, and other out‑of‑pocket expenses due to defendants’ sale, manufacture, or marketing of counterfeit and otherwise defective surgical mesh sufficiently pled an injury for which recovery may be sought under the South Carolina Unfair Trade Practices Act (UTPA). Jones v. Ram Medical, Inc., 2011, 807 F.Supp.2d 501. Antitrust and Trade Regulation 222; Antitrust and Trade Regulation 235

Company that employed dental hygienists was not entitled to amend its complaint against Board of Dentistry to add claim for conspiracy to violate South Carolina Unfair Trade Practices Act (SCUTPA) in action seeking damages regarding Board’s regulation imposing restrictions on hygienists’ work in schools; there was seven‑year lapse between filing of initial complaint and oral motion to amend complaint, and there were no significant factual developments that warranted untimely amendment. Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry (S.C. 2013) 403 S.C. 623, 743 S.E.2d 808. Pleading 245(1)

10. Error

Trial court’s error in granting a directed verdict to law firm on former client’s Unfair Trade Practices Act (UTPA) claim on the basis that the UTPA did not apply to the legal profession was not reversible error, where former client alleged the same facts for its UTPA claim as in the legal malpractice claim, i.e., the deceptive acts of law firm, which the jury rejected. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Appeal and Error 1061.4

11. Federal courts

Suit filed by State of Mississippi as sole plaintiff, alleging that manufacturers, marketers, sellers, and distributors of liquid crystal display (LCD) panels engaged in price‑fixing scheme that violated state consumer protection laws, did not involve claims of “100 or more persons,” and thus did not constitute removable “mass action” under Class Action Fairness Act (CAFA), even if there were 100 or more unnamed persons who were real parties in interest as beneficiaries to State’s claims. Mississippi ex rel. Hood v. AU Optronics Corp., 2014, 134 S.Ct. 736, 187 L.Ed.2d 654, on remand 559 Fed.Appx. 375, 2014 WL 1046959. Removal of Cases 2

12. Instructions

Jury instruction on unfairness and the tendency to deceive standard was in substantial accord with Federal Trade Commission (FTC) guidance, even though instruction did not charge the precise verbiage of the FTCA section concerning unfairness, in State’s action against pharmaceutical company for violations of South Carolina Unfair Trade Practices Act (SCUTPA) in connection with company’s sales and marketing of atypical antipsychotic drug. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 364

13. Estoppel

Any error by district court in relying on a state court judgment, which was later affirmed on other grounds, for its determination that res judicata barred claims by purchaser of residential subdivision lots against law firm and attorney for civil conspiracy, violation of South Carolina Unfair Trade Practices Act (UTPA), and violation of South Carolina Uniform Securities Act (SCUSA) was harmless. RFT Management Co., LLC v. Powell (C.A.4 (S.C.) 2015) 607 Fed.Appx. 238, 2015 WL 1567854. Federal Courts 3704

14. Questions for jury

Issue of whether appraisal of two lots in residential subdivision proximately caused purchaser’s loss was for the jury, in purchaser’s action against appraiser and appraisal company for alleged violations of the South Carolina Unfair Trade Practices Act (UTPA). RFT Management Co., LLC v. Powell (C.A.4 (S.C.) 2015) 607 Fed.Appx. 238, 2015 WL 1567854. Antitrust and Trade Regulation 363

15. Sanctions

Failure to sanction insurers for declining to earlier provide agency agreement containing arbitration provision was not an abuse of discretion, in actions brought by insureds and competing agents for unfair trade practices alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents, even though insurers relied on agreement in their motion to compel arbitration, where insurers properly waited to serve copies of agreement with their motions to compel arbitration and produced agreement well in advance of hearing on motion, which gave insureds and agents sufficient time to review, challenge, and respond to it. Wilson v. Willis (S.C.App. 2016) 416 S.C. 395, 786 S.E.2d 571, rehearing denied. Alternative Dispute Resolution 214

16. Sufficiency of evidence

Evidence was sufficient to support verdict that investment adviser violated Unfair Trade Practices Act (UTPA) through execution of wealth management agreement in provision of advice to investor; adviser’s employee testified adviser knew agreement contained misrepresentations and that adviser could not fulfill the three stated promises outlined within it, and adviser did not notify investor or any other customer that promises made through agreement would not be fulfilled. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust And Trade Regulation 363

Evidence was sufficient to support verdict that investment adviser violated Unfair Trade Practices Act (UTPA) through execution of approval letter, which approved investor’s entering into variable prepaid forward contracts with adviser; on its face, letter appeared to specifically address investor’s needs, explicit goals, and financial concerns, while testimony established that in actuality, letter was a fill‑in‑the blank form letter not tailored to any single client, and letter apparently condoned a conflict of interest between investor’s interest and adviser’s interest. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust and Trade Regulation 219

Evidence was sufficient to support verdict that investment adviser engaged in deceptive practice through issuance of refund letter to investor, which stated that investor was being refunded for a one‑time advisory fee pursuant to an account review, and thus that adviser violated Unfair Trade Practices Act (UTPA); letter purportedly represented corporate values, but fee discussed by letter had been questioned by Securities and Exchange Commission (SEC). Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust and Trade Regulation 219

Evidence was sufficient to support verdict that investment adviser’s actions in execution of letters to investor, which approved investor’s entering into variable prepaid forward contracts and advised investor of an advisory fee refund, purportedly due to corporate values, affected the public, as would allow action by investor against adviser for violation of Unfair Trade Practices Act (UTPA), where such letters were also used for multiple other customers. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust And Trade Regulation 219

Window dealer failed to provide evidence sufficient to establish nonspeculative damages calculation, as required to support its claim under South Carolina Unfair Trade Practices Act (SCUTPA) against window manufacturer for allegedly mislabeling its windows; window dealer did not articulate clearly reasoned, nonspeculative basis for its conclusion that it lost 50% of its sales to window manufacturer. Muhler Co., Inc. v. Ply Gem Holdings, Inc. (C.A.4 (S.C.) 2016) 637 Fed.Appx. 746, 2016 WL 519085. Antitrust and Trade Regulation 390

**SECTION 39‑5‑30.** Repealed.

HISTORY: Former Section, titled Pyramid clubs and similar operations declared unfair trade practices, had the following history: 1962 Code Section 66‑71.2; 1971 (57) 787. Repealed by 2017 Act No. 39, Section 2, eff May 10, 2017. See now, 1976 Code Section 39‑5‑730.

**SECTION 39‑5‑35.** Requiring certain insurance coverage as unfair trade practice.

It shall be an unlawful trade practice under Section 39‑5‑20 for any person engaged in the business of lending money to make it a condition of obtaining a loan for the purchase of an automobile that the borrower carry full coverage comprehensive or fifty dollars collision coverage.

HISTORY: 1979 Act No. 121 Section 5.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Unfair Trade Practices Act Section 13, Required Insurance Coverage.

**SECTION 39‑5‑36.** Resale of tickets for more than one dollar above original price.

(A) A person or firm who knowingly purchases a quantity of tickets for admission to an event which exceeds the maximum quantity posted by or on behalf of the original ticket seller at the point of original sale or printed on the tickets and intends to resell the tickets in excess of one dollar above the price charged by the original ticket seller violates the South Carolina Unfair Trade Practices Act and is subject to its provisions, penalties, and damages.

(B) A person or firm who violates the provisions of Section 16‑17‑710(A) is subject to the provisions, penalties, and damages of the South Carolina Unfair Trade Practices Act.

(C) A person or firm is not liable pursuant to this section with respect to tickets for which the person or firm is the original ticket seller.

(D) For purposes of this section, the term “original ticket seller” means the issuer of the tickets or a person or firm who provides ticket distribution services or ticket sales service under a contract with the issuer.

HISTORY: 2006 Act No. 367, Section 1, eff June 9, 2006.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Unfair Trade Practices Act Section 13.1, Resale of Tickets.

**SECTION 39‑5‑37.** Use of assumed or fictitious name to misrepresent geographical origin, etc., of business as unfair trade practice.

It shall be an unlawful trade practice under Section 39‑5‑20 to use an assumed or fictitious name in the conduct of a business to intentionally misrepresent the geographic origin, ownership of manufacturing facilities, or location of such business.

HISTORY: 1998 Act No. 438, Section 2, eff upon approval (became law without the Governor’s signature on June 17, 1998).

**SECTION 39‑5‑38.** Deceptive or misleading advertisement of live musical performance; injunction; penalty.

(A) For purposes of this section:

(1) “performing person or group” means a vocal or instrumental performer seeking to use the name of another person or group that has previously produced or released, or both, a commercial recording;

(2) “recording person or group” means a vocal or instrumental performer that has previously produced or released, or both, a commercial recording; and

(3) “sound recording” means the fixation of a series of musical, spoken, or other sounds on a material object such as a disk, tape, or other phono‑record on which the sounds are embodied.

(B) It is an unlawful trade practice pursuant to Section 39‑5‑20 to advertise a live musical performance or production in South Carolina through the use of a false, deceptive, or misleading affiliation, connection, or association between the performing person or group with a recording person or group.

(C) The advertisement of a live musical performance does not violate subsection (B) if the:

(1) performing person or at least one member of the performing group was a member of the recording person or group and has a legal right by virtue of use or operation under the group name without having abandoned the name of affiliation with the group;

(2) live musical performance or production is identified as a “salute” or “tribute” to, and is otherwise unaffiliated with, the recording person or group;

(3) advertising does not relate to a live musical performance taking place in South Carolina;

(4) performance is expressly authorized in the advertising by the recording person or group; or

(5) performing group is the authorized registrant and owner of a federal service mark for that group and registered in the United States Patent and Trademark Office.

(D)(1) A court of this State may issue a temporary or permanent injunction for a violation or attempted violation of this chapter where the court believes an injunction would best serve the public interest.

(2) A court that issues a permanent injunction to restrain and prevent a violation of this section may order the enjoined party to restore to its legal owner money or property acquired by the enjoined party through a violation of this section.

(E) A person who violates the provisions of this section is subject to a penalty of at least five thousand dollars and not more than fifteen thousand dollars for each violation.

HISTORY: 2004 Act No. 204, Section 1, eff April 26, 2004; 2011 Act No. 60, Section 1, eff June 14, 2011.

Editor’s Note

2004 Act No. 204, Section 2, provides as follows:

“The penalties and remedies provided in this act are cumulative of and in addition to other provisions of law.”

Effect of Amendment

The 2011 amendment inserted subsection (A)(3), “sound recording” defined; in subsection (C)(1) added the text following “person or group” relating to the legal right; and added the remaining subsections (C)(5), relating to service mark, (D), relating to injunction, and (E), relating to penalty.

**SECTION 39‑5‑39.** Attorney advertising in false, deceptive or misleading manner.

Notwithstanding another provision of law, it is an unlawful trade practice, pursuant to Section 39‑5‑20, for an attorney to advertise his services in this State in a false, deceptive, or misleading manner including, but not limited to, the use of a nickname that creates an unreasonable expectation of results.

HISTORY: 2005 Act No. 27, Section 9, eff March 21, 2005, applicable to advertisements appearing after that date.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Advertising Section 17, Attorneys.

**SECTION 39‑5‑40.** Article inapplicable to certain practices and transactions.

Nothing in this article shall apply to:

(a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

(b) Acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and did not have a direct financial interest in the sale or distribution of the advertised product or service.

(c) This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, Sections 38‑57‑10 through 38‑55‑320.

(d) Any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes.

For the purpose of this section, the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption.

HISTORY: 1962 Code Section 66‑71.3; 1971 (57) 369.

Code Commissioner’s Note

In subsection (c), “Chapter 57, Sections 38‑57‑10 through 38‑57‑320” was substituted for “Chapter 55, Sections 38‑55‑10 through 38‑55‑410” at the direction of the Code Commissioner.

RESEARCH REFERENCES

ALR Library

199 ALR, Federal 169 , Preemption of State Law Under Carmack Amendment to Interstate Commerce Act, 49 U.S.C.A. Section 14706, and Predecessor Statutes‑Shipments Other Than Machinery, Livestock, Food, or Beverages.

Encyclopedias

S.C. Jur. Advertising Section 8, Unfair Trade Practices.

S.C. Jur. Gaming Section 13.1, Video Games.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

S.C. Jur. Unfair Trade Practices Act Section 7, Exemptions.

S.C. Jur. Unfair Trade Practices Act Section 14, Violations of Other Laws.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Business Law: Securities Regulation and the Unfair Trade Practices Act. 33 S.C. L. Rev. 1 (August 1981).

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

NOTES OF DECISIONS

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1. In general

Actions of seller in recruiting buyer to haul cargo for it as an “owner‑operator” inducing him to purchase a tractor from the seller did not come within exemption inasmuch as the transactions regulated under the South Carolina Unfair Trade Practices Act are of a different kind and character than those covered by the Interstate Commerce Act and regulations. Tousley v. North American Van Lines, Inc. (C.A.4 (S.C.) 1985) 752 F.2d 96. Antitrust And Trade Regulation 393

Code Section 39‑5‑40 runs to activity given blanket exemption or endorsement by federal law. Bostick Oil Co., Inc. v. Michelin Tire Corp., Commercial Div. (C.A.4 (S.C.) 1983) 702 F.2d 1207, certiorari denied 104 S.Ct. 242, 464 U.S. 894, 78 L.Ed.2d 232.

Exemption provided by Code Section 39‑5‑40 relates only to fields extensively governed by federal law, where federal pre‑emption might otherwise already apply; thus, in action brought under federal antitrust and South Carolina unfair trade practices law, defendant’s assertion that its conduct in a particular case might not be illegal under federal law does not render federal antitrust law preemptive and does not give rise to exemption under Section 39‑5‑40. Bostick Oil Co., Inc. v. Michelin Tire Corp., Commercial Div. (C.A.4 (S.C.) 1983) 702 F.2d 1207, certiorari denied 104 S.Ct. 242, 464 U.S. 894, 78 L.Ed.2d 232.

All unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act, Sections 38‑57‑10 et seq., and are exempt from the coverage of the South Carolina Unfair Trade Practices Act. $39‑5‑40(c) should be read to refer to Title 57, rather than Title 55. Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co., 1994, 868 F.Supp. 128. Antitrust And Trade Regulation 152

False advertising in the insurance industry falls within the exception to the South Carolina Unfair Trade Practices Act provided by $ 39‑5‑40(c). Colonial Life & Acc. Ins. Co. v. American Family Life Assur. Co. of Columbus, 1994, 846 F.Supp. 454, 31 U.S.P.Q.2d 1195.

Actions of insurance companies in charging interest on prepayment of mortgage loans extended by them may be evaluated under South Carolina Unfair Trade Practices Act since regulation by state insurance commission does not cover such activity. McTeer v. Provident Life and Acc. Ins., 1989, 712 F.Supp. 512.

A drug manufacturer’s decision not to include a stronger warning on a label is not authorized by the Food and Drug Administration (FDA), for purposes of regulated activity exemption to South Carolina Unfair Trade Practices Act (SCUTPA), absent evidence that the FDA affirmatively considered and rejected the stronger warning after being supplied with an evaluation or analysis of the specific dangers presented. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 152

Approval by Food and Drug Administration (FDA) of label on pharmaceutical company’s atypical antipsychotic drug did not constitute an express authorization of pharmaceutical company’s labeling decisions, and thus regulated activity exception did not exempt company from liability under the South Carolina Unfair Trade Practices Act (SCUTPA) for deceptive content of label, absent evidence that the FDA affirmatively considered and rejected the stronger warning after being supplied with an evaluation or analysis of the specific dangers presented. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 152

Regulated activity exemption to the South Carolina Unfair Trade Practices Act (SCUTPA) exempts an entity from liability where its actions are lawful or where it does something required by law, or does something that would otherwise be a violation of SCUTPA, but which is allowed under other statutes or regulations. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 152

To recover in an action under the Unfair Trade Practices Act (UTPA), the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce, (2) the unfair or deceptive act affected the public interest, and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Antitrust and Trade Regulation 134

Regulatory exception, which provides that South Carolina Unfair Trade Practices Act (SCUTPA) does not apply to “actions or transactions permitted under laws administered by any regulatory body,” exempts an entity from liability where its actions are lawful or where it “does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations.” Code 1976, Sections Sections 39‑5‑10, et seq., Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Antitrust And Trade Regulation 152

The city did not violate the South Carolina Trade Practices Act, Sections 39‑5‑10 et seq. nor did it breach its contract for the supply of water with the plaintiffs in charging plaintiffs more for water than it charged residents within the corporate limits, because the city council set the water rates to be charged and it was undisputed that the rate charged non‑residents was more than that charged residents. Calcaterra v. City of Columbia (S.C.App. 1993) 315 S.C. 196, 432 S.E.2d 498.

The exemption in the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., for “ [a]ctions or transactions permitted under laws administered by any regulatory body or officer” did not exclude from UTPA the actions of a car dealer who failed to disclose to buyers that a car had previously been involved in an accident, since the intent of Section 39‑5‑40 was to avoid conflict by excluding “those actions or transactions which are allowed or authorized by regulatory agencies or other statutes”; this interpretation was buttressed by Section 39‑5‑160 providing that “ [t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.” Ward v. Dick Dyer and Associates, Inc. (S.C. 1991) 304 S.C. 152, 403 S.E.2d 310. Antitrust And Trade Regulation 152

The Unfair Trade Practices Act does not apply to an employer‑employee relationship. Miller v. Fairfield Communities, Inc. (S.C.App. 1989) 299 S.C. 23, 382 S.E.2d 16, certiorari dismissed 302 S.C. 518, 397 S.E.2d 377.

The actions of a bank in connection with a loan made by the bank to a farmer were exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39‑5‑40(a) since the State Board of Financial Institutions, which has extensive regulatory authority over banking practices including the power to initiate criminal prosecutions against banks that violate a statute or regulation, regulated the banking practices of the bank pursuant to Sections 34‑1‑10 to 34‑1‑130. Anderson v. Citizens Bank (S.C.App. 1987) 294 S.C. 387, 365 S.E.2d 26.

Outdoor advertising industry is not exempt from Unfair Trade Practices Act, despite allegation that South Carolina Highway Department regulates outdoor advertising industry through issuance of permits for placement of billboards on public highways, because purpose of “Highway Advertising Control Act” is to protect safety on highways and to preserve and enhance natural scenic beauty, and state highway department is charged with issuing permits for erection of signs. Neither highway department statutes nor regulations promulgated pursuant to those statutes address or regulate unfair competition among outdoor advertisers. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc. (S.C.App. 1987) 294 S.C. 169, 363 S.E.2d 390.

Damages cannot properly be awarded for violation of the Act in regard to sale of mobile homes, that activity being exempt from Act, because it is subject to regulatory control and imposition of penalties by Manufactured Housing Board under regulation 19‑425.6. Scott v. Mid Carolina Homes, Inc. (S.C.App. 1987) 293 S.C. 191, 359 S.E.2d 291. Antitrust And Trade Regulation 152

Sale of mobile homes is activity exempt from Unfair Trade Practices Act because it is subject to regulatory control and imposition of penalties by Manufactured Housing Board. Scott v. Mid Carolina Homes, Inc. (S.C.App. 1987) 293 S.C. 191, 359 S.E.2d 291. Antitrust And Trade Regulation 152

Shippers of furniture and household goods could not recover under supplemental agreement with an interstate motor common carrier since, even if the supplemental agreement constituted an unfair or deceptive trade practice, their agreement was authorized by regulations and tariffs administered by the Interstate Commerce Commission, and, thus, exempted from the South Carolina unfair trade practice law by Section 39‑5‑40(a). Carr v. United Van Lines, Inc. (S.C.App. 1986) 289 S.C. 194, 345 S.E.2d 734. Antitrust And Trade Regulation 152

Securities transactions fall within exception provided by Section 39‑5‑40. State ex rel. McLeod v. Rhoades (S.C. 1980) 275 S.C. 104, 267 S.E.2d 539.

1.5. Legislative intent

Exemption from Unfair Trade Practices Act (UTPA) for certain regulatory activities is based on the concept that the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of a trial court. InMed Diagnostic Services, L.L.C. v. MedQuest Associates, Inc. (S.C.App. 2004) 358 S.C. 270, 594 S.E.2d 552, rehearing denied, certiorari denied. Antitrust And Trade Regulation 152

2. Construction and application

South Carolina Unfair Trade Practices Act (SCUTPA) claim brought by city and town against online sellers and/or online resellers of hotel rooms to the general public, alleging that sellers and/or resellers collected municipal accommodations tax from consumers on the rental of hotel rooms and then wrongfully kept a portion of the tax collected, was not barred by SCUPTA exemption for certain regulatory activities, since no regulatory body oversaw enforcement of the city and town’s municipal accommodations tax ordinances. City of Charleston, SC v. Hotels.com, LP, 2007, 487 F.Supp.2d 676. Antitrust And Trade Regulation 152

The Unfair Trade Practices Act’s (UTPA) regulated industries exemption did not apply to UTPA action brought by second real estate agent against first real estate agent for allegedly replacing second agent’s contracts with first agent’s contracts, and excluding second agent from commissions to which he would otherwise have been entitled, despite the regulation of licensed real estate agents by the Department of Labor, Licensing, and Regulation, absent a showing by first agent as to how the Department specifically allowed for, or authorized her actions. Hennes v. Shaw (S.C.App. 2012) 397 S.C. 391, 725 S.E.2d 501. Antitrust and Trade Regulation 152

Mortgagee was not exempt from liability under South Carolina Unfair Trade Practices Act (SCUTPA) based on its pursuit of collection and foreclosure activities on account that purportedly was satisfied by affidavit of lost mortgage satisfaction, inasmuch as provision of Act exempting actions or transactions permitted by state law or under laws administered by state or federal regulatory bodies did not protect mortgagee from lawsuits for general activity, and there was no indication that statute or regulation permitted challenged conduct. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 69 Fed.Appx. 585, 2003 WL 21480586, Unreported. Antitrust And Trade Regulation 212

Mortgagee bank was not exempt under South Carolina Unfair Trade Practices Act (SCUTPA) for its conduct in pursuing collection and foreclosure activities on mortgagor’s account; such conduct was not conduct regulated by state regulatory agency or state statute. Beattie v. Nations Credit Financial Services Corp. (C.A.4 (S.C.) 2003) 65 Fed.Appx. 893, 2003 WL 21213703, Unreported, rehearing granted, on rehearing 69 Fed.Appx. 585, 2003 WL 21480586. Antitrust And Trade Regulation 212

3. Construction with other laws

South Carolina’s Unfair Trade Practices Act does not apply to unfair trade practices covered and regulated under the South Carolina’s Insurance Trade Practices Act. Lewis v. Omni Indem. Co., 2013, 970 F.Supp.2d 437. Antitrust and Trade Regulation 152

Unfair Trade Practices Act (UTPA) did not apply, under UTPA regulatory exemption, to medical services provider’s application to and approval by Department of Health and Environmental Control (DHEC) for exemption from certification requirements to purchase magnetic resonance imaging (MRI) machines, in competitor’s suit alleging provider gave DHEC false information in order to avoid certification procedure in violation of UTPA; legislature designated DHEC as sole agency for control of Certificates of Need and licensure of health facilities, whether provider followed DHEC procedures was uniquely within agency’s expertise. InMed Diagnostic Services, L.L.C. v. MedQuest Associates, Inc. (S.C.App. 2004) 358 S.C. 270, 594 S.E.2d 552, rehearing denied, certiorari denied. Antitrust And Trade Regulation 152

4. Error

Trial court’s error in granting a directed verdict to law firm on former client’s Unfair Trade Practices Act (UTPA) claim on the basis that the UTPA did not apply to the legal profession was not reversible error, where former client alleged the same facts for its UTPA claim as in the legal malpractice claim, i.e., the deceptive acts of law firm, which the jury rejected. RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P. (S.C. 2012) 399 S.C. 322, 732 S.E.2d 166, rehearing denied, certiorari denied 133 S.Ct. 1255, 185 L.Ed.2d 182. Appeal and Error 1061.4

5. Questions of fact

Issue of whether variable prepaid forward contracts were securities and thus fell within industry exemption to regulation by Unfair Trade Practices Act (UTPA) as being subject to other regulation by Securities Act, as argued by investment adviser, was question of fact for jury rather than question of law, in investor’s action against adviser alleging breach of UTPA through faulty investment advice, where adviser’s own expert testified that contracts were not a security, and adviser’s defense was that it was not subject to Securities Act and did not sell securities. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Judgment 199(3.3)

**SECTION 39‑5‑42.** Misrepresenting food or food products as product of South Carolina.

(A) For purposes of this section “food” or “food product” is an article that is produced, raised, caught, or harvested for human consumption.

(B) It is an unfair trade practice pursuant to Section 39‑5‑20 knowingly and wilfully to misrepresent food or a food product if the food or food product purports to be or is represented to be a product of South Carolina but is the product of another state, country, or territory.

(C) A provision in this section is not intended to conflict with the enforcement of criminal penalties or other provisions of law relating to the misrepresentation or adulteration of food or food products.

HISTORY: 2008 Act No. 277, Section 1, eff June 5, 2008, applicable to violations that occur after that date.

CROSS REFERENCES

Adulterated or misbranded food, see Section 39‑25‑10 et seq.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Unfair Trade Practices Act Section 5, Trade or Commerce.

**SECTION 39‑5‑50.** Action for injunction against violation of article; additional orders or judgments to restore property acquired by illegal means.

(a) Whenever the Attorney General has reasonable cause to believe that any person is using, has used or is about to use any method, act or practice declared by Section 39‑5‑20 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary restraining order, temporary injunction or permanent injunction the use of such method, act or practice. Unless the Attorney General determines in writing that the purposes of this article will be substantially impaired by delay in instituting legal proceedings, he shall, at least three days before instituting any legal proceedings as provided in this section, give notice to the person against whom proceedings are contemplated and give such person an opportunity to present reasons to the Attorney General why such proceedings should not be instituted. The action may be brought in the court of common pleas in the county in which such person resides, has his principal place of business or conducts or transacts business. The courts are authorized to issue orders and injunctions to restrain and prevent violations of this article, and such orders and injunctions shall be issued without bond. Whenever any permanent injunction is issued by such court in connection with any action which has become final, reasonable costs shall be awarded to the State.

(b) The court may make such additional orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice, any moneys or property, real or personal, which may have been acquired by means of any practice declared to be unlawful in this article, including the revocation of a license or certificate authorizing that person to engage in business in this State, provided the order declaring the practice to have been unlawful has become final.

HISTORY: 1962 Code Section 66‑71.4; 1971 (57) 369.

CROSS REFERENCES

Civil remedy of injunction, generally, see SCRCP, Rule 65.

LIBRARY REFERENCES

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Section 235.

RESEARCH REFERENCES

ALR Library

5 ALR, Federal 3rd Series 3 , Construction and Application of Mass Action Provision of Class Action Fairness Act, 28 U.S.C.A. S1332(D)(11).

117 ALR 5th 155 , Right to Private Action Under State Consumer Protection Act‑Preconditions to Action.

Encyclopedias

S.C. Jur. Attorney General Section 12, Regulatory Powers.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

NOTES OF DECISIONS

In general 1

1. In general

In anti‑trust action brought by billboard company against competitor and city which adopted rezoning ordinances restricting billboards, cause of action under unfair trade practices act, Sections 39‑5‑10 et seq., could not be maintained where company alleged that competitor was engaged in unfair practice of double‑billing for renting billboard space, but cited no evidence in the record demonstrating that the injury suffered by company had an adverse impact on the public interest. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Mere breach of commercial contract, without more, is not actionable under the unfair trade practices act, Sections 39‑5‑10, et seq., which act is not available to redress a private wrong where public interest is not affected; thus, even if billboard company’s alleged unfair practices may have amounted to fraud between commercial parties, such practices are not actionable under unfair trade practices act, since higher total advertising costs which allegedly resulted from such practice was simply a private injury suffered by purchasing advertisers. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Issue of whether pharmaceutical company’s actions with regard to sales and marketing of atypical antipsychotic drug had a tendency to deceive was for the jury, in State’s action alleging that company violated South Carolina Unfair Trade Practices Act (SCUTPA). State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 363

Pharmaceutical company failed to preserve for appellate review argument that excluded testimony of statistician was relevant and admissible, in action by State alleging company’s sales and marketing of atypical antipsychotic drug violated South Carolina Unfair Trade Practices Act (SCUTPA), where company made untimely offer of proof. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 205

Exclusion of testimony of statistician that, notwithstanding pharmaceutical company’s false representations regarding atypical antipsychotic drug, prescribing physicians were well aware of drug’s risks and side effects, was not reversible error, in action by State alleging company’s sales and marketing of drug violated South Carolina Unfair Trade Practices Act (SCUTPA); company was not prejudiced, as other evidence was presented that company’s deceptive conduct had no effect on community of prescribing physicians, and actual harm resulting from deceptive conduct was not a necessary element of State’s claim. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 1057(1)

While a private party action under South Carolina Unfair Trade Practices Act (SCUTPA) requires the traditional showing of an injury, an action brought by the Attorney General on behalf of the State contains no actual injury element. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 138

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

Officers and sole shareholders of a corporation, as well as the corporation itself, were liable under Section 39‑5‑50 for corporate violations of the Unfair Trade Practices Act, and, where pleadings admitted that defendants were officers and sole shareholders of the corporation, a reasonable inference was created that they were controlling persons of that corporation, so that their motion for summary judgment was erroneously granted. State ex rel. McLeod v. C & L Corp., Inc. (S.C.App. 1984) 280 S.C. 519, 313 S.E.2d 334.

In an action brought by the State, pursuant to Sections 39‑5‑10 et seq., the court improperly granted summary judgment and dismissal of charges as to certain defendants based on a determination that the issues involved were moot in that none of the particular defendants were still engaged in the alleged unlawful practices at the time of the hearing, since Section 39‑5‑50(a) authorizes the Attorney General to commence an action whenever he has reasonable cause to believe that any person is using, “has used,” or is about to use any prohibited act or practice and, Section 39‑5‑110(a) authorizes a court to impose a civil penalty against any person who is wilfully using or who “has wilfully” used a prohibited method or act. State ex rel. McLeod v. Brown (S.C. 1982) 278 S.C. 281, 294 S.E.2d 781.

**SECTION 39‑5‑60.** Assurance of voluntary compliance with article.

In the administration of this article, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be in violation of this article from any person who has engaged in, is engaging in, or is about to engage in such method, act or practice. Such assurance may include a stipulation for the voluntary payment by such person of the costs of investigation, or of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved buyers, or both. Any such assurance shall be in writing and be filed with and subject to the approval of the court of common pleas having jurisdiction. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose; however, any violation of the terms of such assurance shall constitute prima facie evidence of a violation of the provisions of this article. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest.

HISTORY: 1962 Code Section 66‑71.5; 1971 (57) 369.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

**SECTION 39‑5‑70.** Investigative demand by Attorney General.

(a) When it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article, or when he believes it to be in the public interests that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article, he may execute in writing and cause to be served upon that person or any other person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination and copying, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for a reasonable time or to modify or set aside the demand, stating good cause, may be filed in the court of common pleas where the person served with the demand resides or has his principal place of business or conducts or transacts business. This section shall not be applicable to any criminal proceedings, nor shall any information obtained under the authority of this section or Section 39‑5‑80 be admissible in evidence in any criminal prosecution.

HISTORY: 1962 Code Section 66‑71.6; 1971 (57) 369.

LIBRARY REFERENCES

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Section 236.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney General Section 11, Investigative Powers.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

NOTES OF DECISIONS

In general 1

1. In general

In anti‑trust action brought by billboard company against competitor and city which adopted rezoning ordinances restricting billboards, cause of action under unfair trade practices act, Sections 39‑5‑10 et seq., could not be maintained where company alleged that competitor was engaged in unfair practice of double‑billing for renting billboard space, but cited no evidence in the record demonstrating that the injury suffered by company had an adverse impact on the public interest. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Mere breach of commercial contract, without more, is not actionable under the unfair trade practices act, Sections 39‑5‑10, et seq., which act is not available to redress a private wrong where public interest is not affected; thus, even if billboard company’s alleged unfair practices may have amounted to fraud between commercial parties, such practices are not actionable under unfair trade practices act, since higher total advertising costs which allegedly resulted from such practice was simply a private injury suffered by purchasing advertisers. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

**SECTION 39‑5‑80.** Additional powers of Attorney General in administration of article.

To accomplish the objectives and to carry out the duties prescribed by this article, the Attorney General, in addition to other powers conferred upon him by this article, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force and effect of law; provided, however, that none of the powers conferred by this article shall be used for the purpose of compelling any person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided, further, that information obtained pursuant to the powers conferred by this article shall not be made public or disclosed by the Attorney General or his employees beyond the extent necessary for law‑enforcement purposes in the public interest.

HISTORY: 1962 Code Section 66‑71.7; 1971 (57) 369.

CROSS REFERENCES

Repeal of prior regulations concerning vacation time‑sharing plans, see S.C. Code of Regulations R. 13‑30.

LIBRARY REFERENCES

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Section 236.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney General Section 12, Regulatory Powers.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

**SECTION 39‑5‑90.** Service of notice, demand or subpoena.

Service of any notice, demand or subpoena under this article shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(a) Personal service thereof without this State; or

(b) In the manner provided by the laws of this State as if a summons or other pleading which institutes a civil proceeding had been filed; or

(c) Such service as a court of common pleas may direct in lieu of personal service within this State.

HISTORY: 1962 Code Section 66‑71.8; 1971 (57) 369.

CROSS REFERENCES

Service of papers generally, see SCRCP, Rule 4.

**SECTION 39‑5‑100.** Person served with notice, investigative demand or subpoena shall comply; penalty for violation; enforcement.

A person upon whom a notice, investigative demand, or subpoena is served pursuant to the provisions of Section 39‑5‑90 shall comply with the terms thereof unless otherwise provided by the order of a court as provided for in Section 39‑5‑70. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this article, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person subject to any such notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than five thousand dollars.

The Attorney General may file in the court of common pleas in which such person resides, has his principal place of business, or conducts or transacts business, and serve upon such person, in the same manner as provided for in Section 39‑5‑90, a petition for an order of such court for the enforcement of this section and Sections 39‑5‑70 and 39‑5‑80.

HISTORY: 1962 Code Section 66‑71.9; 1971 (57) 369.

LIBRARY REFERENCES

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Section 236.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

**SECTION 39‑5‑110.** Civil penalties for willful violation or violations of injunction.

(a) If a court finds that any person is willfully using or has willfully used a method, act or practice declared unlawful by Section 39‑5‑20, the Attorney General, upon petition to the court, may recover on behalf of the State a civil penalty of not exceeding five thousand dollars per violation.

(b) Any person who violates the terms of an injunction issued under Section 39‑5‑50 shall forfeit and pay to the State a civil penalty of not more than fifteen thousand dollars per violation. For the purposes of this section, the court of common pleas issuing an injunction shall retain jurisdiction, and the cause shall be continued and in such cases the Attorney General acting in the name of the State may petition for recovery of civil penalties. Whenever the court determines that an injunction issued pursuant to Section 39‑5‑50 has been violated, the court shall award reasonable costs to the State.

(c) For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 39‑5‑20.

HISTORY: 1962 Code Section 66‑71.10; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Sections 38‑93‑60, 38‑93‑90.

Injunctions generally, see SCRCP, Rule 65.

RESEARCH REFERENCES

ALR Library

5 ALR, Federal 3rd Series 3 , Construction and Application of Mass Action Provision of Class Action Fairness Act, 28 U.S.C.A. S1332(D)(11).

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 6, Federal Trade Commission Regulation.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

Forms

South Carolina Litigation Forms and Analysis Section 3:40 , South Carolina Unfair Trade Practices Act.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

NOTES OF DECISIONS

In general 1

Constitutional issues 2

1. In general

Penalty of $4,000 per follow‑up visit from pharmaceutical company’s field‑sales team to prescribing physicians, after pharmaceutical company distributed letter to prescribing physicians misrepresenting risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), was excessive; although follow‑up visits were designed to continue the false narrative from the letter, in most instances follow‑up calls were to same prescribing physicians who received letter in mail, and, in many instances, there were multiple calls to the same physician. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005

Trial court acted within its discretion in assessing penalty of $4,000 per letter distributed by pharmaceutical company to prescribing physicians, which contained misleading statements regarding risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA); letter was especially egregious, for it represented not mere nondisclosure but a corporately sanctioned decision to affirmatively lie and an attempt to mislead the medical community. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005

Penalty of $300 per sample box of atypical antipsychotic drug that pharmaceutical company distributed to prescribing physicians, which contained deceptive labeling regarding drug’s risks and side effects in violation of South Carolina Unfair Trade Practices Act (SCUTPA), was excessive; although company’s deceit was substantial, there was an absence of significant actual harm by company’s conduct. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005

In issuing a ruling assessing civil penalties under South Carolina Unfair Trade Practices Act (SCUTPA), the trial court should make sufficient findings of fact concerning all relevant factors to enable appellate review. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005

In assessing civil penalties under South Carolina Unfair Trade Practices Act (SCUTPA), the court may consider the following non‑exclusive factors, in addition to any other factors the trial judge deems appropriate under the circumstances: (1) the degree of culpability and good or bad faith of the defendant; (2) the duration of the defendant’s unlawful conduct; (3) active concealment of information by the defendant; (4) defendant’s awareness of the unfair or deceptive nature of their conduct; (5) prior similar conduct by the defendant; (6) the defendant’s ability to pay; (7) the deterrence value of the assessed penalties; and (8) the actual impact or injury to the public resulting from defendant’s unlawful conduct. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005

South Carolina Unfair Trade Practices Act (SCUTPA) statute of limitations begins to run anew with each violation; thus, where a claim involves a series of ongoing violations, recovery is limited to a period coextensive with the applicable statute of limitations. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 58(1)

State’s attorney general knew or had reason to know of cause of action against pharmaceutical company under South Carolina Unfair Trade Practices Act (SCUTPA), based on label for atypical antipsychotic drug that allegedly misrepresented risks and side effects, no later than three years prior to date of parties subsequent tolling agreement as, by that date, evidence of risks was pervasive. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 95(3)

State’s claim that pharmaceutical company’s label for atypical antipsychotic drug misrepresented drug’s risks and side effects, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), presented ongoing violations of SCUTPA and, thus, under continuous accrual doctrine, labeling claim presented a series of discrete, independently actionable wrongs, each triggering its own three‑year statute of limitations. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 58(1)

Issue of whether pharmaceutical company’s actions with regard to sales and marketing of atypical antipsychotic drug had a tendency to deceive was for the jury, in State’s action alleging that company violated South Carolina Unfair Trade Practices Act (SCUTPA). State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 363

Pharmaceutical company failed to preserve for appellate review argument that excluded testimony of statistician was relevant and admissible, in action by State alleging company’s sales and marketing of atypical antipsychotic drug violated South Carolina Unfair Trade Practices Act (SCUTPA), where company made untimely offer of proof. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 205

Exclusion of testimony of statistician that, notwithstanding pharmaceutical company’s false representations regarding atypical antipsychotic drug, prescribing physicians were well aware of drug’s risks and side effects, was not reversible error, in action by State alleging company’s sales and marketing of drug violated South Carolina Unfair Trade Practices Act (SCUTPA); company was not prejudiced, as other evidence was presented that company’s deceptive conduct had no effect on community of prescribing physicians, and actual harm resulting from deceptive conduct was not a necessary element of State’s claim. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 1057(1)

While a private party action under South Carolina Unfair Trade Practices Act (SCUTPA) requires the traditional showing of an injury, an action brought by the Attorney General on behalf of the State contains no actual injury element. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 138

In private actions under the Unfair Trade Practices Act (UTPA), directors and officers are not liable for the corporation’s unfair trade practices unless they personally commit, participate in, direct or authorize the commission of a violation of the UTPA. Plowman v. Bagnal (S.C. 1994) 316 S.C. 283, 450 S.E.2d 36, rehearing granted, adhered to on rehearing. Antitrust And Trade Regulation 291

In a tort case arising out of the purchase of a business franchise, plaintiffs could not recover punitive damages under the cause of action based on a violation of the Unfair Trade Practices Act (Sections 39‑5‑10 et seq.), as well as fraud causes of action, where the defendant had committed only one wrong. Smith v. Strickland (S.C.App. 1994) 314 S.C. 192, 442 S.E.2d 207, rehearing denied, certiorari denied. Antitrust And Trade Regulation 392; Antitrust And Trade Regulation 393; Damages 15

The term “willful” as used in Section 39‑5‑110 creates a statutory standard of willfulness different from the common law standard and, for purposes of Section 39‑5‑110, conduct is willful if the defendant should have known it violates Section 39‑5‑20, the standard being not one of actual knowledge, but of constructive knowledge, so if, in the ordinary exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Unfair Trade Practices Act, then such conduct is “willful” within the meaning of the statute. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Violation of Section 39‑5‑20 by defendant corporation and 2 of its directors was willful since a person exercising due diligence to determine whether defendant corporation’s membership program violated the law would have no doubt that it constituted a pyramid scheme prohibited by Section 39‑5‑30. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Penalties were properly assessed individually against officers, directors and principal shareholders of a corporation whose membership program constituted a pyramid scheme. State ex rel. Medlock v. Nest Egg Soc. Today, Inc. (S.C.App. 1986) 290 S.C. 124, 348 S.E.2d 381.

Civil penalties could not be imposed under Section 39‑5‑110 on salaried employees, agents and representatives of a corporation operating a pyramid club, who had been hired to promote the corporation’s sales and operations in South Carolina, where the record was devoid of evidence that these employees either helped to formulate company policy regarding the pyramid scheme or were involved in important corporate affairs, and were not “controlling persons” of the corporation. State ex rel. McLeod v. VIP Enterprises, Inc. (S.C.App. 1985) 286 S.C. 501, 335 S.E.2d 243.

The trial court properly imposed a fine of $5,000 per violation for 11 violations of the South Carolina Unfair Trade Practices Act, pursuant to Section 39‑5‑110(a), where the amount of the fine was within the limits authorized by the Act and therefore was a matter of the trial judge’s discretion, and where the party challenging the ruling failed to carry its burden of showing a clear abuse of discretion. State ex rel. McLeod v. C & L Corp., Inc. (S.C.App. 1984) 280 S.C. 519, 313 S.E.2d 334.

In an action brought by the State, pursuant to Sections 39‑5‑10 et seq., the court improperly granted summary judgment and dismissal of charges as to certain defendants based on a determination that the issues involved were moot in that none of the particular defendants were still engaged in the alleged unlawful practices at the time of the hearing, since Section 39‑5‑50(a) authorizes the Attorney General to commence an action whenever he has reasonable cause to believe that any person is using, “has used,” or is about to use any prohibited act or practice and, Section 39‑5‑110(a) authorizes a court to impose a civil penalty against any person who is wilfully using or who “has wilfully” used a prohibited method or act. State ex rel. McLeod v. Brown (S.C. 1982) 278 S.C. 281, 294 S.E.2d 781.

2. Constitutional issues

Penalty award of approximately $124 million against pharmaceutical company for distributing sample boxes and letters to prescribing physicians that contained misleading information regarding risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), did not violate Due Process Clause; although penalty was quite large, intent of SCUTPA was to deter unfair and deceptive behavior in conduct of trade and commerce, and evidence demonstrated company’s pattern of unfair and deceptive behavior. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005; Constitutional Law 4330

Imposition of penalty of approximately $124 million against pharmaceutical company for distributing sample boxes and letters to prescribing physicians that contained misleading information regarding risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), did not violate Excessive Fines Clause; penalty was not grossly disproportionate to company’s pattern of unfair and deceptive behavior, as it bore a rational relationship to gravity of company’s conduct in perpetuating marketing scheme designed to be unfair and deceptive, and penalty awards per violation were within range set by legislature in enacting SCUTPA. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005; Fines 1.3

State’s claim that label for pharmaceutical company’s antipsychotic drug misrepresented risks and side effects of drug in violation of South Carolina Unfair Trade Practices Act (SCUTPA) was not impliedly preempted by Federal Food, Drug, and Cosmetic Act (FDCA); State did not seek to impose labeling requirements different than those imposed by the Food and Drug Administration (FDA), but rather sought civil penalties based on company’s actions in failing to discharge its ongoing, affirmative duty to keep its label updated and unsure that its warnings remained adequate as long as the drug was on the market. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 132; States 18.84

State’s claim that pharmaceutical company’s letter to prescribing physicians misrepresented risks and side effects atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), was not expressly preempted by Federal Food, Drug, and Cosmetic Act (FDCA); although State relied in part on evidence that Food and Drug Administration (FDA) had found letters to be false and misleading in violation of FDCA, there was substantial additional evidence relating to deception surrounding company’s letter, including scientific proof to the contrary, company’s sales strategy, and internal e‑mails, and, following trial, jury was charged with determining factual issues based solely on provisions of SCUTPA, and trial judge assessed penalties under SCUTPA framework. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 132; States 18.84

**SECTION 39‑5‑120.** Dissolution, suspension or forfeiture of franchise or charter of corporation violating injunction.

Upon petition by the Attorney General, the court of common pleas may, for good cause shown, order the dissolution or suspension or forfeiture of any franchise or charter of any corporation which violates the terms of any injunction issued under Section 39‑5‑50.

HISTORY: 1962 Code Section 66‑71.11; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Sections 38‑93‑60, 38‑93‑90.

Dissolution of business corporations, see Sections 33‑14‑101 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

**SECTION 39‑5‑130.** Duty of solicitors and county and city attorneys.

It shall be the duty of the solicitors of each judicial circuit and all county and city attorneys to lend to the Attorney General such assistance as the Attorney General may request in the commencement and prosecution of actions pursuant to this article, or any solicitor or county or city attorney with prior approval of the Attorney General may institute and prosecute actions hereunder in the same manner as provided for the Attorney General; provided, however, that if an action is prosecuted by a solicitor or county or city attorney alone, he shall make a full report thereon to the Attorney General, including the final disposition of the matter.

HISTORY: 1962 Code Section 66‑71.12; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Sections 38‑93‑60, 38‑93‑90.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

**SECTION 39‑5‑140.** Actions for damages.

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39‑5‑20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39‑5‑20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney’s fees and costs.

(b) Upon commencement of any action brought under subsection (a) of this section, the clerk of court shall mail a copy of the complaint or other initial pleading to the Attorney General and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General.

(c) Any permanent injunction, judgment or order of the court made under Section 39‑5‑50 shall be prima facie evidence in an action brought under Section 39‑5‑140 that the respondent used or employed a method, act or practice declared unlawful by Section 39‑5‑20.

(d) For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 39‑5‑20.

HISTORY: 1962 Code Section 66‑71.13; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Sections 38‑93‑60, 38‑93‑90.

Civil remedies and procedures generally, see Title 15.

Violation of Chapter 36 of Title 34, governing loan brokers, constitutes unfair trade practice under this chapter, and borrowers injured by such have action for damages as set forth in this section, see Section 34‑36‑80.

RESEARCH REFERENCES

ALR Library

117 ALR 5th 155 , Right to Private Action Under State Consumer Protection Act‑Preconditions to Action.

Encyclopedias

36 Am. Jur. Proof of Facts 3d 221, Proof of Statutory Unfair Business Practices.

S.C. Jur. Advertising Section 8, Unfair Trade Practices.

S.C. Jur. Appeal and Error Section 71, The Four Basic Requirements.

S.C. Jur. Limitation of Actions Section 52, Trade and Commerce.

S.C. Jur. Private Business Franchises and Business Opportunities Section 6, Federal Trade Commission Regulation.

S.C. Jur. Private Business Franchises and Business Opportunities Section 21, Exemplary Damages and Violation of the Unfair Trade Practices Act.

S.C. Jur. Unfair Trade Practices Act Section 4, Public Impact.

S.C. Jur. Unfair Trade Practices Act Section 8, Survival of Right of Action.

S.C. Jur. Unfair Trade Practices Act Section 9, Actual Damages.

S.C. Jur. Unfair Trade Practices Act Section 10, “Willfulness” and Treble Damages.

S.C. Jur. Unfair Trade Practices Act Section 11, Attorneys’ Fees and Costs.

S.C. Jur. Unfair Trade Practices Act Section 14, Violations of Other Laws.

Forms

South Carolina Litigation Forms and Analysis Section 3:40 , South Carolina Unfair Trade Practices Act.

Treatises and Practice Aids

54 Causes of Action 2d 111, Cause of Action for Violation of State Consumer Protection or Deceptive Trade Practices Statute in Connection With Real Estate Transaction.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

Attorney General’s Opinions

South Carolina magistrates have jurisdiction under Code Section 39‑5‑140 to hear private actions arising under the South Carolina Unfair Trade Practices Act; in an action brought under Code Section 39‑5‑140 wherein treble damages are sought by the plaintiff, the amount in controversy which would determine the jurisdiction of magistrate’s court to hear the case is the trebled amount being sought; attorneys’ fees, as specifically authorized by Code Section 39‑5‑140 are costs and are excluded from the jurisdictional amount in magistrate courts. 1980 Op Atty Gen, No. 80‑1, p 5.

NOTES OF DECISIONS

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1. In general

Gasoline wholesaler’s position in prior case, asserting that it was legally incapable of conspiring with its subsidiary in violation of Sherman Act and that transfer from it to its wholly‑owned subsidiary could not be considered sale for purposes of Robinson‑Patman Act, did not support application of judicial estoppel to bar wholesaler’s argument in instant case that it should not be considered same entity as its subsidiary for purposes of South Carolina Unfair Trade Practices Act (UTPA) merely because it sells goods at wholesale and one of its subsidiaries sells same goods at retail. Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C.A.4 (S.C.) 1998) 149 F.3d 283. Estoppel 68(2)

Advertising agency is not appropriate party to seek recovery for any injuries suffered by the advertisers since South Carolina’s Unfair Trade Practices Act limits recovery to persons who have suffered actual damages and does not afford a right of action which is brought in a representative capacity, therefore, advertising agency cannot piggyback on injuries suffered by others. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

This section [Section 39‑5‑140] limits recovery to persons who have suffered actual damages and does not afford a right of action which was brought in a representative capacity; thus, company’s claim brought under this section was not actionable where competitor’s alleged unfair practice resulted in purely private injuries suffered by third parties. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

In anti‑trust action brought by billboard company against competitor and city which adopted rezoning ordinances restricting billboards, cause of action under unfair trade practices act, Sections 39‑5‑10 et seq., could not be maintained where company alleged that competitor was engaged in unfair practice of double‑billing for renting billboard space, but cited no evidence in the record demonstrating that the injury suffered by company had an adverse impact on the public interest. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Mere breach of commercial contract, without more, is not actionable under the unfair trade practices act, Sections 39‑5‑10, et seq., which act is not available to redress a private wrong where public interest is not affected; thus, even if billboard company’s alleged unfair practices may have amounted to fraud between commercial parties, such practices are not actionable under unfair trade practices act, since higher total advertising costs which allegedly resulted from such practice was simply a private injury suffered by purchasing advertisers. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1992) 974 F.2d 502.

Verdict in favor of billboard company against competitor based on South Carolina Unfair Trade Practices Act was erroneously overturned by trial court because jury’s finding of conspiracy to restrain competition was tantamount to finding that underlying conduct had an impact upon public interest, which would bring competitor’s actions within Act. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc. (C.A.4 (S.C.) 1989) 891 F.2d 1127, rehearing denied, certiorari granted 110 S.Ct. 3211, 496 U.S. 935, 110 L.Ed.2d 659, reversed 111 S.Ct. 1344, 499 U.S. 365, 113 L.Ed.2d 382, on remand 974 F.2d 502.

Liquor distiller’s termination of liquor wholesaler’s distributorship could not form basis for Unfair Trade Practices Act violation where termination was business decision and not wrongful and termination of distributorship did not have any impact on public interest but affected only parties to trade or commercial transaction, such that trial court erred in submitting case to jury. Richland Wholesale Liquors v. Glenmore Distilleries Co. (C.A.4 (S.C.) 1987) 818 F.2d 312.

It is unclear whether wrongful termination of distributorship alone will support claim under South Carolina Unfair Trade Practices Act; ordinarily, violations of Act are either antitrust or consumer actions. Glaesner v. Beck/Arnley Corp. (C.A.4 (S.C.) 1986) 790 F.2d 384.

To bring an action under the South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff must allege: (1) the defendant engaged in an unlawful trade practice; (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Callum v. CVS Health Corporation, 2015, 137 F.Supp.3d 817. Antitrust and Trade Regulation 134

Conduct which only affects the parties to the transaction provides no basis for a South Carolina Unfair Trade Practices Act (SCUTPA) claim. Toney v. LaSalle Bank Nat. Ass’n, 2012, 896 F.Supp.2d 455, affirmed 512 Fed.Appx. 363, 2013 WL 751299. Antitrust and Trade Regulation 151

In order to bring an action under the South Carolina Unfair Trade Practices Act (SCUTPA), the plaintiff must demonstrate that (1) the defendant engaged in an unlawful trade practice, (2) the plaintiff suffered actual, ascertainable damages as a result of the defendant’s use of the unlawful trade practice, and (3) the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest. Toney v. LaSalle Bank Nat. Ass’n, 2012, 896 F.Supp.2d 455, affirmed 512 Fed.Appx. 363, 2013 WL 751299. Antitrust and Trade Regulation 134

Mortgagor did not allege that any public interest was affected by conduct of mortgagee and its assignee in underlying foreclosure action against mortgagor, precluding her claim against mortgagee and its assignee under South Carolina Unfair Trade Practices Act (SCUTPA). Toney v. LaSalle Bank Nat. Ass’n, 2012, 896 F.Supp.2d 455, affirmed 512 Fed.Appx. 363, 2013 WL 751299. Antitrust and Trade Regulation 151

Allegations that online sellers and resellers of hotel rooms misrepresented to consumers that they were collecting certain money as “taxes,” while they kept a substantial portion of that money as profit, were sufficient to support a cause of action under South Carolina Unfair Trade Practices Act (SCUTPA). City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 179

Municipalities’ allegations that online sellers and resellers of hotel rooms collected municipal accommodation taxes from consumers and then kept a portion of the tax collected, thereby wrongfully denying municipalities of their tax revenues, were sufficient to allege unfair and deceptive conduct, for purposes of maintaining a cause of action under the South Carolina Unfair Trade Practices Act (SCUTPA). City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 179

District court’s determination, made mere months earlier, that municipalities were entitled to amend their pleadings to include claims against online sellers and resellers of hotel rooms for alleged violations of South Carolina Unfair Trade Practices Act (SCUTPA), was the law of the case, for purposes of motion of sellers and resellers to dismiss SCUTPA action for failure to state a claim. City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Courts 99(2)

For purposes of the South Carolina Unfair Trade Practices Act (SCUTPA), unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition. City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 151

An act is “unfair,” within the meaning of the South Carolina Unfair Trade Practices Act (SCUTPA), when it is offensive to public policy or when it is immoral, unethical, or oppressive. City of Charleston, S.C. v. Hotels.com, LP, 2007, 520 F.Supp.2d 757, reconsideration denied 586 F.Supp.2d 538. Antitrust And Trade Regulation 135(1)

City and town’s allegations that online sellers and/or online resellers of hotel rooms to the general public collected municipal accommodations tax from consumers on the rental of hotel rooms and then wrongfully kept a portion of the tax collected, sufficiently alleged that sellers engaged in an unfair or deceptive act in the conduct of trade or commerce, as required to state a claim under South Carolina Unfair Trade Practices Act (SCUTPA). City of Charleston, SC v. Hotels.com, LP, 2007, 487 F.Supp.2d 676. Antitrust And Trade Regulation 226

To bring a claim under South Carolina Unfair Trade Practices Act (SCUTPA), a plaintiff must allege: (1) that the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant’s unfair or deceptive act; and (3) that the unfair or deceptive act had an adverse impact on the public interest. City of Charleston, SC v. Hotels.com, LP, 2007, 487 F.Supp.2d 676. Antitrust And Trade Regulation 134; Antitrust And Trade Regulation 138

Recent decision of South Carolina Supreme Court could have significant impact of availability of claims under South Carolina Unfair Trade Practices Act (SCUTPA), and thus certification of question to South Carolina Supreme Court to clarify whether party could maintain suit under SCUTPA if it had neither purchased product at issue directly from defendant nor received any communications from defendant regarding product, where there were three possible readings of that case. Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 2006, 412 F.Supp.2d 560, certified question answered 379 S.C. 181, 666 S.E.2d 247. Federal Courts 3107

Because only unfair acts or practices that adversely affect the public interest come under the Unfair Trade Practices Act, a deliberate or intentional breach of contract, without more, does not constitute a violation of the UTPA. Wilson Group, Inc. v. Quorum Health Resources, Inc., 1995, 880 F.Supp. 416.

Plaintiff could not satisfy the public interest requirement by piggybacking a claim of taxpayer injury onto an unrelated breach of contract claim. Wilson Group, Inc. v. Quorum Health Resources, Inc., 1995, 880 F.Supp. 416.

A claim based upon a single transaction between commercial competitors does not give rise to a private right of action under the Unfair Trade Practice Act, absent a showing of direct effect upon the public, such as the potential for repetition. Orangeburg Pecan Co., Inc. v. Farmers Inv. Co., 1994, 869 F.Supp. 359.

Manufacturer of “NO SPOT” demineralized car wash system may recover for competitor’s misappropriation of copyrighted logo and computer program used in system. Manufacturer, however, was not entitled to treble damages because misappropriation of logo and computer program is not shown to be willful. Raco Car Wash Systems, Inc. v. Smith, 1989, 730 F.Supp. 695, 14 U.S.P.Q.2d 1785, appeal dismissed 929 F.2d 694. Antitrust And Trade Regulation 393; Trademarks 1658

Plaintiff acting in capacity as representative of estate may not maintain action alleging unfair and deceptive trade practices. Faircloth v. Jackie Fine Arts, Inc., 1988, 682 F.Supp. 837, affirmed in part, reversed in part 938 F.2d 513.

Claim brought under South Carolina Unfair Trade Practices Act does not survive death of injured party, as South Carolina Code annotated Section 39‑5‑140 precludes bringing of unfair trade practice action by plaintiff who acts in a representative capacity. Faircloth v. Jackie Fine Arts, Inc., 1988, 682 F.Supp. 837, affirmed in part, reversed in part 938 F.2d 513. Abatement And Revival 52

With respect to unfair trade claim under state law, Section 39‑5‑140(a) creates private right of action for persons damaged by acts or practices declared unlawful by Section 39‑5‑20; this cause of action is limited to those unfair or deceptive acts or practices that affect public interest; thus, unfair or deceptive act or practice that affects only parties to transaction is beyond act’s embrace. Drs. Steuer and Latham, P.A. v. National Medical Enterprises, Inc., 1987, 672 F.Supp. 1489, affirmed 846 F.2d 70.

Bifurcation of discovery was warranted in mortgagors’ putative class action seeking declaratory and injunctive relief to end defendants’ allegedly unfair and deceptive practices in originating and servicing adjustable rate loans secured by mortgages in South Carolina, limiting first phase of discovery to issues relevant to class certification, and if class were to be certified, then permitting discovery on the merits in the second phase of discovery, although mortgagors claimed that bifurcated discovery would prevent them from proving violations of the South Carolina Unfair Trade Practices Act, where class actions were forbidden under the Act. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Federal Civil Procedure 1261

Mortgagors failed to allege an adequate basis to pierce the corporate veil between mortgagee’s parent corporation and its alleged “fifth‑tier subsidiary,” and, thus, subsidiary’s contacts with South Carolina were not sufficient to warrant exercise of personal jurisdiction over parent corporation, in mortgagors’ action seeking declaratory and injunctive relief to end defendants’ allegedly unfair and deceptive practices in originating and servicing adjustable rate loans secured by mortgages in South Carolina. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Federal Courts 2757

District Court lacked personal jurisdiction over mortgagee’s parent corporation, in mortgagors’ action seeking declaratory and injunctive relief to end defendants’ allegedly unfair and deceptive practices in originating and servicing adjustable rate loans secured by mortgages in South Carolina, where parent corporation did not have sufficient minimum contacts with South Carolina that would cause it to anticipate being subject to suit in South Carolina, and it did not have any involvement with mortgagors during the loan transactions. Harris v. Option One Mortg. Corp., 2009, 261 F.R.D. 98. Federal Courts 2747

Amendment to complaint to add claim against mortgage lender for violation of South Carolina Unfair Trade Practices Act (SCUTPA) was not clearly insufficient or frivolous on its face, and would not be denied on basis of futility, notwithstanding questions as to whether actions in withholding mortgage draws and allegedly misappropriating loan monies involved trade or commerce and whether actions had adverse impact on public interest. Crago v. Capital Advantage Finance and Development, Inc., 2007, 242 F.R.D. 341. Federal Civil Procedure 851

“Reasonable costs” recoverable under the Unfair Trade Practices Act (UTPA) may include expert witness fees. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust And Trade Regulation 397

In action by State against pharmaceutical company under South Carolina Unfair Trade Practices Act (SCUTPA) based on company’s sales and marketing of atypical antipsychotic drug, although State had burden of proving company’s representations with regard to sales and marketing of antipsychotic medication had a tendency to deceive, the State was not required to show actual deception or that those representations caused any appreciable injury‑in‑fact or adversely impacted the marketplace. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 222

While a private party action under South Carolina Unfair Trade Practices Act (SCUTPA) requires the traditional showing of an injury, an action brought by the Attorney General on behalf of the State contains no actual injury element. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 138

In home purchasers’ fraud action against vendor’s real estate agent, who purportedly misrepresented home’s square footage, damages had to be calculated under benefit‑of‑the‑bargain approach, which examined difference between value purchasers would have received if representations had been true and value purchasers actually received, and thus damages could not be determined by subtracting market value of home from amount paid. Schnellmann v. Roettger (S.C. 2007) 373 S.C. 379, 645 S.E.2d 239. Brokers 106

To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer’s ignorance of its falsity, (7) the hearer’s reliance on its truth, (8) the hearer’s right to rely thereon, and (9) the hearer’s consequent and proximate injury. Schnellmann v. Roettger (S.C. 2007) 373 S.C. 379, 645 S.E.2d 239. Fraud 3; Fraud 58(1)

Patient’s wife could not a maintain a claim under the Unfair Trade Practices Act against physicians, where statute provided that a person could file suit in an individual capacity, but not in a representative capacity, to recover damages, and wife filed a claim on behalf of patient in her capacity as personal representative of patient’s estate. Wogan v. Kunze (S.C.App. 2005) 366 S.C. 583, 623 S.E.2d 107, rehearing denied, certiorari granted, affirmed as modified 379 S.C. 581, 666 S.E.2d 901, certiorari denied, certiorari denied 129 S.Ct. 1617, 556 U.S. 1127, 173 L.Ed.2d 995. Antitrust And Trade Regulation 290

Patient’s wife could not maintain a cause of action against physician for an alleged violation of the Unfair Trade Practices Act, based on physician billing patient for the administration of medication to patient, where there was no evidence that patient’s wife paid the bill, and the medical services at issue were not rendered to wife. Wogan v. Kunze (S.C.App. 2005) 366 S.C. 583, 623 S.E.2d 107, rehearing denied, certiorari granted, affirmed as modified 379 S.C. 581, 666 S.E.2d 901, certiorari denied, certiorari denied 129 S.Ct. 1617, 556 U.S. 1127, 173 L.Ed.2d 995. Antitrust And Trade Regulation 290

The potential for repetition may be shown in either of two ways, for the purpose of establishing a violation of the Unfair Trade Practices Act: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company’s procedures created a potential for repetition of the unfair and deceptive acts. Wogan v. Kunze (S.C.App. 2005) 366 S.C. 583, 623 S.E.2d 107, rehearing denied, certiorari granted, affirmed as modified 379 S.C. 581, 666 S.E.2d 901, certiorari denied, certiorari denied 129 S.Ct. 1617, 556 U.S. 1127, 173 L.Ed.2d 995. Antitrust And Trade Regulation 151

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice must have an impact upon the public interest; an impact on the public interest may be shown if the acts or practices have the potential for repetition. Wogan v. Kunze (S.C.App. 2005) 366 S.C. 583, 623 S.E.2d 107, rehearing denied, certiorari granted, affirmed as modified 379 S.C. 581, 666 S.E.2d 901, certiorari denied, certiorari denied 129 S.Ct. 1617, 556 U.S. 1127, 173 L.Ed.2d 995. Antitrust And Trade Regulation 151

Genuine issues of material fact existed as to whether automobile dealer violated the Unfair Trade Practices Act (UTPA) in representing to purchaser of limited edition automobile that, by ordering automobile through it and placing her name on waiting list, she would become member in group of charter owners and receive special promotional materials and then placing order in manner that ensured she would get no promotional materials or be member of group, precluding summary judgment for dealer in purchaser’s UTPA action against it. deBondt v. Carlton Motorcars, Inc. (S.C.App. 2000) 342 S.C. 254, 536 S.E.2d 399. Judgment 181(29)

The Unfair Trade Practices Act (UTPA) should not be construed to increase a plaintiff’s burden of proving liability since its purpose is to give additional protection to victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles. deBondt v. Carlton Motorcars, Inc. (S.C.App. 2000) 342 S.C. 254, 536 S.E.2d 399. Antitrust And Trade Regulation 128; Antitrust And Trade Regulation 367

Genuine issues of material fact existed as to whether automobile manufacturer violated the Unfair Trade Practices Act (UTPA) in developing and administering promotional program that promised that purchasers of first 7,000 models of limited edition automobile would receive promotional materials and be members of group of charter owners, but which allowed dealers to determine which purchasers actually received materials, precluding summary judgment for manufacturer in purchaser’s UTPA action against it. deBondt v. Carlton Motorcars, Inc. (S.C.App. 2000) 342 S.C. 254, 536 S.E.2d 399. Judgment 181(29)

Plaintiffs in residential construction defects case cannot sue defendant builder, seller and developer under South Carolina Unfair Trade Practices Act (SCUPTA) if plaintiffs did not purchase their residences from defendant but from original homeowner more than three years after initial sale. Reynolds v. Ryland Group, Inc. (S.C. 2000) 340 S.C. 331, 531 S.E.2d 917. Antitrust And Trade Regulation 290

Condom marketer violated Unfair Trade Practices Act (UTPA), thus warranting trebling of damages in action by competitor; marketer willfully appropriated competitor’s marks and packaging, so that marketer’s package was exact copy, including trademarks, of competitor’s product, this left consumer with no way of knowing truth about source of item in question, and marketer testified that he sold approximately 48,000 condoms, each of which was deceptive. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1658

Evidence supported finding that condom marketer’s willful appropriation of competitor’s marks and packaging, so that marketer’s package was exact copy, caused competitor’s damages, for purposes of competitor’s action against marketer for common law trademark infringement and violation of Unfair Trade Practices Act (UTPA); competitor’s profits on East Coast were down during time in which marketer sold his virtually identical product, competitor’s East Coast profits increased after it obtained injunction against marketer, and competitor had to lower price of its product to compete. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1630

Condom marketer provided sufficient evidence of lost profits in its action against competitor for common law trademark infringement and violation of Unfair Trade Practices Act (UTPA), arising from competitor’s willful appropriation of marketer’s marks and packaging; while marketer’s profits on East Coast were down during relevant time, marketer’s president testified that West Coast market in same period experienced 590% increase in sales, that East Coast market should have performed similarly, and would have, but for competitor’s intentional infringement, and that comparison between East Coast market and Southern California market was reasonable comparison to make, primarily because both were tourist beach resorts. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1660

Condom marketer was entitled to recover research and development costs in its action against competitor for common law trademark infringement and violation of Unfair Trade Practices Act (UTPA), arising from competitor’s willful appropriation of marketer’s marks and packaging; marketer invested considerable time and expense in developing unique packaging for its product, and by producing substantially identical product, competitor prevented marketer from realizing full benefit of its investment. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1656(1)

Actual damages under the Unfair Trade Practices Act (UTPA) include special or consequential damages that are a natural and proximate result of deceptive conduct. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Antitrust And Trade Regulation 389(1)

Record supported $311,819.19 attorney fee award under Unfair Trade Practices Act (UTPA) to condom marker who sued competitor for willful appropriation of marketer’s marks and packaging; case presented numerous and complex issues, requiring time‑consuming research and trial preparation, marketer’s counsel was in excellent standing, marketer’s counsel was to receive 40% under contingency contract, whereas fee award in question represented only one‑third of damages recovered, and court found that contingent fee arrangements were common in complex cases and that typical range of such contingency fees was one‑third to one‑half recovery. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Trademarks 1755

On appeal, an award for attorney fees under the Unfair Trade Practices Act (UTPA) will be affirmed so long as sufficient evidence in the record supports each factor. Global Protection Corp. v. Halbersberg (S.C.App. 1998) 332 S.C. 149, 503 S.E.2d 483, rehearing denied, certiorari denied. Appeal And Error 1024.1

Unfair Trade Practices Act (UTPA) provision governing attorney fees does not violate equal protection, even though it provides for recovery of attorney fees to prevailing plaintiffs but not to prevailing defendants; allowing plaintiffs who successfully pursue action to recover their attorney fees encourages them to pursue litigation to protect public interest, requiring unsuccessful defendants to pay attorney fees discourages tradesmen from engaging in unfair methods of competition and unfair or deceptive acts in conduct of trade or commerce, and attorney fees provision is legitimate tool that supports policy objectives of statute. Taylor v. Medenica (S.C. 1998) 331 S.C. 575, 503 S.E.2d 458. Antitrust And Trade Regulation 129; Constitutional Law 3467

In determining reasonable attorney fees under Unfair Trade Practices Act (UTPA), trial court should consider nature, extent, and difficulty of case, time necessarily devoted to case, professional standing of counsel, contingency of compensation, beneficial results obtained, and customary legal fees for similar services; all factors should be considered, but none is controlling. Taylor v. Medenica (S.C. 1998) 331 S.C. 575, 503 S.E.2d 458. Antitrust And Trade Regulation 397

Award of $500,000 in attorney fees in patient’s Unfair Trade Practices Act (UTPA) action against oncologist and his medical clinic was not excessive; trial court determined that number of hours claimed by attorneys was reasonable, if not conservative, that attorneys were experienced and capable and charged appropriate hourly rates, that attorneys submitted detailed time sheets listing services rendered and time spent, that case was taken on contingency fee basis, that UTPA cases were difficult to try, that attorneys obtained beneficial result for client, while judgment had deterrent effect on clinic, and that clinic contested liability under UTPA, requiring patient to call expert witnesses. Taylor v. Medenica (S.C. 1998) 331 S.C. 575, 503 S.E.2d 458. Antitrust And Trade Regulation 397

Award of attorney fees under Unfair Trade Practices Act (UTPA) may be upheld even if fee substantially exceeded actual recovery. Taylor v. Medenica (S.C. 1998) 331 S.C. 575, 503 S.E.2d 458. Antitrust And Trade Regulation 397

Limitations period for golf club members’ claims against golf course owners under Unfair Trade Practices Act (UTPA) for allegedly using tee‑time schedule to solicit new members, and then unilaterally revoking schedule, accrued as of date owners announced intention to revoke. Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership (S.C.App. 1998) 331 S.C. 385, 503 S.E.2d 184, rehearing denied, certiorari denied. Limitation Of Actions 95(16)

Even if tee‑time schedule was not a contract, course owners’ alleged use of schedule to solicit business and its subsequent abrogation of its terms could be “unfair and deceptive acts” prohibited by Unfair Trade Practices Act (UTPA). Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership (S.C.App. 1998) 331 S.C. 385, 503 S.E.2d 184, rehearing denied, certiorari denied. Antitrust And Trade Regulation 179

Court of Appeals’ prior decision, which did not address supplier’s claim that jury’s verdict on damages in buyer’s Unfair Trade Practices Act (UTPA) action was res judicata as to buyer’s fraud action, had no res judicata effect on buyer’s fraud action on remand; failure to address claim did not raise inference that Court of Appeals rejected res judicata claim. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1998) 329 S.C. 414, 496 S.E.2d 637, rehearing denied, reversed 338 S.C. 171, 525 S.E.2d 869. Judgment 642

Jury’s determination that buyer did not suffer damages from supplier’s Unfair Trade Practices Act (UTPA) violations was res judicata on buyer’s’ fraud cause of action on remand, where fraud and UTPA causes of action arose out of same factual situation. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1998) 329 S.C. 414, 496 S.E.2d 637, rehearing denied, reversed 338 S.C. 171, 525 S.E.2d 869. Judgment 588

Trial court’s unchallenged rulings in buyer’s Unfair Trade Practices Act (UTPA) trial which precluded admission of evidence that buyer hired additional employee due to supplier’s misconduct was res judicata on issue of buyer’s hiring of additional employee in buyer’s fraud action against supplier on remand. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1998) 329 S.C. 414, 496 S.E.2d 637, rehearing denied, reversed 338 S.C. 171, 525 S.E.2d 869. Judgment 720

To be actionable under Unfair Trade Practices Act (UTPA), unfair or deceptive act or practice must have impact upon the public interest. Crary v. Djebelli (S.C. 1998) 329 S.C. 385, 496 S.E.2d 21, rehearing denied. Antitrust And Trade Regulation 151

Unfair or deceptive acts or practices have impact upon the public interest, and thus are actionable under Unfair Trade Practices Act, if acts or practices have potential for repetition. Crary v. Djebelli (S.C. 1998) 329 S.C. 385, 496 S.E.2d 21, rehearing denied. Antitrust And Trade Regulation 151

Plaintiff who alleges and proves facts demonstrating potential for repetition of defendant’s actions has proven adverse effect on public interest sufficient to support claim under Unfair Trade Practices Act (UTPA), and need not allege or prove anything further in relation to public interest requirement. Crary v. Djebelli (S.C. 1998) 329 S.C. 385, 496 S.E.2d 21, rehearing denied. Antitrust And Trade Regulation 367

In action at law, on appeal of case tried without jury, scope of appellate review extends merely to correction of errors of law, and factual findings of trial judge will not be disturbed unless review of record discloses that there is no evidence which reasonably supports judge’s findings. Crary v. Djebelli (S.C. 1998) 329 S.C. 385, 496 S.E.2d 21, rehearing denied. Appeal And Error 989; Appeal And Error 1010.2

Finding that allegedly unfair or deceptive trade practices had potential for repetition, and thus had impact on public interest and would support claim under Deceptive Trade Practices Act (DTPA), was supported by defendants’ admission that they had previously had opportunity to, and had entered into, similar conduct as complained of by plaintiffs. Crary v. Djebelli (S.C. 1998) 329 S.C. 385, 496 S.E.2d 21, rehearing denied. Antitrust And Trade Regulation 369

Unfair Trade Practices Act was available to truck buyer who claimed that seller represented that truck was “like new” demonstrator that had never been titled to individual but who subsequently was told by mechanic that truck had bent frame from previous accident; while Act requires that act or practice have impact upon public interest, conduct of seller, which was in business of selling vehicles, had potential for repetition. York v. Conway Ford, Inc. (S.C. 1997) 325 S.C. 170, 480 S.E.2d 726. Antitrust And Trade Regulation 151; Antitrust And Trade Regulation 193

To be actionable under Unfair Trade Practices Act, unfair or deceptive act or practice must have impact upon public interest; such is the case if acts or practices have potential for repetition. York v. Conway Ford, Inc. (S.C. 1997) 325 S.C. 170, 480 S.E.2d 726. Antitrust And Trade Regulation 151

Performance of allegedly useless medical laboratory tests satisfied Unfair Trade Practices Act’s public interest requirement; performance of such tests was capable of repetition by laboratory. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 151

Plaintiff sustained “ascertainable loss” within meaning of Unfair Trade Practices Act as result of performance of and billing for useless medical tests, but only to extent of laboratory’s bill for such tests, and not to extent that physician relied on those tests to provide negligent medical care; there was no evidence suggesting that laboratory should have foreseen that physician, who was laboratory’s sole stockholder, would rely on useless tests to provide care. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 222

“Actual damages” under Unfair Trade Practices Act include special or consequential damages that are natural and proximate result of deceptive conduct. Taylor v. Medenica (S.C. 1996) 324 S.C. 200, 479 S.E.2d 35, rehearing denied. Antitrust And Trade Regulation 389(1)

To be actionable under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., the unfair or deceptive acts or practices in the conduct of trade or commerce must have an impact upon the public interest. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21. Antitrust And Trade Regulation 151

Under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., unfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential for repetition. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21. Antitrust And Trade Regulation 151

For an act to have the potential for repetition under the Uniform Trade Practices Act, Sections 39‑5‑10 et seq., it must be real and substantial, as opposed to a hypothetical possibility that the defendant’s act would be repeated; consequently, the mere proof that the actor is still alive and engaged in the same business is not sufficient to establish the requirement of potential for repetition. Crary v. Djebelli (S.C.App. 1995) 321 S.C. 38, 467 S.E.2d 128, rehearing denied, certiorari granted, reversed 329 S.C. 385, 496 S.E.2d 21.

The trial court did not err in refusing to award treble damages under the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., where there was no evidence that the alleged violation of the UTPA was willful and knowing. Top Value Homes, Inc. v. Harden (S.C.App. 1995) 319 S.C. 302, 460 S.E.2d 427.

In order to recover pursuant to the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., one must prove each of the following three elements by the greater weight or preponderance of the evidence: (1) a violation of the Act, (2) proximate cause, and (3) damages. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1995) 318 S.C. 471, 458 S.E.2d 431, rehearing denied, certiorari denied. Antitrust And Trade Regulation 134; Antitrust And Trade Regulation 369

In an action under the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., the trial court did not err in denying the defendants’ request for attorney’s fees pursuant to Section 39‑5‑20 where the jury found that although the plaintiff’s actions constituted an unfair or deceptive act or practice, the defendants did not suffer any actual damages as a proximate result of the unfair act. Charleston Lumber Co., Inc. v. Miller Housing Corp. (S.C.App. 1995) 318 S.C. 471, 458 S.E.2d 431, rehearing denied, certiorari denied.

In private actions under the Unfair Trade Practices Act (UTPA), directors and officers are not liable for the corporation’s unfair trade practices unless they personally commit, participate in, direct or authorize the commission of a violation of the UTPA. Plowman v. Bagnal (S.C. 1994) 316 S.C. 283, 450 S.E.2d 36, rehearing granted, adhered to on rehearing. Antitrust And Trade Regulation 291

An attorney, whose client was told by a consumer lender that the attorney was unacceptable to it, failed to state a cause of action against the lender for a violation of the Unfair Trade Practices Act, Section 39‑5‑10 et seq., since the conduct complained of did not describe any action by the lender which was “unfair” or “deceptive” in the context of trade or commerce. Camp v. Springs Mortg. Corp. (S.C. 1993) 310 S.C. 514, 426 S.E.2d 304, rehearing denied. Antitrust And Trade Regulation 209; Antitrust And Trade Regulation 256

In an action brought pursuant to the Unfair Trade Practices Act, Sections 39‑5‑10 et seq., the trial court erred in refusing to grant a motion for judgment n.o.v. after the plaintiff was awarded treble damages where the plaintiff failed to show that he suffered any actual damages as a result of the defendant dealership’s misrepresentation that a truck purchased by him had a 352 cubic inch engine when it actually had a larger engine since the larger engine was actually more valuable and the plaintiff’s estimate of the additional amount spent on gasoline due to the larger engine was purely speculative. Fields v. Yarborough Ford, Inc. (S.C. 1992) 307 S.C. 207, 414 S.E.2d 164.

A commercial nursery’s conduct in supplying mislabeled fruit trees to a farmer was not a “willful” violation of the Unfair Trade Practices Act where the nursery’s conduct was not expressly prohibited by statute and was in accord with the common practice of the trade. Haley Nursery Co., Inc. v. Forrest (S.C. 1989) 298 S.C. 520, 381 S.E.2d 906. Antitrust And Trade Regulation 393

“Unfair methods of competition” as well as “unfair or deceptive acts or practices” must have an adverse impact on the public interest in order to be actionable under the Unfair Trade Practices Act. Florence Paper Co. v. Orphan (S.C. 1989) 298 S.C. 210, 379 S.E.2d 289.

Insurance company’s conversion of note and mortgage, being unconnected with transaction constituting either trade or commerce, while admittedly unfair, is not kind of unfair or deceptive method, act, or practice declared unlawful by Section 39‑5‑20. Connolly v. People’s Life Ins. Co. of South Carolina (S.C.App. 1988) 294 S.C. 355, 364 S.E.2d 475, reversed 299 S.C. 348, 384 S.E.2d 738. Antitrust And Trade Regulation 146(1)

There was no error in award of attorney fees where court received affidavits from counsel, as well as time records relating to case, despite contention that fees had been awarded by court considering only amount of jury verdict and beneficial results obtained in awarding fees; although judge stated in his order result obtained was marginal, it was clear he carefully evaluated all factors appropriate to award of attorneys fees and based his award upon careful consideration of time spent on prosecution of counterclaim and appropriate hourly rate for counsel. Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc. (S.C.App. 1987) 294 S.C. 169, 363 S.E.2d 390.

Trial judge’s award of attorney fees under South Carolina Unfair Trade Practices Act and South Carolina Consumer Protection Code was proper where plaintiff’s counsel estimated number of hours that he worked on case, and finance company’s counsel voiced no objection to this procedure at that time; moreover, finance company did not argue in its brief that award of attorney fees was improper under South Carolina Consumer Protection Code, and decision that trial judge improperly awarded attorney fees under South Carolina Unfair Trade Practices Act would not change judgment since award of attorneys fees was grounded on another statute; additionally, award was not unreasonable considering professional standing of plaintiff’s attorneys, nature and extent of services rendered, complexity of issues, and beneficial results obtained for plaintiff. Freeman v. A. & M. Mobile Home Sales, Inc. (S.C.App. 1987) 293 S.C. 255, 359 S.E.2d 532.

To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688. Antitrust And Trade Regulation 151

A complaint containing allegations of unfair or deceptive acts or practices on the part of the defendant which allegedly damaged the plaintiff did not state a claim under the unfair trade practices act, where the complaint nowhere alleged any facts demonstrating that those acts or practices adversely affected the public. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc. (S.C.App. 1986) 290 S.C. 475, 351 S.E.2d 347, certiorari dismissed 294 S.C. 235, 363 S.E.2d 688.

In an action brought by several purchasers of condominiums for alleged false representations and fraudulent concealments in connection with the sale of the units, an award of treble damages under Section 35‑5‑140 was not an abuse of discretion since the purchasers suffered actual damages due to the difference in value between what they spent and what they actually received. Payne v. Holiday Towers, Inc. (S.C.App. 1984) 283 S.C. 210, 321 S.E.2d 179. Antitrust And Trade Regulation 393

An insurance company was not obligated to defend its insured in an action based upon a violation of Sections 39‑5‑10 et seq., brought by a purchaser of the insured’s merchandise where the insurance policy provided coverage for bodily injury or property damage caused by an occurrence and the policy defined “occurrence” so that coverage was limited to injury or damage which was “neither expected nor intended from the standpoint of the insured.” R. A. Earnhardt Textile Machinery Division, Inc. v. South Carolina Ins. Co. (S.C. 1981) 277 S.C. 88, 282 S.E.2d 856.

Computer networking equipment manufacturer’s alleged mistreatment of distributor did not violate South Carolina unfair trade practices statute absent showing that it harmed any member of South Carolina public, or that its business procedures risked repeating unfair and deceptive acts. Network Computing Services Corp. v. Cisco Systems, Inc. (C.A.4 (S.C.) 2005) 152 Fed.Appx. 317, 2005 WL 2857965, Unreported. Antitrust And Trade Regulation 260

1.5. Constitutional issues

Penalty award of approximately $124 million against pharmaceutical company for distributing sample boxes and letters to prescribing physicians that contained misleading information regarding risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), did not violate Due Process Clause; although penalty was quite large, intent of SCUTPA was to deter unfair and deceptive behavior in conduct of trade and commerce, and evidence demonstrated company’s pattern of unfair and deceptive behavior. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005; Constitutional Law 4330

Imposition of penalty of approximately $124 million against pharmaceutical company for distributing sample boxes and letters to prescribing physicians that contained misleading information regarding risks and side effects of atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), did not violate Excessive Fines Clause; penalty was not grossly disproportionate to company’s pattern of unfair and deceptive behavior, as it bore a rational relationship to gravity of company’s conduct in perpetuating marketing scheme designed to be unfair and deceptive, and penalty awards per violation were within range set by legislature in enacting SCUTPA. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 1005; Fines 1.3

State’s claim that label for pharmaceutical company’s antipsychotic drug misrepresented risks and side effects of drug in violation of South Carolina Unfair Trade Practices Act (SCUTPA) was not impliedly preempted by Federal Food, Drug, and Cosmetic Act (FDCA); State did not seek to impose labeling requirements different than those imposed by the Food and Drug Administration (FDA), but rather sought civil penalties based on company’s actions in failing to discharge its ongoing, affirmative duty to keep its label updated and unsure that its warnings remained adequate as long as the drug was on the market. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 132; States 18.84

State’s claim that pharmaceutical company’s letter to prescribing physicians misrepresented risks and side effects atypical antipsychotic drug, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), was not expressly preempted by Federal Food, Drug, and Cosmetic Act (FDCA); although State relied in part on evidence that Food and Drug Administration (FDA) had found letters to be false and misleading in violation of FDCA, there was substantial additional evidence relating to deception surrounding company’s letter, including scientific proof to the contrary, company’s sales strategy, and internal e‑mails, and, following trial, jury was charged with determining factual issues based solely on provisions of SCUTPA, and trial judge assessed penalties under SCUTPA framework. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 132; States 18.84

First Amendment free speech clause did not bar imposition of liability on pharmaceutical company for violating South Carolina Unfair Trade Practices Act (SCUTPA) through its sales and marketing of atypical antipsychotic drug, where record supported finding that company’s conduct was unfair and deceptive. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 222; Constitutional Law 1602; Constitutional Law 1624

1.75. Construction with other laws

Customers could not bring class claims against store under the South Carolina Unfair Trade Practices Act (SCUTPA); SCUTPA’s prohibitions against class actions were substantive portions of South Carolina law and were thus not trumped by federal civil procedure rule allowing any plaintiff in any federal civil proceeding to maintain a class action if the rule’s prerequisites were met. Fejzulai v. Sam’s West, Inc., 2016, 205 F.Supp.3d 723. Federal Courts 3079(4)

Gambling loss statutes, authorizing gamblers and affected third parties to recover gambling losses in certain limited circumstances, provide the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling, accordingly, one engaged in illegal gambling cannot recover under South Carolina Unfair Trade Practices Act; overruling Johnson v. Collins Entertainment Company, 349 S.C. 613, 564 S.E.2d 653, and Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137. Proctor v. Whitlark & Whitlark, Inc. (S.C. 2015) 414 S.C. 318, 778 S.E.2d 888, rehearing denied. Antitrust and Trade Regulation 282; Gaming and Lotteries 275(1)

1.9. Counterclaim

Mortgagor’s counterclaim, alleging that mortgagee violated Unfair Trade Practices Act (UTPA) by engaging in pattern of reneging upon promises to modify loans including loan that was subject of mortgage foreclosure action, was legal and compulsory, and thus, mortgagor was entitled to jury trial on counterclaim in mortgage foreclosure action; UTPA claim was action at law seeking treble damages, and if mortgagor’s allegations were true, it could affect loan’s enforceability. South Carolina Community Bank v. Salon Proz, LLC (S.C.App. 2017) 420 S.C. 89, 800 S.E.2d 488. Jury 14(1.2)

2. Damages

Finding that defendant willfully or knowingly violated the South Carolina Unfair Trade Practices Act (SCUTPA) dictated that court treble damages and award plaintiff attorney fees. Liberty Mut. Ins. Co. v. Employee Resource Management, Inc., 2001, 176 F.Supp.2d 510.

Prospective purchasers of real property failed to prove that they suffered any actual damages based on amount of time and resources expended interacting with vendor’s brokerage firm and its licensee in an attempt to finalize an agreement for sale of property with vendor, as necessary to support their claim for damages under the South Carolina Unfair Trade Practices Act (SCUTPA) claim against brokerage firm and licensee; although prospective purchasers alleged that they suffered $3,000 in damages based on time spent and miles traveled in an attempt to purchase property, prospective purchasers could not substantiate number of hours spent during negotiations or amount of miles traveled, such that any estimate of damages was purely speculative. Woodson v. DLI Properties, LLC (S.C. 2014) 406 S.C. 517, 753 S.E.2d 428. Antitrust and Trade Regulation 369

Under Unfair Trade Practices Act (UTPA), actual damages include special or consequential damages that are a natural and proximate result of deceptive conduct. Collins Holding Corp. v. Defibaugh (S.C.App. 2007) 373 S.C. 446, 646 S.E.2d 147, rehearing denied. Antitrust And Trade Regulation 389(1)

Under Unfair Trade Practices Act (UTPA), recoverable damages include compensation for all injury to plaintiff’s property or business which is the natural and probable consequence of defendant’s wrong. Collins Holding Corp. v. Defibaugh (S.C.App. 2007) 373 S.C. 446, 646 S.E.2d 147, rehearing denied. Antitrust And Trade Regulation 138

Company that placed pool tables, foosball machines, and other games in bars and restaurants did not suffer damages under Unfair Trade Practices Act (UTPA) and thus could not prevail on UTPA claim that was brought against competitors, whose machines used reflexive payout, which allowed machine, unbeknownst to players, to make adjustments to game’s outcome to stay within payback percentage; company did not show that use of reflexive payout was cause of any lost revenue, and primary reason that competitors’ machines hurt company’s business was that competitors’ machines were easy to play. Collins Holding Corp. v. Defibaugh (S.C.App. 2007) 373 S.C. 446, 646 S.E.2d 147, rehearing denied. Antitrust And Trade Regulation 239

Proper method to determine amount of damages in a fraud case is the benefit‑of‑the‑bargain approach, according to which the plaintiff is entitled to the difference between the value he would have received if the defendant’s representations had been true and the value he actually received, together with any proximately caused consequential or special damages. Schnellmann v. Roettger (S.C. 2007) 373 S.C. 379, 645 S.E.2d 239. Fraud 59(2)

Evidence was sufficient to support award of actual damages in the amount of $25,578 for pickup truck buyer, in trial of buyer’s Unfair Trade Practices Act (UTPA) claim against truck dealer for selling truck that had been wrecked and repaired; buyer submitted evidence that truck was valueless in its wrecked and repaired condition, buyer had paid nearly half of the outstanding balance on the truck loan when he discovered that truck had been wrecked and repaired, and buyer lost his equity in the vehicle he traded in to purchase truck. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 390

Actual damages under the Unfair Trade Practices Act (UTPA) include special or consequential damages that are a natural and proximate result of deceptive conduct. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 389(1)

The Unfair Trade Practices Act (UTPA) allows for the recovery of actual damages. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 389(1)

Under the Unfair Trade Practices Act (UTPA), a plaintiff can recover treble damages where the use or employment of the unfair or deceptive act or practice was a willful or knowing violation. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 393

3. Arbitration

Limitations on statutory remedies imposed by arbitration clause in automobile sales contract between customer and automobile dealership, which provided that an arbitrator was not authorized to award punitive, exemplary, double, or treble damages as to disputes arising under the contract, were oppressive and one‑sided and violated statutory law and public policy, and thus, were unconscionable and unenforceable; customer asserted claims that dealership violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act), which required courts to impose awards of either double or treble damages for violations. Simpson v. MSA of Myrtle Beach, Inc. (S.C. 2007) 373 S.C. 14, 644 S.E.2d 663, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 493, 552 U.S. 990, 169 L.Ed.2d 340. Alternative Dispute Resolution 134(6)

Challenge to arbitration clause as a violation of public policy by precluding punitive damages was premature prior to arbitration in suit alleging fraud and violation of the Unfair Trade Practices Act (UTPA); the arbitrator needed to decide whether the UTPA was violated and the statutory treble damages were punitive or compensatory damages, it was unclear how the arbitrator would rule on merits or claim for punitive damages, and the issues were thus not ripe. Carolina Care Plan, Inc. v. United HealthCare Services, Inc. (S.C. 2004) 361 S.C. 544, 606 S.E.2d 752, rehearing denied. Alternative Dispute Resolution 213(1)

4. Attorney’s fees

Trailer leasing company that prevailed in its action against its former employees and competitor in action alleging fraud, conversion, breach of contract, and violation of South Carolina Unfair Trade Practices Act (SCUTPA) was entitled to attorney fee award of $550,000 under SCUTPA, even though it incurred attorney fees of over $1.1 million, where SCUTPA award comprised only approximately 17.4 percent of total award as to one employee, and approximately 10.2 percent of total award as to other employee. GTR Rental, LLC v. DalCanton, 2008, 547 F.Supp.2d 510, entered. Antitrust And Trade Regulation 397

In determining whether damages award in class action under South Carolina Unfair Trade Practices Act would exceed amount in controversy needed for diversity jurisdiction, award of attorney fees would be distributed pro rata to all class members, both named and unnamed, rather than attributed entirely to named plaintiff. Phillips v. Whirlpool Corp., 2005, 351 F.Supp.2d 458. Federal Courts 2523(2)

Award of $2,654,295 in attorneys’ fees to investor under the Unfair Trade Practices Act (UTPA), based on lodestar multiplier, was not excessive, in investor’s action against investment adviser arising out of provision of investment advice, where matter was heavily litigated for several years and produced more than 60,000 pages of documentation, adviser filed numerous motions, and counsel was experienced and achieved beneficial results for investor on five causes of action. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Costs 194.18

Under the South Carolina Unfair Trade Practices Act (SCUTPA), actual damages are distinct from attorney fees, and whereas actual damages are subject to trebling, attorney fees are not. Mull v. Ridgeland Realty, LLC (S.C.App. 2010) 387 S.C. 479, 693 S.E.2d 27. Antitrust And Trade Regulation 393; Antitrust And Trade Regulation 397; Costs 66

Evidence was sufficient to support award of actual damages in the amount of $25,578 for pickup truck buyer, in trial of buyer’s Unfair Trade Practices Act (UTPA) claim against truck dealer for selling truck that had been wrecked and repaired; buyer submitted evidence that truck was valueless in its wrecked and repaired condition, buyer had paid nearly half of the outstanding balance on the truck loan when he discovered that truck had been wrecked and repaired, and buyer lost his equity in the vehicle he traded in to purchase truck. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 390

Actual damages under the Unfair Trade Practices Act (UTPA) include special or consequential damages that are a natural and proximate result of deceptive conduct. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 389(1)

5. Treble damages

Former employees’ violations of South Carolina Unfair Trade Practices Act (SCUTPA) in connection with their scheme to create company to compete with their current employer and to use that company to convert money and resources from employer were willful and knowing, thereby warranting treble damages, where one employee submitted falsified credit approval requests to other employee, who approved requests, knowing that they were fraudulent, employee leased employer’s trailers to competitor at prices far below market value, and then profited when other employee, through competitor, subleased trailers to employer’s existing customers for market value rates, employees sold employer’s trailers to third parties and kept profits, and employees misrepresented to employer’s customers that competitor was employer’s sister company, and instructed them to remit future rent payments to competitor. GTR Rental, LLC v. DalCanton, 2008, 547 F.Supp.2d 510, entered. Antitrust And Trade Regulation 393

Under South Carolina law, jury’s award of punitive damages in employer’s action alleging that its employees created competing company and used it to convert money and resources from it did not preclude employer from recovering statutory treble damages under South Carolina Unfair Trade Practices Act (SCUTPA), where evidence supported finding of separate and distinct wrongs for fraud, by creating false paper trail and insurance papers, and SCUTPA violation, as result of unfair competition with employer. GTR Rental, LLC v. DalCanton, 2008, 547 F.Supp.2d 510, entered. Antitrust And Trade Regulation 393

Evidence was sufficient to support finding that investment adviser knew or should have known that its conduct, including execution of wealth management agreement and issuance of letter approving investor’s entering into variable prepaid forward contracts, violated the Unfair Trade Practices Act (UTPA), as would allow treble damages to investor in investor’s action against adviser under the UTPA, where multiple witnesses testified adviser knew it could not fulfill terms of wealth management agreement, and letter was seemingly tailored specifically to investor but was in fact a fill‑in‑the‑blank form letter. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Contracts 138(1)

If a person of ordinary prudence who was engaged in trade or commerce could have ascertained that his conduct violated the Unfair Trade Practices Act (UTPA), such conduct is “willful” within the meaning of statute providing for treble damages upon a finding of willful violation of Act. Maybank v. BB&T Corporation (S.C. 2016) 416 S.C. 541, 787 S.E.2d 498, rehearing denied. Antitrust and Trade Regulation 393

Award of $40,000, consisting of $10,000 in attorney fees and actual damages of $10,000 which were trebled, was excessive for prospective buyer of recreational vehicle (RV) in his action against alleged seller for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), where the $10,000 in actual damages included the $2,500 retainer fee the prospective buyer paid to his attorney, this was trebled to $7,500, and this resulted in $17,500 being awarded for attorney fees in total, when prospective buyer’s actual attorney fees totaled only $10,000. Mull v. Ridgeland Realty, LLC (S.C.App. 2010) 387 S.C. 479, 693 S.E.2d 27. Antitrust And Trade Regulation 393; Antitrust And Trade Regulation 397

Alleged seller of recreational vehicle (RV) did not preserve for appellate review the trial court’s award of treble damages to prospective buyer under the South Carolina Unfair Trade Practices Act (SCUTPA) without making the requisite finding that seller’s violations of the SCUTPA were willful or knowing, where the seller did not specifically challenge the trial court’s decision to treble the damages without making the required finding, but instead merely challenged the judgment as “excessive.” Mull v. Ridgeland Realty, LLC (S.C.App. 2010) 387 S.C. 479, 693 S.E.2d 27. Appeal And Error 232(.5)

Under the Unfair Trade Practices Act (UTPA), a plaintiff can recover treble damages where the use or employment of the unfair or deceptive act or practice was a willful or knowing violation. Wright v. Craft (S.C.App. 2006) 372 S.C. 1, 640 S.E.2d 486, rehearing denied. Antitrust And Trade Regulation 393

Secondary lender for residential development project unambiguously elected rescission, rather than damages, in its action against lead lender, and thus secondary lender could not seek treble damages under the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA) or South Carolina Unfair Trade Practices Act (SCUTPA), both of which required an award of actual damages to obtain treble damages; before trial, secondary lender informed district court that it was not seeking actual damages that were above rescission or its money back, case was presented to jury as a rescission case, and jury was instructed on rescission. First South Bank v. Fifth Third Bank NA (C.A.4 (S.C.) 2015) 631 Fed.Appx. 121, 2015 WL 7351751. Antitrust and Trade Regulation 393

6. Liability of corporate officer

Corporate officer or director who participates in, authorizes, or directs violations of the South Carolina Unfair Trade Practices Act (SCUTPA) may be personally liable. Crago v. Capital Advantage Finance and Development, Inc., 2007, 242 F.R.D. 341. Antitrust And Trade Regulation 291; Corporations And Business Organizations 1970

7. Private cause of action

South Carolina Unfair Trade Practices Act (SCUTPA) is not available to redress a private wrong where the public interest is unaffected. Toney v. LaSalle Bank Nat. Ass’n, 2012, 896 F.Supp.2d 455, affirmed 512 Fed.Appx. 363, 2013 WL 751299. Antitrust and Trade Regulation 151

South Carolina Unfair Trade Practices Act (SCUTPA) prohibited former patients from bringing class action suit for damages against hospital for violations of SCUTPA; statute provides that any person who suffered a loss as a result of an unfair act or practice could “bring an action individually, but not in a representative capacity.” Dema v. Tenet Physician Services‑Hilton Head, Inc. (S.C. 2009) 383 S.C. 115, 678 S.E.2d 430. Parties 35.67

7.5. Parties

A South Carolina Unfair Trade Practices Act (SCUTPA) claim cannot be brought in a representative capacity, as SCUTPA prohibits the survival of a cause of action after a plaintiff’s death. Williams v. Preiss‑Wal Pat III, LLC, 2014, 17 F.Supp.3d 528. Abatement and Revival 58(.5); Antitrust and Trade Regulation 290

8. Class action

Consumers could not bring class claims against national bank under the South Carolina Unfair Trade Practices Act (SCUTPA); SCUTPA’s prohibitions against class actions were substantive portions of South Carolina law and were thus not trumped by federal civil procedure rule allowing any plaintiff in any federal civil proceeding to maintain a class action if the rule’s prerequisites were met. In re TD Bank, N.A., 2015, 150 F.Supp.3d 593, motion to certify appeal denied 2016 WL 7320864. Banks And Banking 100; Banks And Banking 226

South Carolina Unfair Trade Practices Act (SCUTPA) prohibited borrower from bringing class action against lender for engaging in unfair, misleading, or deceptive acts by failing to disclose terms of adjustable rate mortgages (ARM), since statute provided that any person who suffered a loss as a result of an unfair act or practice could bring an action individually, but not in a representative capacity. Harris v. Sand Canyon Corp., 2010, 274 F.R.D. 556. Federal Civil Procedure 182.5

9. Summary judgment

Genuine issue of material fact as to whether lender engaged in unfair, misleading, or deceptive acts by failing to disclose terms of adjustable rate mortgage (ARM) to individual borrower, precluded summary judgment to lender in borrower’s action pursuant to South Carolina Unfair Trade Practices Act (SCUTPA). Harris v. Sand Canyon Corp., 2010, 274 F.R.D. 556. Federal Civil Procedure 2491.9

10. Admissibility of evidence

Exclusion of testimony of statistician that, notwithstanding pharmaceutical company’s false representations regarding atypical antipsychotic drug, prescribing physicians were well aware of drug’s risks and side effects, was not reversible error, in action by State alleging company’s sales and marketing of drug violated South Carolina Unfair Trade Practices Act (SCUTPA); company was not prejudiced, as other evidence was presented that company’s deceptive conduct had no effect on community of prescribing physicians, and actual harm resulting from deceptive conduct was not a necessary element of State’s claim. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 1057(1)

Warning letters from Division of Drug Marketing Advertising and Communications (DDMAC) of Food and Drug Administration (FDA) to pharmaceutical company, in which DDMAC characterized letters that company sent to prescribing physicians regarding risks and side effects of atypical antipsychotic drug as “false and misleading,” were admissible, in trial for violation of South Carolina Unfair Trade Practices Act (SCUTPA) based on sales and marketing of drug; letters were relevant to issues of liability and, concomitantly, statute of limitations concerning claim for violation of SCUTPA arising from drug’s labeling. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 368

11. Questions for jury

Issue of whether pharmaceutical company’s actions with regard to sales and marketing of atypical antipsychotic drug had a tendency to deceive was for the jury, in State’s action alleging that company violated South Carolina Unfair Trade Practices Act (SCUTPA). State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Antitrust and Trade Regulation 363

12. Review

Unappealed circuit court ruling on grant of gambler’s motion for partial summary judgment, that operation of video poker machines in contravention of state law is an unfair act as defined in the South Carolina Unfair Trade Practices Act, was law of the case, requiring affirmance of Court of Appeals finding that gambler had a viable claim under the Act; nonetheless, gambler was only entitled to seek recovery for those losses that were allegedly sustained prior to effective date of ban on video poker. Proctor v. Whitlark & Whitlark, Inc. (S.C. 2015) 414 S.C. 318, 778 S.E.2d 888, rehearing denied. Appeal and Error 853; Gaming and Lotteries 275(1)

Pharmaceutical company failed to preserve for appellate review argument that excluded testimony of statistician was relevant and admissible, in action by State alleging company’s sales and marketing of atypical antipsychotic drug violated South Carolina Unfair Trade Practices Act (SCUTPA), where company made untimely offer of proof. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 205

State’s comments in opening and closing arguments that pharmaceutical company put “profits over safety” did not impermissibly invite jury to base its verdict on passion rather than reason and, thus, did not warrant new trial in State’s action alleging company’s sales and marketing of atypical antipsychotic drug violated South Carolina Unfair Trade Practices Act (SCUTPA); State directly linked elements of SCUTPA to company’s misleading and deceptive practices, such arguments were within proper bounds as State sought to establish that company acted willfully and contrary to the public interest, and nature of comments was more closely associated with allegedly grossly excessive civil penalties award, but jury’s role was limited to determining liability and not civil penalties. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. New Trial 29

Pharmaceutical company’s claim that State’s comments in opening and closing arguments that company put “profits over safety” were inflammatory and prejudicial by inviting jury to impose liability on basis of company’s size and commercial success, was procedurally barred from appellate review, where company’s objection at trial was limited to relevance, which was entirely different basis than the inflammatory/unduly prejudicial argument advanced on appeal. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 232(.5)

Pharmaceutical company’s generalized continuing objection was insufficient to preserve for appeal claim that State’s comments in opening and closing arguments that company put “profits over safety,” were inflammatory and prejudicial by inviting jury to impose liability on basis of company’s size and commercial success, where company failed to make contemporaneous objection identifying particular comments complained of and the basis for the objection. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Appeal and Error 230; Appeal and Error 233(1)

**SECTION 39‑5‑145.** Price gouging during emergency; definitions; penalty; evidence of knowledge or intent.

(A) As used in this section:

(1) “Abnormal disruption of the market” means a change in the market for a commodity in a part of South Carolina, whether actual or imminently threatened, resulting from stress of weather, forces of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, or other cause that constitutes the basis for an out‑of‑state declaration.

(2) “Commodity” means goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce, and includes, without limitation, food, water, ice, chemicals, petroleum products, and lumber essential for consumption or use as a direct result of a declared state of emergency.

(3) “Notice of an abnormal disruption of the market” means notice given by the South Carolina Attorney General of an abnormal disruption of the market.

(4) “Out‑of‑state declaration” means a declaration of a state of emergency, state of disaster, or similar declaration by the President of the United States.

(5)(a) “Unconscionable price” means an amount charged which:

(i) represents a gross disparity between the price of the commodity or rental or lease of a dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility that is the subject of the offer or transaction and the average price at which that commodity or dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility was rented, leased, sold, or offered for rent or sale in the usual course of business during the thirty days immediately before a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of the dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility, or local, regional, national, or international market trends; or

(ii) grossly exceeds the average price at which the same or similar commodity, dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility was readily obtainable in the trade area during the thirty days immediately before a declaration of a state of emergency, and the increase in the amount charged is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of the dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility, or local, regional, national, or international market trends.

(b) It is prima facie evidence that a price is unconscionable if it meets the definition of item (i) or (ii).

(B)(1) Upon a declaration of a state of emergency by the Governor, it is unlawful and a violation of this article for a person or his agent or employee to:

(a) rent or sell or offer to rent or sell a commodity at an unconscionable price within the area for which the state of emergency is declared; or

(b) impose unconscionable prices for the rental or lease of a dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility within the area for which the state of emergency is declared.

(2) This prohibition remains in effect until the declaration expires or is terminated.

(C)(1) Upon a declaration of a state of disaster by the President, in which the disaster area includes all or a portion of the State of South Carolina, it is unlawful and a violation of this article for a person or his agent or employee in this State to:

(a) rent or sell or offer to rent or sell a commodity at an unconscionable price within the area for which the state of disaster is declared; or

(b) impose unconscionable prices for the rental or lease of a dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility within the area for which the state of disaster is declared.

(2) This prohibition remains in effect until the declaration expires or is terminated.

(D) When notice of an abnormal disruption of the market is given, it is unlawful and a violation of this article for a person or his agent or employee to:

(1) rent or sell or offer to rent or sell a commodity at an unconscionable price in any area of this State where there is an abnormal disruption in the market; or

(2) impose unconscionable prices for the rental or lease of a dwelling unit, including a motel or hotel unit, or other temporary lodging, or self‑storage facility in any area of this State where there is an abnormal disruption in the market.

(E) When notice of an abnormal disruption of the market is given, the prohibitions in this section are in effect for fifteen days unless notice of an abnormal disruption in the market is earlier retracted or renewed. The Attorney General may renew a notice of abnormal disruption of the market for an unlimited number of successive fifteen‑day periods.

(F) A trade association, corporation, or partnership may register as an agent for the purpose of being notified when the Attorney General gives, retracts, or renews notice of an abnormal disruption of the market. A trade association may designate up to three persons to be notified on behalf of the organization’s members. The trade association, corporation, or partnership is responsible for maintaining current information for the designated agents. The Attorney General’s Office shall notify the registered agents simultaneous to giving, retracting, or renewing notice of an abnormal disruption of the market.

(G) A price increase approved by an appropriate government agency is not a violation of this section.

(H) A price increase that reflects the usual and customary seasonal fluctuation in the price of the subject essential commodity or the rental or lease of a dwelling unit or self‑storage facility is not a violation of this section.

(I) This section does not apply to sales by growers, producers, or processors of raw or processed food products, except for retail sales of those products to the ultimate consumer within the area of the declared state of emergency or disaster.

(J) This section does not preempt the powers of local government, except that the evidentiary standards contained in this section are the sole evidentiary standards to be adopted by ordinance of a local government to restrict price gouging. In the event a local government declares a state of emergency or disaster or experiences an abnormal disruption of the market in which the area includes all or a portion of the area under the local government’s jurisdiction, and restricts price gouging during that time, the governmental entity must notify the Governor’s Office of the declaration. The Governor’s Office must notify registered agents simultaneously at the time of the declaration and also at its expiration or termination.

(K) In addition to all other remedies provided in this article, a person who wilfully and knowingly violates this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than one thousand dollars or imprisoned not more than thirty days, or both.

(L) A person who is charged with committing an action in violation of this section may present evidence relating to, but not limited to, his knowledge or intent when committing the action to rebut any presumption or evidence of violation of this section.

HISTORY: 2002 Act No. 339, Section 21, eff July 2, 2002; 2006 Act No. 374, Section 1, eff June 14, 2006.

Editor’s Note

2002 Act No. 393, Section 45, provides as follows:

“This act takes effect upon approval by the Governor, and applies to offenses committed after its effective date and to causes of action arising or accruing on or after the effective date.”

Effect of Amendment

The 2006 amendment, in subsection (A), added subparagraph (1), redesignated subparagraph (1) as (2), added subparagraphs (3) and (4) and redesignated subparagraph (2) as subparagraph (5); added subsections (D) to (F) relating to abnormal disruption in the market; redesignated subsection (D) as subsection (G); added subsection (H) excepting seasonal price fluctuations; redesignated subsections (E) to (H) as subsections (I) to (L); and made conforming and nonsubstantive changes throughout.

Attorney General’s Opinions

Discussion of commodity prices following a state or federal disaster. S.C. Op.Atty.Gen. (September 5, 2014) 2014 WL 4659411.

**SECTION 39‑5‑147.** Charitable solicitations during emergencies; penalty.

(A) Upon a declaration of a state of emergency by the Governor, it is unlawful and a violation of this article for a person or his agent or employee to solicit the contribution or sale of goods or services for charitable purposes by any manner, means, practice, or device that is knowingly and wilfully misleading.

(B) Upon a declaration of a state of disaster by the President, in which the disaster areas include all or a portion of the State of South Carolina, it is unlawful and a violation of this article for a person or his agent or employee to solicit in this State the contribution or sale of goods or services for charitable purposes by any manner, means, practice, or device that is knowingly and wilfully misleading.

(C) These prohibitions remain in effect until the declaration of emergency or disaster expires or is terminated.

(D) In addition to all other remedies provided in this article, a person who wilfully violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than thirty days.

HISTORY: 2002 Act No. 339, Section 21, eff July 2, 2002.

**SECTION 39‑5‑149.** Registration of agent by trade association, corporation, or partnership to receive notification of state of emergency.

A trade association, corporation, or partnership may register an agent for the purposes of being notified when the Governor declares and terminates a state of emergency. A trade association may designate up to three persons to be notified on behalf of the organization’s members. The trade association, corporation, or partnership is responsible for maintaining current information for the designated agent or agents. The Governor’s Office is responsible for notifying the registered agents simultaneous to the declaration and termination of the state of emergency.

HISTORY: 2002 Act No. 339, Section 21, eff July 2, 2002.

**SECTION 39‑5‑150.** Limitation of actions.

No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.

HISTORY: 1962 Code Section 66‑71.14; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Section 38‑93‑60.

RESEARCH REFERENCES

Encyclopedias

4 Am. Jur. Trials 441, Solving Statutes of Limitation Problems.

S.C. Jur. Arbitration Section 8, Stay of Judicial Proceedings.

S.C. Jur. Limitation of Actions Section 52, Trade and Commerce.

S.C. Jur. Limitation of Actions Section 56, Ignorance of Cause of Action.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Business Law: Securities Regulation and the Unfair Trade Practices Act. 33 S.C. L. Rev. 1, August 1981.

NOTES OF DECISIONS

In general 1

1. In general

Causes of action for misappropriation of trade secrets, fraud, breach of fiduciary duty, and unfair trade practices accrued, and three‑year statutes of limitations under South Carolina law began to run, under discovery rule, when employer knew or should have known, by exercise of reasonable diligence, that its former employee used its confidential documents while working for competitor, deleted files from employer’s computer, and received monthly payments from competitor while he worked for employer. Abrasives‑South, Inc. v. Korte, 2016, 226 F.Supp.3d 584. Limitation Of Actions 95(1)

South Carolina Unfair Trade Practices Act (SCUTPA) statute of limitations begins to run anew with each violation; thus, where a claim involves a series of ongoing violations, recovery is limited to a period coextensive with the applicable statute of limitations. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 58(1)

State’s claim that pharmaceutical company’s label for atypical antipsychotic drug misrepresented drug’s risks and side effects, in violation of South Carolina Unfair Trade Practices Act (SCUTPA), presented ongoing violations of SCUTPA and, thus, under continuous accrual doctrine, labeling claim presented a series of discrete, independently actionable wrongs, each triggering its own three‑year statute of limitations. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 58(1)

State’s attorney general knew or had reason to know of cause of action against pharmaceutical company under South Carolina Unfair Trade Practices Act (SCUTPA), based on label for atypical antipsychotic drug that allegedly misrepresented risks and side effects, no later than three years prior to date of parties subsequent tolling agreement as, by that date, evidence of risks was pervasive. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 95(3)

Under the discovery rule, the three‑year clock under the South Carolina Unfair Trade Practices Act (SCUTPA) starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 95(3)

Cause of action under South Carolina Unfair Trade Practices Act (SCUTPA), based on allegedly deceptive letters pharmaceutical company sent to prescribing physicians regarding risks and side effects of atypical antipsychotic, accrued, and three‑year limitations period began to run, when Division of Drug Marketing Advertising and Communications (DDMAC) of Food and Drug Administration (FDA) issued warning letter to company characterizing company’s letter to physicians as false and misleading. State ex rel. Wilson v. Ortho‑McNeil‑Janssen Pharmaceuticals, Inc. (S.C. 2015) 414 S.C. 33, 777 S.E.2d 176, rehearing granted, certiorari denied 136 S.Ct. 824, 193 L.Ed.2d 766. Limitation of Actions 95(3)

Dismissal without prejudice, rather than a stay to allow parties to pursue arbitration, prejudiced plaintiff and was improper in action under Regulation of Manufacturers, Distributors, and Dealers Act and Unfair Trade Practices Act; statute of limitations could bar refiling of claims that were not arbitrated. Widener v. Fort Mill Ford (S.C.App. 2009) 381 S.C. 522, 674 S.E.2d 172. Alternative Dispute Resolution 196

Limitations period for golf club members’ claims against golf course owners under Unfair Trade Practices Act (UTPA) for allegedly using tee‑time schedule to solicit new members, and then unilaterally revoking schedule, accrued as of date owners announced intention to revoke. Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership (S.C.App. 1998) 331 S.C. 385, 503 S.E.2d 184, rehearing denied, certiorari denied. Limitation Of Actions 95(16)

**SECTION 39‑5‑160.** Article shall be cumulative.

The powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.

HISTORY: 1962 Code Section 66‑71.15; 1971 (57) 369.

CROSS REFERENCES

Application of this section to violations regarding privacy of genetic information, see Section 38‑93‑60.

RESEARCH REFERENCES

ALR Library

66 ALR 6th 351 , Validity, Construction and Application of State Laws Concerning, Relating To, or Encompassing Disclosure of and Tampering With Motor Vehicle Odometer‑Validity of Statutory Provisions, Construction of Statute and...

Encyclopedias

S.C. Jur. Action Section 15, Exclusive or Cumulative Remedies.

S.C. Jur. Civil Conspiracy Section 11, Unfair Trade Practices.

S.C. Jur. Civil Conspiracy Section 15, Evidence.

Treatises and Practice Aids

11 Causes of Action 267, Cause of Action for Violation of State Deceptive Trade Practices or Consumer Protection Statutes in Connection With Sale of Motor Vehicle.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea? 33 S.C. L. Rev. 479 (March 1982).

NOTES OF DECISIONS

In general 1

1. In general

The exemption in the Unfair Trade Practices Act (UTPA), Sections 39‑5‑10 et seq., for “ [a]ctions or transactions permitted under laws administered by any regulatory body or officer” did not exclude from UTPA the actions of a car dealer who failed to disclose to buyers that a car had previously been involved in an accident, since the intent of Section 39‑5‑40 was to avoid conflict by excluding “those actions or transactions which are allowed or authorized by regulatory agencies or other statutes”; this interpretation was buttressed by Section 39‑5‑160 providing that “ [t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.” Ward v. Dick Dyer and Associates, Inc. (S.C. 1991) 304 S.C. 152, 403 S.E.2d 310. Antitrust And Trade Regulation 152

Sale of mobile homes is activity exempt from Unfair Trade Practices Act because it is subject to regulatory control and imposition of penalties by Manufactured Housing Board. Scott v. Mid Carolina Homes, Inc. (S.C.App. 1987) 293 S.C. 191, 359 S.E.2d 291. Antitrust And Trade Regulation 152

**SECTION 39‑5‑170.** Vehicle glass repair business; unlawful practices.

It is an unfair trade practice and unlawful for a person who is acting on behalf of or engaged in a vehicle glass repair business to offer or make a payment or transfer money or other consideration to:

(1) a third person for the third person’s referral of an insurance claimant to the vehicle glass repair business for the repair or replacement of vehicle safety glass;

(2) an insurance claimant in connection with the repair or replacement of vehicle safety glass; or

(3) waive, rebate, give, or pay all or part of an insurance claimant’s casualty or property insurance deductible as consideration for selecting the vehicle glass repair business.

HISTORY: 2002 Act No. 215, Section 1, eff April 22, 2002.

RESEARCH REFERENCES

Encyclopedias

74 Am. Jur. Proof of Facts 3d 63, Scams and Cons.

Treatises and Practice Aids

54 Causes of Action 2d 111, Cause of Action for Violation of State Consumer Protection or Deceptive Trade Practices Statute in Connection With Real Estate Transaction.

**SECTION 39‑5‑180.** Vehicle glass repairs; false claims.

It is an unlawful practice for a person who sells, repairs, or replaces vehicle glass to knowingly:

(1) submit a claim to an insurer or a third party administrator for vehicle glass repair, replacement, or related services:

(a) if the vehicle glass was not damaged prior to repair or replacement;

(b) if the services were not provided;

(c) showing work performed in a geographical area that in fact was not the location where the services were provided and that results in a higher payment than would otherwise be paid to the person by the policyholder’s insurer;

(d) without having an authorization by the owner, lessee, or insured driver of the vehicle for the repair of the vehicle;

(e) showing work performed on a date other than the date the work was actually performed and resulting in a change of insurance coverage status; or

(f) making any other material misrepresentation related to the repair or an insurance claim submitted in relation to that repair;

(2) advise a policyholder to falsify the date of damage to the vehicle glass that results in a change of insurance coverage for repair or replacement of the vehicle glass;

(3) falsely sign on behalf of a policyholder or another person a work order, insurance assignment form, or other related form in order to submit a claim to an insurer for vehicle glass repair or replacement or for related services;

(4) intentionally misrepresent to a policyholder or other person:

(a) the price of the proposed repairs or replacement being billed to the policyholder’s insurer; or

(b) that the insurer or third party administrator has authorized the repairs or replacement of the glass of the insured vehicle;

(5) represent to a policyholder or other person that the repair or replacement will be paid for entirely by the policyholder’s insurer and at no cost to the policyholder unless the insurance coverage has been verified by a person who is employed by, or is a producer contracted with the policyholder’s insurer, or is a third party administrator contracted with the insurer;

(6) add to the damage of vehicle glass before repair in order to increase the scope of repair or replacement or encourage a policyholder or other person to add to the damage of vehicle glass before repair;

(7) perform work clearly and substantially beyond the level of work necessary to repair or replace the vehicle glass to put the vehicle back into a pre‑loss condition in accordance with accepted or approved reasonable and customary glass repair or replacement techniques;

(8) engage in business practices that have the effect of providing rebates or something of value to an insured who files a claim to pay for the glass repair or replacement services provided; or

(9) intentionally misrepresent the relationship of the glass repair facility to the policyholder’s insurer. For the purposes of determining whether a person intended the misrepresentation, the person presumably intended the misrepresentation if he was engaged in a regular and consistent pattern of misrepresentation. For the purposes of determining whether a defendant knew of any particular element of the prohibited activity, the person presumably had knowledge if he was engaged in a regular and consistent pattern of the prohibited activity.

HISTORY: 2012 Act No. 236, Section 2, eff June 18, 2012.

ARTICLE 3

Merchandising Unfair Trade Practices

**SECTION 39‑5‑310.** Definitions.

For the purpose of this article:

(1) A “wholesale” sale shall be one made to any person for the purpose of resale at retail; and

(2) A “retail sale” shall be a sale for the purpose of consumption or use.

HISTORY: 1962 Code Section 66‑81; 1952 Code Section 66‑81; 1942 Code Section 6640; 1939 (41) 425.

LAW REVIEW AND JOURNAL COMMENTARIES

Consumer Protection and the Proposed “South Carolina Unfair Trade Practices Act”. 22 S.C. L. Rev. 767.

Milk Price Fixing in South Carolina. 19 S.C. L. Rev. 389.

**SECTION 39‑5‑320.** Sale by wholesaler at retail for as low a price as at wholesale shall be unfair trade practice.

It is declared an unfair trade practice and unlawful for any person who is in both the wholesale and retail business of selling merchandise to sell merchandise of like grade and quality at retail at a price as low as such person sells the same merchandise at wholesale in the same town or locality.

HISTORY: 1962 Code Section 66‑82; 1952 Code Section 66‑82; 1942 Code Section 6640; 1939 (41) 425.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 80, Price Discrimination Statutes.

**SECTION 39‑5‑325.** Unfair trade practice for retailer of motor fuel to sell below cost with intent or effect of impairing competition; exemptions; records to support claimed exemption.

(A) Except as otherwise permitted to meet competition as provided by this chapter, it is declared an unfair trade practice and unlawful for any person who is in the retail business of selling motor fuel to sell motor fuel of like grade and quality at retail at a price which is below the cost of acquiring the product plus taxes and transportation where the intent or effect is to destroy or substantially lessen competition or to injure a competitor.

(B) The provisions of subsection (A) shall not apply in the following situations where:

(1) motor fuel is advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in such motor fuel, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of such motor fuel advertised, offered for sale, or to be sold;

(2) motor fuel is sold upon the final liquidation of a business;

(3) motor fuel is advertised, offered for sale, or sold by any fiduciary or other officer under the order or direction of any court;

(4) motor fuel is sold for promotional purposes including, but not limited to, grand opening, anniversary, or promotional sales. However, the total number of days for promotional sales shall not exceed fourteen days within each calendar year; or

(5) an isolated or inadvertent incident occurs that does not exceed two days.

(C) Any person who is in the retail business of selling motor fuel claiming any exemption from subsection (A) under the exceptions provided in subsection (B) must keep and maintain records substantiating this claim. These records must be made available to the Office of the Attorney General on request made in connection with any investigation of a possible violation of this section by the Attorney General.

HISTORY: 1993 Act No. 161, Section 1, eff sixty days after approval (approved June 15, 1993); 2017 Act No. 29 (S.359), Section 1, eff May 10, 2017.

Effect of Amendment

2017 Act No. 29, Section 1, in (C), in the second sentence, deleted “Department of Consumer Affairs and”, substituted “Office of the Attorney General” for “the Attorney General’s Office”, and deleted “department or the” following “possible violation of this section by the”.

RESEARCH REFERENCES

ALR Library

26 ALR 6th 249 , Validity, Construction, and Application of State Statutory Provisions Prohibiting Sale of Gasoline Below Cost.

41 ALR 4th 612 , Validity, Construction, and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost‑Modern Cases.

Attorney General’s Opinions

The owner of a gasoline station injured by a competitor’s below‑cost sales of gasoline could file a lawsuit to seek relief under Section 39‑5‑325. S.C. Op.Atty.Gen. (April 24, 2012) 2012 WL 1561871.

NOTES OF DECISIONS

In general 1

Meeting competition 2

Standard of proof 3

Validity 1/2

1 2. Validity

Provision of South Carolina’s Unfair Trade Practices Act (UTPA), prohibiting retail gasoline sellers from selling gasoline at a price below cost where the intent or effect was to destroy or substantially lessen competition or to injure a competitor, was reasonably related to state’s legitimate interest of preventing predatory pricing, and thus, provision did not violate substantive due process. R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc. (C.A.4 (S.C.) 2003) 353 F.3d 334. Antitrust And Trade Regulation 455; Constitutional Law 4290

1. In general

Question of whether gasoline station violated South Carolina Unfair Trade Practices Act (UTPA) by reducing its price to maintain two‑cent per gallon differential between its price and price of competitor’s major brand gasoline presented novel issue of state law that should have been certified to Supreme Court of South Carolina. R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc. (C.A.4 (S.C.) 2001) 23 Fed.Appx. 141, 2001 WL 1528458, Unreported. Federal Courts 3107

Under South Carolina Unfair Trade Practices Act’s (SCUTPA) motor fuel pricing provision, independent retailers are not allowed to sell below cost in order to “meet competition” from national brand gasoline retailers; legislature intended an exemption for below‑cost sales only to match the existing price of a competitor. R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc. (S.C. 2002) 352 S.C. 34, 572 S.E.2d 288. Antitrust And Trade Regulation 468

2. Meeting competition

“Meet competition,” as used in South Carolina Unfair Trade Practices Act’s (SCUTPA) motor fuel pricing provision, means to meet the existing price charged by a competitor, and thus a gasoline retailer does not qualify for the exemption for below‑cost sales if it sells below cost at a price less than that of the competition. R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc. (S.C. 2002) 352 S.C. 34, 572 S.E.2d 288. Antitrust And Trade Regulation 468

3. Standard of proof

As predicted by the Court of Appeals, provision of South Carolina’s Unfair Trade Practices Act (UTPA), prohibiting retail gasoline sellers from selling gasoline at a price below cost where the intent or effect was to destroy or substantially lessen competition or to injure a competitor, required showing that the intent or effect of the below‑cost selling be to injure the competitor or that the intent or effect of the below‑cost selling be to destroy or substantially lessen competition; it did not require showing of injury to competition as a whole. R.L. Jordan Oil Co. of North Carolina, Inc. v. Boardman Petroleum, Inc. (C.A.4 (S.C.) 2003) 353 F.3d 334. Antitrust And Trade Regulation 468

**SECTION 39‑5‑330.** Sale by wholesaler at retail at lower price than at wholesale shall be unfair trade practice.

It is declared an unfair trade practice and unlawful for any person who is in both the wholesale and retail business of selling merchandise to sell merchandise of like grade and quality at retail at a lower price than such person sells the same merchandise at wholesale in the same town or locality.

HISTORY: 1962 Code Section 66‑83; 1952 Code Section 66‑83; 1942 Code Section 6640; 1939 (41) 425.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 80, Price Discrimination Statutes.

NOTES OF DECISIONS

In general 1

1. In general

District court appropriately refused to allow jury to decide whether gasoline retailer could recover for wholesaler’s alleged violation of South Carolina Unfair Trade Practices Act (UTPA) by acting with its subsidiary as one entity in selling gasoline at retail for less than wholesale in same area, absent any actual proof that wholesaler and its retail subsidiary were the same entity, and in light of wholesaler’s evidence that they were separate entities. Havird Oil Co., Inc. v. Marathon Oil Co., Inc. (C.A.4 (S.C.) 1998) 149 F.3d 283. Antitrust And Trade Regulation 363

**SECTION 39‑5‑340.** Liability of wholesaler for sale at wholesale prices by retail establishment controlled by wholesaler.

When a wholesaler owns a controlling interest or stock in a retail establishment or corporation and creates, organizes or maintains such retail outlet for the purpose of violating this article by making retail sales therefrom at a price that would be in violation of this article if made at retail directly by the wholesaler, such wholesaler shall be liable also for any violation of this article by any such retailer.

HISTORY: 1962 Code Section 66‑84; 1952 Code Section 66‑84; 1942 Code Section 6640; 1939 (41) 425.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 80, Price Discrimination Statutes.

**SECTION 39‑5‑350.** Exemptions.

(A) No part of this article shall be construed to apply to sales at wholesale to hotels, restaurants, colleges, bona fide licensed contractors, farmers buying for their plantations, including labor on their own farms, boardinghouses, religious institutions, or county, city, federal, or state institutions or departments or to cooperative purchases for redistribution among farmers. Retail sales of merchandise of like grade and quality at a price to meet existing competition at any time in any town or locality are also exempt from the provisions of this article. But if such competition is created by any person in violation of this article or when any two or more persons contend that they are meeting the competition of the other and all would be making retail sales in violation of this article, except for the above provisions allowing existing competition to be met, any retailer affected thereby may enjoin all in such category from continuing such practices in any court of competent jurisdiction in this State.

(B) Any person selling motor fuel at wholesale or retail at a price below the actual cost of acquiring the product, including transportation and taxes, claiming exemption from this article on the basis that such sales of motor fuel by that person are at a price to meet existing competition under subsection (A) shall keep and maintain records substantiating each effort to meet the competition, including the identity and place of business of the competitors whose competition that person is meeting. The records must be made available to the Attorney General on request made in connection with any investigation of a possible violation of this article by the Attorney General.

HISTORY: 1962 Code Section 66‑85; 1952 Code Section 66‑85; 1942 Code Section 6640; 1939 (41) 425; 1993 Act No. 161, Section 2, eff sixty days after approval (approved June 15, 1993); 2017 Act No. 29 (S.359), Section 2, eff May 10, 2017.

Effect of Amendment

The 1993 amendment designated the existing material subsection (A) and added subsection (B).

2017 Act No. 29, Section 2, in (B), deleted “of this section” following “under subsection (A)”, deleted “the Department of Consumer Affairs and” following “made available to”, and deleted “department or the” following “possible violation of this article by the”.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 80, Price Discrimination Statutes.

**SECTION 39‑5‑360.** Penalties.

Each sale in violation of the terms of this article shall be declared a separate offense and the penalty for each violation thereof shall be a fine of not more than one hundred dollars or imprisonment for not more than thirty days in the discretion of the court.

HISTORY: 1962 Code Section 66‑86; 1952 Code Section 66‑86; 1942 Code Section 6640; 1939 (41) 425.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 80, Price Discrimination Statutes.

ARTICLE 5

Bidding and Negotiation of Contracts for Exhibition of Motion Pictures

**SECTION 39‑5‑510.** Definitions.

When used in this article:

(a) “Theater” means any establishment in which motion pictures are exhibited to the public regularly for a charge.

(b) “Distributor” means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental or licensing.

(c) “Exhibitor” means any person engaged in the business of operating one or more theaters.

(d) “Exhibit” or “exhibition” means showing a motion picture to the public for a charge.

(e) “Invitation to bid” means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a motion picture.

(f) “Bid” means a written or oral offer or proposal by an exhibitor to a distributor in response to an invitation to bid or otherwise stating the terms under which the exhibitor will agree to exhibit a motion picture.

(g) “License agreement” means any contract, agreement, understanding or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

(h) “Trade screening” means the showing of a motion picture by a distributor at a location within the State or in the Film Exchange Center in the State of North Carolina which is open to any exhibitor interested in exhibiting the motion picture.

(i) “Blind bidding” means the bidding for, negotiating for or offering or agreeing to terms for the licensing or exhibition of a motion picture if the motion picture has not been trade screened within the State or in the Film Exchange Center in the State of North Carolina before any such event has occurred.

(j) “Run” means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A “first run” is the first exhibition of a picture in the designated area; a “second run” is the second exhibition and “subsequent runs” are subsequent exhibitions after the second run.

HISTORY: 1978 Act No. 523 Section 2; 1979 Act No. 33 Sections 1, 2.

**SECTION 39‑5‑520.** Blind bidding prohibited; notice of trade screenings required.

(a) Blind bidding is prohibited in this State. No bids shall be returnable; no negotiations for the exhibition or licensing of a motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any motion picture in this State before the motion picture has been trade screened in the State or in the Film Exchange Center in the State of North Carolina.

(b) A distributor shall include in each invitation to bid for a motion picture for exhibition in the State, if the motion picture has not already been trade screened, the date, time and place of trade screening of the motion picture.

(c) A distributor shall provide reasonable and uniform notice to exhibitors in the State of all trade screenings of motion pictures he is distributing for exhibition within this State. The notice may be by mail or by publication having general circulation among exhibitors in the State.

HISTORY: 1978 Act No. 523 Section 3; 1979 Act No. 33 Section 3.

Attorney General’s Opinions

No criminal liability attaches under a statute declaring blind bidding for the exhibition of movies to be unlawful, where a distributor receives a blind bid in writing and accepts it orally prior to the effective date of the statute, but the bidder does not receive written acceptance of the bid until after the effective date of the statute. 1978 Op Atty Gen, No 78‑145, p 179.

**SECTION 39‑5‑530.** Contents of invitation to bid; nature and examination of bids; rebids.

If bids are solicited from exhibitors for the licensing of a motion picture in the State:

(a) The invitation to bid shall specify (1) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run and the geographic area for each run; (2) the names of all exhibitors who are being individually solicited; (3) the date and hour the invitation to bid expires and (4) the location, including the address, where the bids will be opened at the distributor’s place of business in the film exchange center.

(b) All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors or their agents.

(c) After being opened, bids shall be subject to examination by exhibitors or their agents. Within seven days, exclusive of Saturday and Sunday, after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

(d) Once bids are solicited, the distributor shall license the picture only by bidding and must solicit rebids if he does not accept any of the submitted bids.

HISTORY: 1978 Act No. 523 Section 4.

**SECTION 39‑5‑540.** Waiver of blind bidding prohibited.

If the first run exhibitors within any county in this State desire to waive the provisions of this article for the purpose of blind bidding on a movie to be shown within that county, the exhibitors may waive the provisions and blind bid if all exhibitors within that county who exhibit first run movies agree in writing to such waiver; and the distributors shall have the right to request waivers from any and all first run exhibitors.

HISTORY: 1978 Act No. 523 Section 5.

**SECTION 39‑5‑550.** Applicability of article.

The provisions of this article shall apply to all motion picture licensing contracts executed within or without this State for the exhibition of motion pictures in South Carolina.

HISTORY: 1978 Act No. 523 Section 6A.

**SECTION 39‑5‑560.** Penalty for violation of article.

Any person violating the provisions of this article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than ten thousand dollars or be imprisoned for not more than six months.

HISTORY: 1978 Act No. 523 Section 6.

RESEARCH REFERENCES

ALR Library

48 ALR 6th 511 , Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts‑Pyramid or Ponzi or Referral Sales Schemes.

Encyclopedias

S.C. Jur. Appeal and Error Section 77, Pleadings.

S.C. Jur. Appeal and Error Section 78, Pre‑Trial Motions and Orders.

S.C. Jur. Appeal and Error Section 83, Argument in the Briefs.

S.C. Jur. Attorney and Client Section 64, South Carolina Unfair Trade Practices Act.

S.C. Jur. Intellectual Property Section 16, State Law Governs Rights that Are Not Equivalent to the Exclusive Rights Under the Federal Copyright Statute.

S.C. Jur. Private Business Franchises and Business Opportunities Section 50, State Antitrust Laws.

S.C. Jur. South Carolina Rules of Civil Procedure Section 50.0, Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

S.C. Jur. Unfair Trade Practices Act Section 3, Unfairness or Deception.

ARTICLE 7

Pyramid Promotional Scheme Prohibition Act

**SECTION 39‑5‑710.** Short title.

This article must be known and may be cited as the “Pyramid Promotional Scheme Prohibition Act”.

HISTORY: 2017 Act No. 39 (H.3883), Section 1, eff May 10, 2017.

**SECTION 39‑5‑720.** Definitions.

As used in this article:

(1) “Compensation” means the payment of money, a thing of value, or a benefit.

(2) “Consideration” means either the payment of money or the provision of a thing of value for the purchase of a product, good, service, or intangible property. Consideration does not include:

(a) the purchase of a product, furnished at cost, for use in making a sale, but not for resale, of the purchased product itself; or

(b) time and effort spent to pursue a sale or recruiting activity.

(3) “Pyramid promotional scheme” means a plan or operation in which an individual pays consideration for the right to receive compensation based primarily upon recruiting other individuals into the plan or operation instead of selling products or services to ultimate users for their use or consumption.

(4) “Ultimate users” are individuals who consume or use the products or services, whether or not they are participants in the plan or operation.

HISTORY: 2017 Act No. 39 (H.3883), Section 1, eff May 10, 2017.

**SECTION 39‑5‑730.** Pyramid promotional schemes prohibited.

A pyramid promotional scheme is an unfair trade practice pursuant to Section 39‑5‑20(a), and accordingly, is prohibited in this State.

HISTORY: 2017 Act No. 39 (H.3883), Section 1, eff May 10, 2017.