

2007

# Ray William Garrard v. Gateway Financial Services, Inc.; Civil Process Services & Investigations, LLC; and Granite Furniture Company : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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Ray William Garrard,

Plaintiff and Appellant,

v.

Gateway Financial Services, Inc.; Civil  
Process Services & Investigations, LLC;  
and Granite Furniture Company,

Defendant and Appellee.

**BRIEF OF APPELLANT**

**Case No. 20070968-SC**

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Appeal from the Third Judicial District Court, Salt Lake County, State of Utah  
Honorable Deno G. Himonas, Case No. 040912063

---

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MAR - 6 2008

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May 22, 2008

Utah Supreme Court  
Attn. Celia  
Via facsimile: (801) 578-3999

Re: **RAY WILLIAM GARRARD V. GATEWAY FINANCIAL SERVICES, ET AL.,  
APPELLATE CASE NO. 20070968-SC**

Dear Celia:

I'm writing this letter to give notice that Civil Process Services & Investigations, LLC has chosen not to file a responsive brief. The costs involved in responding are too great of a hardship for the business. Civil Process Services & Investigations has already incurred significant legal fees in defending this action on the trial court level. The Appellant is seeking a policy change to a Utah Statute, with this appeal, which should be left up to the legislature and to this Court.

Sincerely,

Reed R. Braithwaite  
Attorney

cc. Civil Process Services & Investigations, LLC

---

IN THE UTAH SUPREME COURT

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Plaintiff and Appellant,

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## STATEMENT OF JURISDICTION

This appeal is taken by Plaintiff and Appellant Ray William Garrard (“Garrard”) from the trial court’s grant of directed verdict in favor of Defendant and Appellee Civil Process Services & Investigations, LLC (“CPSI”). The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code section 78-2-2(3)(j). *See* Utah Code Ann. § 78-2-2(3)(j). Also, in its January 16, 2008 Order, the supreme court elected to retain this appeal. *See* R. 736 (vacating transfer to Utah Court of Appeals).

## STATEMENT OF THE ISSUE

The issue on appeal is whether the trial court erred in granting directed verdict against Garrard on his Utah Unfair Practices Act (the “UUPA”) cause of action against CPSI, on the basis that the “Cigarette Rule”<sup>1</sup> is an improper test to determine whether conduct violates the UUPA, Utah Code section 13-5-1, *et seq.*

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<sup>1</sup> The Cigarette Rule is the set of factors, adopted by the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), that the Federal Trade Commission (the “FTC”) “considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is unfair.” *Pepsi-Cola Metro. Bottling Corp, Inc. v. Checkers, Inc.*, 754 F.2d 10, 17 (1st Cir. 1985).

The Cigarette Rule factors are as follows:

“(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).”

## STANDARD OF REVIEW

A trial court's grant of directed verdict is reviewed for correctness. *See Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 10, 104 P.3d 1185 ("We review a trial court's grant of directed verdict for correctness."); *Dahlstrom v. Nass*, 2005 UT App 433, ¶ 7, 126 P.3d 773 (same). All facts and the inferences drawn therefrom must be viewed in the light most favorable to the party against whom directed verdict was entered. *See Stevensen v. Goodson*, 924 P.2d 339, 342 (Utah 1996) ("In reviewing grants of directed verdicts . . . , we view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party."); *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶ 1 n.1, 166 P.3d 621 (same).

## PRESERVATION OF ISSUE

The issue was preserved by Garrard's objection and oral argument in opposition to CPSI's motion for directed verdict and Garrard's memorandum of legal authority filed with the trial court. *See* R. 738 at 187:18-191:8; R. 586-602.

## DETERMINATIVE STATUTES AND RULE

The determinative statutes and rule are Utah Code sections 13-5-17 and 13-11-2(4) and Utah Administrative Code rule 152-1-1(B)(2)(a), respectively. Section 13-5-17 of the UUPA reads as follows:

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*Sperry*, 405 U.S. at 244 n.5 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355(1964)). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a letter extent in meets all three." *Saturn Constr. Co., Inc. v. Premier Roofing Co., Inc.*, 680 A.2d 1274, 1283 (Conn. 1996)).



The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

Utah Code Ann. § 13-5-17 (2004) (internal footnote omitted).

Section 13-11-2(4) acknowledges the Legislature’s intent that Utah law be consistent with the Federal Trade Commission Act (the “FTCA”), and reads as follows:

This act shall be construed liberally to promote the following policies:

....

(4) To make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection . . . .

*Id.* § 13-11-2(4) (2004) (internal footnote citing 15 U.S.C.A. § 41, *et seq.*, omitted).<sup>2</sup>

Rule 152-1-1(B)(2)(a) provides a framework for interpreting the UUPA, and reads as follows:

Without limiting the scope of any statute or rule, this rule shall be liberally construed and applied to promote its stated purposes and policies. The purposes and policies of this rule are to:

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<sup>2</sup> Although section 13-11-2 is part of the Utah Consumer Sales Practices Act (the “UCSPA”), it and the UUPA should be interpreted in harmony. Indeed, courts should read statutes “in harmony with other statutes under the same and related chapters.” *Roberts v. Erickson*, 851 P.2d 643, 644 (Utah 1993) (per curiam). Both the UUPA and the UCSPA are contained in Title 13 of the Utah Code, which governs commerce and trade. Compare Utah Code Ann. § 13-5-1, *et seq.*, with *id.* § 13-11-1, *et seq.* Moreover, the administrative rules that interpret the UUPA group it together with the UCSPA. See Utah Admin. Code R152-1-1(B)(2)(a); see also Utah Admin. Code R152-1-1(A) (“These rules are promulgated pursuant to Subsection 13-2-5(1) to assist the orderly administration of the statutes listed in Utah Code Section 13-2-1.”); Utah Code Ann. § 13-2-1 (2004) (listing the UUPA and UCSPA).

(a) protect consumers from individuals and businesses who have engaged in and committed deceptive acts or practices, or have engaged in and committed unconscionable acts or practices.

Utah Admin. Code R152-1-1(B)(2)(a); *see also* Utah Admin. Code R152-1-1(A) (“These rules are promulgated pursuant to Subsection 13-2-5(1) to assist the orderly administration of the statutes listed in Utah Code Section 13-2-1.”); Utah Code Ann. § 13-2-1 (2004) (listing the UUPA).

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This is the ideal case for the Utah Supreme Court to, in a single decision, fulfill the Utah Legislature’s intent and policy goals in enacting the UUPA, and bring the UUPA into conformity with the United States Supreme Court’s precedent and the growing number of sister jurisdictions’ interpretation of similar unfair practices statutes.

Garrard brought this action, in an effort to hold CPSI accountable for his injuries caused by CPSI’s fraudulent service of process, and subsequent attempts to cover up its fraud. CPSI first claimed that its agents personally served Garrard’s wife, Marva Garrard. However, at the time of the purported personal service, Mrs. Garrard had been dead for over a year. Nevertheless, the fraudulent service of process document was used to obtain a default judgment against Garrard and his deceased wife.

When Garrard’s counsel exposed CPSI’s fraudulent service of process, CPSI then claimed there was a mix up and that CPSI’s agent had actually personally served Garrard at his home. Once again, however, CPSI’s purported service of process proved fraudulent. At the time Garrard was purportedly served, he was on duty as a temple

worker in the St. George Temple, twenty miles from his home. Eventually, Garrard was able to set aside the default judgment, but only after hiring counsel, filing this action, and incurring thousands of dollars in attorney fees.

Through his UUPA cause of action against CPSI, Garrard sought his statutorily prescribed damages. The trial court declined to utilize the Cigarette Rule for determining whether CPSI's conduct was unfair and an actionable violation of the UUPA, confined violations of the UUPA to a narrow reading of the statute, and entered directed verdict against Garrard on his UUPA claim against CPSI. Thus, under the current state of the law, only conduct within a narrow interpretation of the UUPA is actionable. By following and applying the Cigarette Rule, the Utah Supreme Court will properly expand the reach of the UUPA to encompass unfair conduct like that of CPSI, which was the intent of the Utah Legislature in enacting the UUPA and is consistent with other jurisdictions' interpretations of similar unfair practices acts.

For the reasons discussed herein, Garrard respectfully asks the Utah Supreme Court to reverse the trial court's grant of directed verdict in CPSI's favor, and remand to the trial court for additional, necessary proceedings.

## **II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

On June 10, 2004, Garrard filed this civil action against Gateway Financial Services, Inc. ("Gateway"),<sup>3</sup> CPSI, and Granite Furniture Company ("Granite").<sup>4</sup> *See R.*

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<sup>3</sup> While Gateway was a Defendant in the action before the trial court, it is not involved in this appeal.

1-43. Garrard asserted causes of action against Gateway for violation the Federal Debt Collection Practices Act, violation of the UUPA, and declaratory judgment; against Granite for breach of contract, breach of the covenant of good faith and fair dealing, violation of the UUPA, and declaratory judgment; and against CPSI for violation of the UUPA. *See* R. 8-12 ¶¶ 42-68.

Prior to trial, Garrard and Gateway reached a settlement. R. 279. Thus, Garrard dismissed his claims against Gateway with prejudice. *See* R. 286-88.

Also prior to trial, the trial court granted in part Granite's motion for summary judgment. *See* R. 630-36. Specifically, the trial court entered summary judgment in favor of Granite on Garrard's causes of action for breach of contract and breach of covenant of good faith and fair dealing.<sup>5</sup> *See* R. 635. Thus, the trial involved only Garrard's UUPA and declaratory judgment claims against Granite and CPSI.

At trial, after Garrard rested, the trial court granted Granite and CPSI's motions for directed verdict on Garrard's remaining claims. *See* R. 738 at 213:21-23; R. 709 ¶ 22. With regard to Garrard's UUPA claim against CPSI, the trial court declined to adopt the Cigarette Rule as the test determining whether CPSI's conduct constituted a violation of the UUPA. *See* R. 708 ¶¶ 18-19. The trial court based its ruling on its legal conclusions that CPSI's conduct did not violate the express provisions of the UUPA, the UUPA is not ambiguous, the plain language of the UUPA does not include the Cigarette Rule, and the

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<sup>4</sup> While Granite was a Defendant in the action before the trial court, it is not involved in this appeal.

<sup>5</sup> Garrard does not challenge the trial court's summary judgment ruling in this appeal.

legislature could have expressly incorporated the Cigarette Rule, but has not. *See* R. 707 ¶ 17; R. 708 ¶¶ 18-19. The trial court's ruling was memorialized in the November 9, 2007 Findings and Conclusions, from which Garrard now appeals in part. *See* R. 704-10. In particular, Garrard appeals the trial court's grant of CPSI's motion for directed verdict on his UUPA cause of action. *See* R. 728-30.

### STATEMENT OF FACTS

On July 7, 1999, Garrard and his wife, Marva Garrard, who is now deceased, went furniture shopping. *See* R. 705 ¶ 3. The Garrards ultimately decided to buy a bedroom set from Granite. *See id.* ¶ 5.

The Garrards timely paid for the furniture in full, but arguably did not timely pay for certain finance charges about which they were unaware. *See* R. 369-70, 372-73, 375-76; R. 738 at 45:25-46:9 and 49:10-50:2. At some unspecified time, Gateway, a collection agency, became involved in a dispute regarding the Garrards' payment for the finance charges. *See* R. 706 ¶ 10. Gateway caused CPSI to attempt to serve the Garrards with process in a small claims action. *See id.* On January 28, 2004, the Third District Court, Small Claims Department, entered a default judgment against the Garrards for \$897.52, based upon CPSI's purported service. *See id.*; R. 378.

After receiving notice of the judgment, Garrard was forced to retain attorneys. *See* R. 706 ¶ 11. Because Mr. Garrard had not been personally served, Garrard's counsel requested copies of CPSI's service of process from Gateway. *See* R. 351. In response, Gateway provided Garrard's counsel with a certificate of service upon Mrs. Marva Garrard, which CPSI purported to have served upon her personally, on November 28,

2003. *See* R. 346. However, in a subsequent letter, Garrard’s counsel pointed out to Gateway that CPSI’s alleged personal service on Mrs. Garrard on November 28, 2003, could not be genuine because she had passed away on November 13, 2002 – over a year earlier. *See* R. 706 ¶ 11; R. 351-52.

Gateway responded by indicating that it had researched the service of process upon the Garrards and discovered that it was Mr. Ray Garrard that CPSI had served on November 28, 2003. *See* R. 707 ¶ 12; R. 354. Gateway produced a new CPSI certificate of service, this time indicating that it was Garrard who was served at his home. *See* R. 355. Garrard’s counsel responded by pointing out that CPSI could not have served Garrard as claimed because, at the time that CPSI claimed to have personally served him, Garrard was on duty as a temple worker in the St. George Temple, twenty miles from his home.<sup>6</sup> *See* R. 707 ¶ 12; R. 358-59; R. 738 at 60:15-23. Additionally, the later-produced certificate of service upon Garrard contained changes in its language to reflect changes in the controlling statutes. *See* R. 355. Importantly, the statutory changes took place after the purported service upon Garrard, indicating that CPSI backdated the later-produced certificate of service.<sup>7</sup> *See* R. 738 at 127:21-129:9; R. 355-56; *compare* Utah Code Ann. § 78-12a-2 (pre-2003 amendment), *with id.* § 78-12a-2 (post-2003 amendment).

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<sup>6</sup> Garrard’s presence at the St. George Temple at the relevant time was confirmed at trial by testimony from Garrard and the St. George Temple Recorder, Lavell Christensen. Mr. Christensen also confirmed this testimony by reviewing the attendance records from the St. George Temple. *See* R. 707 ¶ 12; R. 738 at 58:8-61:5, 78:1-23, and 102:20-103:25.

<sup>7</sup> CPSI’s credibility was further undermined by Garrard’s trial examination of CPSI’s agent, who claimed to remember each of literally hundreds of thousands of services, but

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could not remember the color of the examining attorney's tie. That interesting line of questioning proceeded as follows:

Q. Okay. Do you have a specific memory of conducting this service?

A. I do remember this service, yes.

....

Q. Okay. And do you recall what the house looked like?

A. I do.

....

I've served more than 200,000 documents in my career.

....

Q. Okay. Mr. Stubbs, having served 200,000 process services, you're telling us – you're telling this jury that you remember – of those 200,000, you remember this one in particular?

A. I remember this one in particular.

Q. Any do you remember, for example, the one that you did immediately before this?

A. Absolutely.

Q. And you remember the one immediately after it?

A. I remember both of them.

....

Q. Okay. Tell us, Mr. Stubbs because I'm curious: The person that you served immediately before Mr. Garrard is served – and you remember exactly what he was wearing four years ago – what was the person that you served immediately before you served Mr. Garrard?

A. It was a female.

Q. And what was she wearing?

A. She was wearing a dark skirt. She had black hair.

Q. Okay. And let's – what about the person that was served before that? Do you remember who that was?

....

Ultimately, Gateway agreed to remove the default judgment and, to that end, an order vacating the judgment was entered on September 30, 2004. *See* R. 707 ¶ 13. Nevertheless, Garrard, an 80 year-old retiree, incurred \$5,897.25 in attorney fees and costs to set aside the default judgment caused by CPSI's wrongful and fraudulent conduct. *See* R. 738 at 109:11-25. As a result, Garrard filed suit against CPSI for violating the UUPA. *See* R. 10-11 ¶¶ 62-66.

---

A. Absolutely.

Q. Okay. Tell me what they wore.

A. Well, there were two children there and they were wearing shorts and different things, playing on the swingset.

[MR. MAGLEBY TURNS WAY FROM MR. STUBBS]

Q. Okay. *What color is my tie?*

A. Does it matter?

Q. Can you tell me?

A. I'm not serving a paper. There's no emotion in it.

Q. [STILL FACING AWAY FROM MR. STUBBS] Well, sir, you have been on the stand for about half an hour and I've been asking you questions, and not necessarily friendly ones. Can you tell me what color my tie is?

A. Darker color.

Q. Darker color. Anything more specific than that?

A. No.

R. 738 at 117:11-119:22 and 148:12-150:25 (emphases added). Counsel's tie was silver and green, and not a "darker color."



At trial, after Garrard rested, the trial court granted CPSI's motion for directed verdict on Garrard's UUPA claim. *See* R. 708 ¶¶ 18-19. The trial court's ruling is memorialized in the November 9, 2007 Findings and Conclusions, from which Garrard now appeals in part. *See* R. 704-10.

### **SUMMARY OF THE ARGUMENT**

The Utah Supreme Court should reverse the trial court's entry of directed verdict against Garrard on his UUPA claim against CPSI. The trial court erred by declining to apply the Cigarette Rule factors for determining whether CPSI's conduct was unfair, and thus violated the UUPA.

The United States Supreme Court has endorsed the Cigarette Rule, which is a broad definition of unfair competition under section 5(a)(1) of the Federal Trade Commission Act (the "FTCA"), which is similar to the UUPA. *See* 15 U.S.C.A. § 45(a)(1); Utah Code Ann. § 13-5-17. Specifically, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Court ruled that a party is liable under the FTCA if it meets any one of three tests:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

*Id.* at 244 n.5 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355(1964)).

The Utah Supreme Court should apply the Cigarette Rule factors to the UUPA for several reasons. First, the FTCA and the UUPA are similar in intent, purpose, and wording. Second, the Utah Legislature expressly stated that the statute should be broadly interpreted to accomplish its purpose and advance the policies for enacting the UUPA. Third, the Utah Legislature expressly looks to interpretations of the FTCA in another chapter of the UUPA's title – Title 13 of the Utah Code. Fourth, a number of federal and state courts have already adopted the Cigarette Rule factors as the test to determine unfair competition under unfair practices statutes similar to the UUPA. Fifth, if the Utah Supreme Court does not apply the Cigarette Rule factors, Garrard and others similarly injured will not have a remedy. Sixth, if the Utah Supreme Court does not apply the Cigarette Rule factors, CPSI and others engaged in unfair, immoral, oppressive, unethical, deceptive, or unscrupulous conduct can escape justice. Finally, the issue of whether such factors apply to the UUPA has not yet been decided by the appellate courts of this state.

## **ARGUMENT**

### **THE TRIAL COURT INCORRECTLY GRANTED CPSI'S MOTION FOR DIRECTED VERDICT**

#### **I. THE CIGARETTE RULE IS THE UNITED STATES SUPREME COURT'S TEST FOR UNFAIR COMPETITION**

The United States Supreme Court has endorsed the Cigarette Rule as an appropriately broad and flexible interpretation of unfair competition in the context of the FTCA – the federal equivalent of the UUPA. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972). The similarities between the FTCA and the UUPA warrant the

Utah Supreme Court’s application of the Cigarette Rule factors to determine whether a party has engaged in unfair competition in violation of the UUPA.

In *Sperry*, the Sperry & Hutchinson Co. (“S&H”), an issuer of trading stamps, challenged a Federal Trade Commission (“FTC”) cease-and-desist order. *See id.* at 235-36. Citing the FTCA’s prohibition of “unfair methods of competition,” the FTC issued the order on the basis that S&H violated the statute by attempting to suppress the free and open exchange and redemption of their trading stamps. *Id.* at 235 (quoting 15 U.S.C. § 45(a)(6) (1972)); *see also id.* at 234. Because the FTCA does not contain a definition of “unfair,” the FTC used the following factors, known as the Cigarette Rule, to determine whether conduct is an unfair method of competition, and thus violated the FTCA:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

*Id.* at 244 n.5 (additional quotations and citation omitted).

In assessing the scope of the FTCA, the Court analyzed the phrase “unfair methods of competition.” *Id.* at 240. First, the Court noted that Congress had correctly determined that it could not and should not attempt to expressly define or enumerate every type of unfair competition because “[i]t is impossible to frame definitions which embrace all unfair practices,” in light of the fecundity of “human inventiveness in this field.” *Id.* (quoting H.R. Confer. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914)).

The Court next observed that the phrase “unfair methods of competition” should have broad “sweep and flexibility,” and that “judicial attempts to fence in the grounds upon which . . . might rest a finding of unfairness” had been unsuccessful. *Id.* at 241. Moreover, the Court determined that “unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior.” *Id.* at 244. Indeed, the prohibition of “unfair methods of competition” protects “consumers as well as competitors.” *Id.* Ultimately, the Court accepted the Cigarette Rule as a proper test for determining whether a method of competition was unfair. *See id.* at 244 n.5. For the reasons stated below, the Utah Supreme Court should do the same.

## **II. THE SIMILARITIES BETWEEN THE FTCA AND THE UUPA WARRANT APPLICATION OF THE CIGARETTE RULE TO THE UUPA**

The UUPA is substantially similar to the FTCA. For instance, neither the UUPA nor the FTCA define the terms “unfair” or “deceptive.” Thus, both statutes must look elsewhere for guidance in interpreting what conduct is prohibited. *See, e.g., State v. Ireland*, 2006 UT 17, ¶ 19, 133 P.3d 396 (looking to definitions of statutory terms “applied by other jurisdictions” where statute did not define term); *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347 (N.M. 1984) (recognizing other courts’ incorporation of Cigarette Rule into state unfair practices statutes that do not expressly define the terms “unfair” or “deceptive”).

Additionally, the two statutes are similarly worded in their descriptions of proscribed conduct. The FTCA prohibits “[u]nfair methods of competition in or affecting

commerce, and unfair or deceptive acts or practices in or affecting commerce . . . .” 15 U.S.C. § 45(a)(1) (2006) (emphases added). Similarly, the UUPA prohibits “unfair and discriminatory practices by which fair and honest competition is destroyed or prevented,” Utah Code Ann. § 13-5-17 (emphases added). Furthermore, the UUPA also proscribes “deceptive acts or practices, or . . . unconscionable acts or practices.” Utah Admin. Code R152-1-1(B)(2)(a) (emphasis added) (providing Utah Division of Consumer Protection’s purpose and policy behind rules to assist orderly administration of UUPA).

Furthermore, the two statutes have similar purposes and policies – to protect against monopolies and other restraints on trade, encourage competition, and protect consumers. “It was the main purpose of the Federal Trade Commission Act to provide for scrutiny and restraint of those trade practices which tended towards monopoly or involved restraint of trade.” *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337, 342 (6th Cir. 1926). Similarly, the purpose and policy of the UUPA is “to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented,” Utah Code Ann. § 13-5-17, and to “protect consumers from individuals and businesses who have engaged in and committed deceptive acts or practices, or have engaged in and committed unconscionable acts or practices.” Utah Admin. Code R152-1-1(B)(2)(a); *see also* Utah Code Ann. § 13-5-17 (“This act shall be liberally construed that its beneficial purposes may be subserved.”).

Finally, in another chapter of the UUPA’s title, the Utah Legislature endorsed looking to “the policies of the Federal Trade Commission Act relating to consumer

protection.” Utah Code Ann. § 13-11-2(4) (internal footnote citing 15 U.S.C.A. § 41, *et seq.*, omitted). Courts should read statutes “in harmony with other statutes under the same and related chapters.” *Roberts v. Erickson*, 851 P.2d 643, 644 (Utah 1993) (*per curiam*). Thus, it is appropriate to look to the Cigarette Rule to interpret the UUPA. The similarities between the UUPA and the FTCA justify the Utah Supreme Court to follow and apply the Cigarette Rule to determine whether a party has violated the UUPA.

### **III. OTHER JURISDICTIONS HAVE ADOPTED AND APPLIED THE CIGARETTE RULE FOR DETERMINING VIOLATIONS OF UNFAIR PRACTICES ACTS SIMILAR TO THE UUPA**

When a term is not defined by statute, a court may look to other jurisdictions with similar language for guidance. *See State v. Wanosik*, 2003 UT 46, ¶ 23, 79 P.3d 937 (explaining that “when we are asked to define terms found in our rules and statutes, we often look to other jurisdictions with similar language for guidance”). Many other federal and state jurisdictions have adopted the Cigarette Rule for interpreting unfair practices acts that are similar to the UUPA. For instance, the Alaska Supreme Court has adopted the Cigarette Rule as part of its “broad guidelines for determining what constitutes an unfair act or practice” under its unfair practices act. *Alaska Rent-A-Car, Inc. v. Cendant Corp.*, No. 3:03-CV-00029-TMB, 2007 WL 2206784, at \*21 (D. Alaska July 27, 2007) (citing *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 534-35 (Alaska 1980)).

Alaska’s unfair practices act is similar to the UUPA. *Compare* Alaska Stat. § 45.50.471(a) (prohibiting “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce”), *with* Utah Code Ann. § 13-5-17 (prohibiting “unfair and discriminatory practices by which fair and honest competition is

destroyed or prevented”), and Utah Admin. Code R152-1-1(B)(2)(a) (expressly intended to “protect consumers from individuals and businesses who have engaged in and committed deceptive acts or practices, or have engaged in and committed unconscionable acts or practices”). Although both Alaska’s unfair practices act and the UUPA specifically identify certain non-exhaustive prohibited conduct, they contain the above-quoted catchall provisions, recognizing (as did the United States Supreme Court in *Sperry*) the impossibility of enumerating all unfair practices. See Alaska Stat. § 45.50.471(a); Utah Code Ann. § 13-5-17; Utah Admin. Code R152-1-1(B)(2)(a); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (“It is impossible to frame definitions which embrace all unfair practices.” (quoting H.R. Confer. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914))).

The State of California and the Ninth Circuit have also adopted the Cigarette Rule, even where the relevant unfair practices act contained a definition of “unfair competition.” See *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (noting that violation of California unfair practices act “encompasses practices which offend established public policy or that are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers” (citing *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Cal. Ct. App. 1996)); see also Cal. Bus. & Prof. Code § 17200 (prohibiting “unfair competition,” and defining it as “any unlawful, unfair or fraudulent business act or practice”).

The State of Connecticut and the Second Circuit have also adopted the Cigarette Rule “for determining when a practice is unfair” under the Connecticut Unfair Practices

Act (“CUTPA”), which, like the UUPA and FTCA, does not define the terms “unfair” or “deceptive.” *Edmands v. Cuno, Inc.*, 892 A.2d 938, 955 n.16 (Conn. 2006) (quoting *Hartford Electric Supply Co. v. Allen-Bradley Co.*, 736 A.2d 824, 842 (Conn. 1999)); *see also Boulevard Assocs. v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1038 (2d Cir. 1995) (analyzing unfair practices claim via Cigarette Rule). Indeed, the Connecticut Supreme Court has repeatedly stated:

[CUTPA] provides that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” “It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the ‘cigarette rule’ by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] . . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.” (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, *supra*, 245 Conn. at 43, 717 A.2d 77.

*Hartford*, 736 A.2d at 842-43 (first alteration and emphasis added) (omission in original) (footnote citing *Sperry*, 405 U.S. at 244-45, omitted).

Furthermore, the operative language of CUTPA is substantially similar to that of the UUPA. *Compare* Conn. Gen. Stat. § 42-110b(a) (prohibiting “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce”), *with* Utah Code Ann. § 13-5-17 (prohibiting “unfair and discriminatory practices by which fair and honest competition is destroyed or prevented”), *and* Utah



Admin. Code R152-1-1(B)(2)(a) (expressly intended to “protect consumers from individuals and businesses who have engaged in and committed deceptive acts or practices, or have engaged in and committed unconscionable acts or practices”); *compare also* Conn. Gen. Stat. § 42-110b(b) (referring to interpretation of FTCA for guidance), *with* Utah Code Ann. § 13-11-2(4) (requiring consistency with “the policies of the Federal Trade Commission Act relating to consumer protection.” (internal footnote omitted)).

The State of Florida and the Seventh Circuit have also adopted the Cigarette Rule. *See Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1976) (employing Cigarette Rule); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (same); *see also* Fla. Stat. Ann. § 501.204(1) (prohibiting “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce”); *id.* § 501.204(2) (referring to interpretation of FTCA for guidance).

The State of Hawaii has adopted the Cigarette Rule. *See Rosa v. Johnson*, 651 P.2d 1228, 1234 (Haw. Ct. App. 1982) (applying Cigarette Rule); *see also* Haw. Rev. Stat. § 480-2(a) (prohibiting “[u]nfair or deceptive acts or practices in the conduct of any trade or commerce”); *id.* § 480-2 (referring to interpretation of FTCA for guidance).

Likewise, the State of Illinois has adopted the Cigarette Rule. *See Griffin v. Universal Cas. Co.*, 654 N.E.2d 694, 703 (Ill. Ct. App. 1995) (using Cigarette Rule “to determine whether a practice is ‘unfair’”); *see also* 815 Ill. Comp. Stat. 505/2 (prohibiting

“[u]nfair methods of competition and unfair or deceptive acts or practices.” and referring to interpretation of FTCA for guidance).

The State of Louisiana and the Fifth Circuit also adopted the Cigarette Rule in substance, by interpreting the statutory proscription of “unfair or deceptive acts or practices in the conduct of any trade or commerce,” La. Rev. Stat. § 51:1409, as prohibiting conduct that is “unethical, oppressive, unscrupulous, or substantially injurious.” *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) (quoting *Bolanos v. Madary*, 609 So. 2d 972, 977 (La. Ct. App. 1992)). This test is merely a rewording of the second and third Cigarette Rule factors – “(2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (additional quotations and citation omitted).

The State of Massachusetts and First Circuit courts also turn to the Cigarette Rule to determine whether a party has violated that state’s unfair practices act. See *Pepsi-Cola v. Checkers, Inc.*, 754 F.2d 10, 17-18 (1st Cir. 1985) (endorsing Cigarette Rule); *PMP Assocs., Inc. v. Globe Newspaper Co.*, 321 N.E.2d 915, 917 (Mass. 1975) (same). Again, like the UUPA and FTCA, the Massachusetts unfair practices act does not define the terms “unfair” or “deceptive.” In *Pepsi-Cola*, the First Circuit interpreted the Massachusetts Attorney General’s “broad regulations prohibiting trade practices that are ‘oppressive or unconscionable in any respect’” as the basis to incorporate the Cigarette Rule. *Id.* at 18 (quoting 940 C.M.R. 3.16(2)).

The rules governing the UUPA and Massachusetts's unfair practices act are similar. Massachusetts's rules prohibit "trade practices that are 'oppressive or unconscionable in any respect.'" *Pepsi-Cola*, 754 F.2d at 18 (emphasis added) (quoting 940 Mass. Code Regs. 3.16(2)). Rules governing the UUPA's prohibit "deceptive acts or practices, or . . . unconscionable acts or practices." Utah Admin. Code R152-1-1(B)(2)(a) (emphasis added).

Further, the Massachusetts's unfair practices act is substantially similar to the UUPA. For example, the two statutes similarly define proscribed conduct. *Compare* Mass. Gen. Laws Ann. Ch. 93A § 2(a) (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"), *with* Utah Code Ann. § 13-5-17 (prohibiting "unfair and discriminatory practices by which fair and honest competition is destroyed or prevented"), *and* Utah Admin. Code R152-1-1(B)(2)(a) (prohibiting "deceptive acts or practices, or . . . unconscionable acts or practices"); *compare also* Mass. Gen. Laws Ann. Ch. 93A § 2(b) (referring to interpretation of FTCA for guidance), *with* Utah Code Ann. § 13-11-2(4) (requiring consistency with "the policies of the Federal Trade Commission Act relating to consumer protection." (internal footnote omitted)).

The State of Nebraska too has *de facto* adopted the Cigarette Rule. *See Radd v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998) (adopting first and second Cigarette Rule factors). Nebraska's unfair practices act proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Neb. Rev. Stat. § 59-1602. Like the UUPA and the FTCA,

Nebraska's act does not define the terms "unfair" or "deceptive." *Radd*, 13 F. Supp. 2d at 1011. However, unlike some states' unfair practices acts, Nebraska's act does not contain any reference to interpretations of the FTCA.

After a through analysis of the approach taken by various jurisdictions in interpreting what constitutes unfair or deceptive practices, the United States District Court for the District of Nebraska adopted the following test for an unfair practice between merchants: the conduct "(1) fell within some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous." *Id.* at 1014. This test is simply a rewording of first two Cigarette Rule factors:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous.

*FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (additional quotations and citation omitted). Notably, the *Radd* court suggested that an even more expansive interpretation of unfair or deceptive practices would be warranted in an action brought by a consumer. *Radd*, 13 F. Supp. 2d at 1015; *see also Boulevard Assocs. v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1039 n.5 (2d Cir. 1995) (recognizing that "individual consumers" are "a constituency entitled to special solitude" under unfair practices act).

The State of New Hampshire has also adopted the Cigarette Rule to interpret its unfair practices act. *See Becksted v. Nadeau*, 926 A.2d 819, 822-23 (N.H. 2007) ("In

determining whether the defendants' actions violate the general provision of the [New Hampshire unfair practices act], we also look for guidance to the [Cigarette Rule]."); *see also* N.H. Rev. Stat. § 358-A:2 (prohibiting "any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce"); N.H. Rev. Stat. § 358-A:13 (referring to interpretation of FTCA for guidance).

The State of North Carolina has adopted the Cigarette Rule. *See Johnson v. Insurance Co.*, 266 S.E.2d 610, 621 (N.C. 1980) (following Cigarette Rule for determining whether "practice is unfair"), *rev'd on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 374 S.E.2d 385 (N.C. 1988); *see also* N.C. Gen. Stat. Ann. § 75-1.1(a) (prohibiting "unfair or deceptive acts or practices in or affecting commerce.").

The State of Pennsylvania has adopted the Cigarette Rule. *See In re Clark*, 96 B.R. 569, 582 (E.D. Pa. 1989) (looking to Cigarette Rule "for determining whether a particular act or practice is 'unfair'"); *see also* 73 Pa. Cons. Stat. Ann. § 201-3 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce").

The State of Rhode Island has adopted the Cigarette Rule. *See Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677, 681 (R.I. 2001) (considering Cigarette Rule "to determine whether a practice is 'unfair'"); *see also* R.I. Gen. Laws § 6-13.1-2 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in

the conduct of any trade or commerce”); *id.* § 6-13.1-3 (referring to interpretation of FTCA for guidance).

The State of Vermont has adopted the Cigarette Rule. *See Vermont Mobile Home Owners’ Ass’n, Inc. v. Lapierre*, 94 F. Supp. 2d 519, 522 (D. Vt. 2000) (identifying Cigarette Rule as factors used in determining whether a practice is unfair”); *see also* Vt. Stat. Ann. § 2453(a) (prohibiting “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”); *id.* § 2453(b) (referring to interpretation of federal unfair practices act for guidance).

As a final example, courts in the State of Washington have adopted the Cigarette Rule “to determine whether a practice or act is unfair.” *Krienke v. Chase Home Fin., LLC*, No. 35098-0-II, 2007 WL 2713737, at \*7 (Wash. Ct. App. Sept. 18, 2007). As with the other states discussed above, Washington’s unfair practices act is similar to the UUPA. *Compare* Wash. Rev. Code Ann. § 19.86.20 (prohibiting “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce”), *with* Utah Code Ann. § 13-5-17 (prohibiting “unfair and discriminatory practices by which fair and honest competition is destroyed or prevented”), *and* Utah Admin. Code R152-1-1(B)(2)(a) (prohibiting “deceptive acts or practices, or . . . unconscionable acts or practices”).

In sum, the Utah Supreme Court should look to other jurisdictions’ interpretations of unfair practices acts that are similar to the UUPA, and adopt the Cigarette Rule.

#### IV. CPSI'S CONDUCT VIOLATED THE CIGARETTE RULE

CPSI's conduct should be actionable under UUPA because it easily qualifies as an unfair practice as defined by the Cigarette Rule. CPSI's representative admitted he understood that CPSI owed duties of honesty, candor, and good faith to those it was hired to serve – in this case the Garrards. R. 738 at 132:9-133:13. Despite CPSI's understanding of its duties, it forged and backdated not one, but two service of process documents, which resulted in a default judgment against Garrard and his dead wife. *See* R. 378; R. 706. Such conduct is clearly unfair. As a result of CPSI's wrongful conduct, Garrard was forced to retain counsel and incur substantial costs and expenses to set aside the default judgment. *See* R. 706; R. 738 at 109:11-25. CPSI's forgery and backdating of documents filed with a court is unethical, deceptive, oppressive, immoral, unconscionable, anticompetitive, unscrupulous, and unfair. *See Horvath v. Adelson, Golden & Loria, P.C.*, No. 97-00266-F, 2000 WL 33159239, at \*6 (Mass. Super. Ct. June 16, 2000) (stating that closing attorney's conduct in postdating a confirmation certification or a notice or right to cancel and permitting the borrower to sign the certificate may have been within the penumbra of some statutory or other established concept of unfairness).

CPSI's deceit persisted through trial, as CPSI's agent claimed to remember each of literally hundreds of thousands of services, yet could not remember the color of the examining attorney's tie. *See supra* n.5; R. 738 at 117:11-119:22 and 148:12-150:25. CPSI's conduct caused substantial injury to Garrard, an 80 year-old retiree, through the

attorney fees and costs he was forced to incur to set aside the default judgment. R. 738 at 109:11-25. CPSI should not be allowed to escape justice. Thus, CPSI conduct should be actionable under the UUPA.

**V. WITHOUT A BROAD AND FLEXIBLE DEFINITION OF UNFAIR COMPETITION UNDER THE UUPA, GARRARD HAS NO REMEDY AND CPSI NO DETERRENT FOR THE FRAUDULENT SERVICE**

Without the Utah Supreme Court's adoption of a broad and flexible definition of conduct that violates the UUPA, Garrard would have no remedy. There was no contract, direct fiduciary relationship, or privity between Garrard and CPSI. CPSI's wrongful conduct is unusual and abhorrent – exactly the type of behavior that cannot be contemplated and expressly addressed in an unfair practices statute. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (“It is impossible to frame definitions which embrace all unfair practices.” (quoting H.R. Confer. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914))). Certainly, there needs to be a remedy for such conduct. By adopting the Cigarette Rule, the Utah Supreme Court can fulfill the Utah Legislature's broad purposes for enacting the UUPA, comply with the Utah Code's express instruction to conform Utah law to interpretations of the FTCA, join the growing number of sister jurisdictions that have adopted and apply the Cigarette Rule, provide Garrard a remedy, and discourage wrongful conduct like that of CPSI.

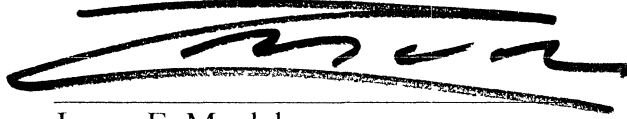


**CONCLUSION**

For the above-stated reasons, the Utah Supreme Court should reverse the trial court's grant of CPSI's motion for directed verdict, and remand to the trial court for additional, necessary proceedings.

DATED this 6<sup>th</sup> day of March 2008.

**MAGLEBY & GREENWOOD, P.C.**

A handwritten signature in black ink, appearing to read 'J. Magleby', is written over a horizontal line. The signature is stylized and somewhat cursive.

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the law firm of Magleby & Greenwood, P.C., 170 South Main Street, Suite 350, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the **APPELLANT'S BRIEF** was delivered this 6<sup>th</sup> day of March 2008 to the following by:

- Hand Delivery
- Depositing the same in the U.S. Mail, postage prepaid
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**ADDENDUM**

November 9, 2007 Findings and Conclusions ..... 1

Utah Code Ann. § 13-2-1 ..... 2

Utah Code Ann. § 13-2-5 ..... 3

Utah Code Ann. § 13-5-17 ..... 4

Utah Code Ann. § 13-11-2 ..... 5

Utah Admin. Code R. 152-1-1 ..... 6

15 U.S.C.A. § 45. .... 7

# **Exhibit 1**

NOV 09 2007

SALT LAKE COUNTY

By *WPG*

Deputy Clerk

In the Third Judicial District Court, Salt Lake County, State of Utah

**RAY WILLIAM GARRARD,  
an individual,**

**Plaintiff,**

v.

**GATEWAY FINANCIAL SERVICES,  
INC., a Utah corporation,  
CIVIL PROCESS SERVICES &  
INVESTIGATIONS, LLC,  
a Utah limited liability company and  
GRANITE FURNITURE COMPANY,  
a Utah corporation,**

**Defendants.**

**FINDINGS AND CONCLUSIONS**

Civil No. 040912063

Hon. Deno G. Himonas

¶1 This matter came on for a jury trial on September 10-11, 2007. James Magleby and Christopher Von Maack appeared on behalf of the plaintiff, Ray Garrard (“Garrard”); John Richards III and Curtis Kimble appeared on behalf of defendant Granite Furniture Company (“Granite”); and Reed Braithwaite appeared on behalf of defendant Civil Process Services & Investigations (“CPSI”). At the close of Garrard’s evidence, Granite and CPSI moved the court for a directed verdict on Garrard’s third cause of action, violation of the Utah Unfair Practices Act, Utah Code Ann. § 13-5-1, *et seq.* (the “UUPA”), and his fourth cause of action, declaratory judgment.<sup>1</sup> The court, in a ruling from the bench, granted the Motion. What follows is the written memorialization of that decision.

**FINDINGS OF FACT**

¶2 On Friday, July 2, 1999, Granite ran an advertisement in *The Salt Lake Tribune* of six months with “no interest” and “nothing down” for the purchase of furniture. In fine print, however, the ad noted that there was a \$299.99 minimum purchase obligation and that “[m]inimum payments [were] required.”<sup>2</sup>

<sup>1</sup>Garrard alleges five cause of action in his Complaint. The first is moot as it only involves defendant Gateway Financial Services (“Gateway”) and Garrard and Gateway have resolved their issues. And the court dismissed the second and third causes of action on summary judgment.

<sup>2</sup>There is no indication the Garrard’s saw or acted upon this ad.

¶3 Several days later, on July 7, 1999, Garrard and his wife, Marva, who is now deceased, went furniture shopping. Attracted by a sign on the door of the Granite furniture store in Layton, Utah, advertising the six months with no interest sale, the Garrards decided to enter the store.

¶4 They were assisted there by Dave Aamodt, a Granite sales person. Aamodt confirmed that the Garrards could avoid financing and interest charges if they paid off their purchase in six months. He did not tell the Garrards that minimum payments were required.<sup>3</sup>

¶5 The Garrards ultimately decided to buy a bedroom set from Granite at a cost of \$2,571.21. To this end, Granite presented the Garrards with a sales order. The order contained the following statement in boldfaced letters:

**6-Month Financing**  
**Accrued finance charges will be removed**  
**If you pay the required minimum payments**  
**and the remaining balance in full**  
**by the end of 6 months**

While Garrard signed the sales order and initialed the six-month financing provision, he admittedly did not read what he was signing.

¶6 At the same time he signed the sales order, Garrard, along with his wife, filled out and signed a credit application with American General Financial (“AGF”). The application contains the following provisions:

**BY SIGNING BELOW YOU ACKNOWLEDGE, CERTIFY  
AND AGREE THAT:**

- (1) You are applying for an open-ended card account with **AMERICAN GENERAL FINANCIAL CENTER, MIDVALE, UTAH** or for other credit available from its affiliate.

\* \* \*

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<sup>3</sup>In setting forth the facts of this matter, the court has endeavored to “view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party.” *Gilbert v Ince, et al*, 1999 UT 65, P14, 981 P.2d 841 (quoting *Nay v General Motors Corp*, 850 P.2d 1260, 1261 (Utah 1993)); *see also Enlow v Tishomingo County, et al.*, 45 F.3d 885, 888 (5<sup>th</sup> Cir. 1995) (“We review a directed verdict de novo, applying the same standard as the district court. . . . Accordingly, we must view the facts, and any reasonable inferences that may be drawn therefrom, in the light most favorable to the non-movant.”) (citation omitted).

- (3) If this application is accepted and credit is extended by **AMERICAN GENERAL FINANCIAL CENTER**, you will be bound by the terms of the Credit Card Cardholder Agreement attached hereto, a copy of which has been provided to you to keep.

\* \* \*

- (5) **YOU HAVE READ AND UNDERSTAND THE CREDIT CARD TERMS AND THE ATTACHED CREDIT CARD CARDHOLDER AGREEMENT.**

(Emphasis in original.) The credit application indicates that the Garrards' AGF account number was 5889436300404077.<sup>4</sup>

¶7 At this same time, Ms. Garrard signed a sales receipt for \$2,571.21. The receipt reflected the Garrards' newly assigned account number and that the terms were "6 MONTHS SAME AS CASH/PAYMENTS REQUIRED."

¶8 Granite received payment for the furniture, presumably from AGF, on July 28, 1999. About one month after their purchase, the Garrards received their first bill from AGF, which they ignored because they were concerned it was a scam. The bill reflects a minimum payment due of \$77.00.

¶9 On or about November 5, 1999, Ms. Garrard called Granite regarding their bills from AGF. The Granite customer service representative explained that, while the Garrards had six months to pay off the furniture, they still had to make minimum payments each month. The representative also explained that it was Granite's practice to "verbally explain" the terms to the customer at the time the customer signed the sales order and initialed the six-month provision. Ms. Garrard said that was not explained to them at the time of purchase.

¶10 At some unspecified time, Gateway, a collection agency, became involved in the dispute and caused CPSI to attempt to serve Garrards with process in a small claims action. On January 28, 2004, the Third District Court, Small Claims Department, entered a judgment against Garrards for \$897.52.

¶11 After receiving notice of the judgement, Garrard got legal counsel involved. In a letter dated March 16, 2004, counsel pointed out to Gateway that the alleged personal service on November 28, 2003, on Marva Garrard was defective as she had passed away on November 13, 2002, over a year earlier.

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<sup>4</sup>It is worth noting that Garrard, while elderly, is well-educated, well-spoken, and mentally acute. It is also worth noting that Garrard felt no pressure to sign any of the documents.

¶12 Gateway responded by indicating that it had “researched the service for Ray and Marva Garrard” of the small claims complaint and discovered that it was Ray Garrard that CPSI had served on November 28, 2003. Garrard’s counsel responded by pointing out that CPSI could not have served Garrard as claimed as “he was on duty as a temple worker in the St. George” Temple. Garrard confirmed that CPSI did not personally serve him; too.

¶13 Ultimately, Gateway agreed to remove the judgment and, to that end, an order vacating the judgment was entered on September 30, 2004.

### CONCLUSIONS OF LAW

¶14 Garrard charges that the practices of Granite and CPSI of which he complains are so “immoral, unethical, oppressive, and/or unscrupulous, and/or . . . cause substantial injury to consumers” that they “constitute unfair methods of competition in commerce or trade” and therefore violate the UUPA. Complaint, ¶ 63. He further charges that he is entitled to a declaratory judgment that he “is not indebted to Granite or any other defendant” and that the small claims judgment should be vacated. *Id.*, ¶ 68(a) & (b).<sup>5</sup> Because the facts established simply do not make out a UUPA claim, and because the declaratory judgment cause of action is entirely moot, the court grants the motion for a directed verdict.

¶15 In deciding a motion for a directed verdict, the trial court should, as previously noted, “view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party.” *Gilbert*, 1999 UT 65, P14 (quoting *Nay*, 850 P.2d at 1261). But if the evidence, so viewed, is insufficient “to permit a reasonable jury to find for the nonmovant,” a directed verdict is appropriate. *Id.* Such is the case here.

¶16 The court turns first to Garrard’s claim under the UUPA. A primary purpose of the UUPA is to prohibit “unfair and discriminatory practices by which fair and honest competition is destroyed or prevented.” Utah Code Ann. § 13-5-17. To this end, the UUPA sets forth a number of acts that the legislature has deemed injurious to competition and unlawful. The one that Garrard argues is applicable here makes it “unlawful for any person engaged in business within the state to advertise, goods, wares, or merchandise that person is not prepared to supply.” Utah Code Ann. § 13-5-8.

¶17 There is, however, no way to reconcile the facts of this case with a violation of this section of the UUPA, or, for that matter, any section. There is no indication that Granite advertised a stick of furniture that it was not prepared to supply. To the contrary, the record discloses that Granite offered, as advertised, a wide variety of furniture and that, as a result, the Garrards purchased a bedroom set. And Garrard advances no argument for the proposition that CPSI violated the express provisions of the UUPA.

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<sup>5</sup>Garrard’s other declaratory judgment requests, reflected in subparagraphs (c)-(f), are either redundant or mooted by the stipulated motion to dismiss Gateway.



¶18 In implicit recognition that the actual language of the UUPA does not extend to the facts of this case, Garrard urges the court to adopt the “Cigarette Rule.”<sup>6</sup> This the court declines to do. First, Garrard does not argue that the UUPA is ambiguous; nevertheless, he asks the court to interpret it “through the lens of the ‘Cigarette Rule.’” Legal Authority Regarding FTC Test for Utah Unfair Practices Act, p. 2. In other words, Garrard proposes that the court sanction the wholesale importation of the Cigarette Rule into Utah’s statutory scheme without regard to whether or not the UUPA is ambiguous. But without an ambiguity, there is no reason for the court to go beyond the plain language of the statute. *See, e.g., Sill v. Hart*, 2007 UT 45, P7, 162 P.3d 1099. And the plain language does not include the Cigarette Rule.

¶19 Second, the court is mindful of the fact that the Utah legislature has established an extensive framework of consumer protection laws (*see, e.g.*, the UUPA; the Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-1, *et seq.*; and the Truth in Advertising Act, Utah Code Ann. § 13-11a-1, *et seq.*) and that the legislature has had plenty of opportunity to incorporate the Cigarette Rule into that framework if it so desired (*e.g.*, the UUPA was promulgated in the 1930s).<sup>7</sup> It has not done so. The court therefore cannot and will not presume that this was an unintended oversight and, again, will not apply the Cigarette Rule to the case at bar.

¶20 Even if the court were to apply the Cigarette Rule, it would be of no avail to Garrard, at least with respect to Granite. The record makes clear that the real source of the problem here was Garrard’s failure to read any of the materials that Granite presented to him, including the boldfaced six-month financing terms, and not anything Granite did or did not do.

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<sup>6</sup>The Cigarette Rule is the set of factors that the Federal Trade Commission “considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is unfair.” *Pepsi-Cola Metro Bottling Corp, Inc. v Checkers, Inc*, 754 F.2d 10, 17 (1<sup>st</sup> Cir. 1985). The factors are as follows.

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

*Id* “All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.” *Saturn Construction Company, Inc. v Premier Roofing Company, Inc*, 680 A.2d 1274, 1283 (Conn 1996) (internal quotations and citation omitted).

<sup>7</sup>The court notes, for example, that the Connecticut and Massachusetts legislatures specifically incorporated the Cigarette Rule into their respective unfair practices acts. *See* Conn. Gen Stat § 42-110b and *Pepsi-Cola Metro Bottling*, 754 F.2d at 17.

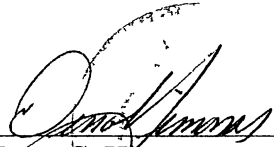
¶21 As to Garrard's declaratory judgment cause of action, there is nothing to declare. Paragraph 68(a) of the Complaint seeks a declaration that "Garrard is not indebted to Granite or any other [d]efendant." But no defendant claims otherwise. And paragraph 68(b) seeks a declaration that the small claims judgment should be set aside. That has already happened. Consequently, the declaratory judgment claim is moot.

### CONCLUSION

¶22 For the reasons set forth above, and pursuant to Utah R. Civ. P. 50(a), the court grants Granite and CPSI a directed verdict.

DATED this 9<sup>th</sup> day of November, 2007.

BY THE COURT

  
\_\_\_\_\_  
Deno G. Himonas  
Third District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040912063 by the method and on the date specified.

METHOD	NAME
Mail	REED R BRAITHWAITE Attorney DEF 50 E 100 S STE 203 ST GEORGE, UT 84770
Mail	JAMES E MAGLEBY Attorney PLA 170 S MAIN ST STE 350 SALT LAKE CITY UT 84101
Mail	JOHN D RICHARDS III Attorney PLA 2040 E MURRAY HOLLADAY RD STE SALT LAKE CITY UT 84117

Dated this 9 day of November, 2007.

  
\_\_\_\_\_  
Deputy Court Clerk

# **Exhibit 2**

U.C.A. 1953 § 13-2-1

**C**

West's Utah Code Annotated Currentness

Title 13. Commerce and Trade

Chapter 2. Division of Consumer Protection (Refs & Annos)

**→ § 13-2-1. Consumer protection division established--Functions**

(1) There is established within the Department of Commerce the Division of Consumer Protection.

(2) The division shall administer and enforce the following:

- (a) Chapter 5, Unfair Practices Act;
- (b) Chapter 10a, Music Licensing Practices Act;
- (c) Chapter 11, Utah Consumer Sales Practices Act;
- (d) Chapter 15, Business Opportunity Disclosure Act;
- (e) Chapter 20, New Motor Vehicles Warranties Act;
- (f) Chapter 21, Credit Services Organizations Act;
- (g) Chapter 22, Charitable Solicitations Act;
- (h) Chapter 23, Health Spa Services Protection Act;
- (i) Chapter 25a, Telephone and Facsimile Solicitation Act;
- (j) Chapter 26, Telephone Fraud Prevention Act;
- (k) Chapter 28, Prize Notices Regulation Act;
- (l) Chapter 32a, Pawnshop Transaction Information Act;
- (m) Chapter 34, Utah Postsecondary Proprietary School Act;
- (n) Chapter 41, Price Controls During Emergencies Act; and
- (o) Chapter 42, Uniform Debt-Management Services Act.

Laws 1983, c. 57, § 1; Laws 1987, c. 92, § 22; Laws 1987, c. 105, § 1; Laws 1987, c. 122, § 1; Laws 1989, c. 225, § 5; Laws 1991, c. 5, § 3; Laws 1991, c. 149, § 1; Laws 1996, c. 26, § 1, eff. April 29, 1996; Laws 1996, c. 79, § 15, eff. April 29, 1996; Laws 1998, c. 150, § 1, eff. May 4, 1998; Laws 1998, c. 324, § 1, eff. July 1, 1998; Laws 2001, c. 283, § 1, eff. April 30, 2001; Laws 2002, c. 222, § 1, eff. July 1, 2002; Laws 2005, c. 70, § 1, eff. May 2, 2005;

U.C.A. 1953 § 13-2-1

Laws 2005, c. 256, § 1, eff. May 2, 2005; Laws 2005, c. 306, § 1, eff. May 2, 2005; Laws 2006, c. 154, § 1, eff. July 1, 2007.

#### HISTORICAL AND STATUTORY NOTES

Composite section by the Office of Legislative Research and General Counsel of Laws 2005, c. 70, § 1, Laws 2005, c. 256, § 1 and Laws 2005, c. 306, § 1.

#### CROSS REFERENCES

Commerce department divisions, see § 13-1-2.

#### LIBRARY REFERENCES

Consumer Protection ↪1.

Westlaw Key Number Search: 92Hk1.

C.J.S. Credit Reporting Agencies; Consumer Protection § 23.

#### RESEARCH REFERENCES

##### Encyclopedias

84 Am. Jur. Trials 367, Using Taxation of Costs to Collect Some Litigation Expenses and Maximize Client Recovery.

##### Treatises and Practice Aids

Hand. Auto. Warr. & Reposs. § 8:2, Citations for Deceptive Trade Practices Acts and Odometer Statutes.

149 Practising Law Institute Litig. & Admin. Prac.: Crim. Law & Urban Problems 59, Nursing Home Issues.

215 Practising Law Institute Tax Law and Estate Planning: Estate Planning and Administration 163, Nursing Home Law.

204 Practising Law Institute Tax Law and Estate Planning: Estate Planning and Administration 157, Nursing Home Law.

196 Practising Law Institute Tax Law and Estate Planning: Estate Planning and Administration 93, Nursing Home Law.

#### UNITED STATES CODE ANNOTATED

Consumer product warranties, see 15 U.S.C.A. § 2301 et seq.

U.C.A. 1953 § 13-2-1, UT ST § 13-2-1

Current through 2007 First Special Session including results from the November 2007 General Election.

U.C.A. 1953 § 13-2-1

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# **Exhibit 3**



U.C.A. 1953 § 13-2-5

**C**

West's Utah Code Annotated Currentness

Title 13. Commerce and Trade

Chapter 2. Division of Consumer Protection (Refs & Annos)

**→§ 13-2-5. Powers of director**

The director has authority to:

(1) in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, issue rules to administer and enforce the chapters listed in Section 13-2-1;

(2) investigate the activities of any business governed by the laws administered and enforced by the division;

(3) take administrative and judicial action against persons in violation of the division rules and the laws administered and enforced by it, including the issuance of cease and desist orders;

(4) coordinate, cooperate, and assist with business and industry desiring or attempting to correct unfair business practices between competitors;

(5) provide consumer information and education to the public and assist any organization providing such services; and

(6) coordinate with, assist, and utilize the assistance of federal, state, and local agencies in the performance of his duties and the protection of the public.

Laws 1983, c. 57, § 1; Laws 1994, c. 177, § 1.

ADMINISTRATIVE CODE REFERENCES

Buyer beware lists, see Utah Admin. Code 152-1.

Consumer protection, see Utah Admin. Code 152.

LIBRARY REFERENCES

Consumer Protection ↪1.

Westlaw Key Number Search: 92Hk1.

C.J.S. Credit Reporting Agencies; Consumer Protection § 23.

U.C.A. 1953 § 13-2-5, **UT ST § 13-2-5**

Current through 2007 First Special Session including results from the November 2007 General Election.

U.C.A. 1953 § 13-2-5

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# **Exhibit 4**

UCA 1953 § 13-5-17

**C**

West's Utah Code Annotated Currentness

Title 13 Commerce and Trade

Chapter 5 Unfair Practices Act (Refs & Annos)

→ § 13-5-17. Policy of act

The legislature declared that the purpose of this act [FN1] is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented This act shall be liberally construed that its beneficial purposes may be subserved

Laws 1937, c 21, § 17

**Codifications** C 1943, § 16A-4-17

[FN1] Laws 1937, c 21, enacted the Unfair Practices Act comprising this chapter

CROSS REFERENCES

Statutes in derogation of common law liberally construed, see § 68 3 2

LIBRARY REFERENCES

Trade Regulation ↪861

Westlaw Key Number Search 382k861

C J S Trade Marks, Trade Names, and Unfair Competition § 380

UNITED STATES CODE ANNOTATED

Clayton Act, antitrust laws, see 15 U S C A § 12 et seq

Fishing industry, see 15 U S C A § 521 et seq

Sherman Act, contracts in restraint of trade, see 15 U S C A § 1 et seq

Wilson Tariff Act, trusts in restraint of import trade, see 15 U S C A § 8 et seq

UNITED STATES SUPREME COURT

**Restraint of trade,**

*Price fixing,*

Antitrust, price setting, lawful economically integrated joint ventures, per

U.C.A. 1953 § 13-5-17

se

illegality, see *Texaco Inc. v. Dagher*, 2006, 126 S.Ct. 1276.

*Tying arrangements,*

Antitrust, tying claims, patents, market power, see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 2006, 126 S.Ct. 1281.

*Vertical restraints of trade,*

Antitrust, pricing, vertical agreements to fix minimum resale prices, per se illegality rule, rule of reason, see *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 2007, 127 S.Ct. 2705.

U.C.A. 1953 § 13-5-17, **UT ST § 13-5-17**

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# **Exhibit 5**

U.C.A. 1953 § 13-11-2

**C**

West's Utah Code Annotated Currentness

Title 13. Commerce and Trade

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

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

This act [FN1] shall be construed liberally to promote the following policies:

- (1) To simplify, clarify, and modernize the law governing consumer sales practices;
- (2) To protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) To encourage the development of fair consumer sales practices;
- (4) To make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act [FN2] relating to consumer protection;
- (5) To make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and
- (6) To recognize and protect suppliers who in good faith comply with the provisions of this act.

Laws 1973, c. 188, § 2.

[FN1] Laws 1973, c. 188, that enacted this chapter.

[FN2] 15 U.S.C.A. § 41 et seq.

HISTORICAL AND STATUTORY NOTES

**Uniform Law**

This section is similar to § 1 of the Uniform Consumer Sales Practices Act. See Volume 7A, Pt. I Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

LIBRARY REFERENCES

Consumer Protection  1.

Westlaw Key Number Search: 92Hk1.

C.J.S. Credit Reporting Agencies; Consumer Protection § 23.

**RESEARCH REFERENCES****Treatises and Practice Aids**

1 Elderlaw: Advocacy for the Aging § 6.41, Introduction.

Fed. Reg. Real Estate & Mortgage Lending 4th § 13:48, Utah.

**NOTES OF DECISIONS**

Loss 3

Motor vehicles 2

Real estate sales or leases 1

1 Real estate sales or leases

Utah Consumer Sales Practices Act (UCSPA) applies to residential landlord and tenant relationship and, while it was not unconscionable for landlord to rent premises with sewer problems in the absence of knowledge of those problems, it was unconscionable to fail to repair the sewer despite complaints and reports from housing inspector and to have the house effectively condemned for the purpose of evicting the tenant (Per Durham, J , with one Justice concurring ) U C A 1953, 13-11-1 to 13-11 23 Wade v Jobe, 1991, 818 P 2d 1006 Consumer Protection 8

2 Motor vehicles

Sales Practices Act did not apply to claims of buyer of damaged vehicle against either insurer that settled claim for vehicle with its insured or auto company that acquired vehicle at an auction, based on buyer's inability to use vehicle's original manufacturer's warranty to cover repairs to vehicle, neither insurer nor auto company were buyer's "supplier" and buyer, insurer, and auto company were not engaged in "consumer transaction " U C A 1953, 13 11- 2(2), 13 11 3(2, 6) Holmes v American States Ins Co , 2000, 1 P 3d 552, 391 Utah Adv Rep 16, 2000 UT App 85, rehearing denied, certiorari denied 9 P 3d 170 Consumer Protection 9

Even if Sales Practice Act applied to claims of buyer of damaged vehicle against insurer that settled claim for vehicle with its insured and auto company that acquired vehicle at auction, insurer and auto company did not violate Act, where they did nothing to deceive or make any misrepresentations to buyer, who knew character and value of vehicle, and paid an amount far below retail value of undamaged vehicle U C A 1953, 13 11 2(2), 13 11 3(2, 6) Holmes v American States Ins Co , 2000, 1 P 3d 552, 391 Utah Adv Rep 16, 2000 UT App 85, rehearing denied, certiorari denied 9 P 3d 170 Consumer Protection 9

3 Loss



U.C.A. 1953 § 13-11-2

Former gym member, whose gym membership agreement was fraudulently altered in violation of the Utah Consumer Sales Practices Act (UCSPA), resulting in an unwarranted collection action against him brought by gym, suffered the threshold "loss" entitling him to recover statutory damages, by virtue of unwarranted negative information that gym caused to be included in customer's personal credit report. *Andreason v. Felsted*, 2006, 137 P.3d 1, 551 Utah Adv. Rep. 20, 2006 UT App 188. Antitrust And Trade Regulation 238

A consumer may seek recovery for a loss under the Utah Consumer Sales Practices Act (UCSPA), despite the fact that consumer's actual damages may be de minimis, speculative, or too difficult to prove, where the consumer can show that a loss has been suffered as a result of a violation of the UCSPA; "loss," under the UCSPA, embodies a broader concept than damages, which is itself a broader concept than actual damages. *Andreason v. Felsted*, 2006, 137 P.3d 1, 551 Utah Adv. Rep. 20, 2006 UT App 188. Antitrust And Trade Regulation 138

U.C.A. 1953 § 13-11-2, **UT ST § 13-11-2**

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# **Exhibit 6**

**Utah Admin. R. 152-1**

**UTAH ADMINISTRATIVE CODE  
COMMERCE  
R152. CONSUMER PROTECTION.**

Current through December 1, 2007

R152-1 Utah Division of Consumer Protection "Buyer Beware List"

R152-1-1 Purposes, Policies and Rules of Construction

A These rules are promulgated pursuant to Subsection 13-2-5(1) to assist the orderly administration of the statutes listed in Utah Code Section 13-2-1

B (1) These substantive rules are adopted by the Director of the Division of Consumer Protection pursuant to general authority of Utah Code Section 13-2- 5, and specific authority of the following statutory sections

- (a) Utah Code Subsection 13-11-8(2),
- (b) Utah Code Subsection 13-15-3(1), and
- (c) Utah Code Section Section 13-16-12

(2) Without limiting the scope of any statute or rule, this rule shall be liberally construed and applied to promote its stated purposes and policies. The purposes and policies of this rule are to

- (a) protect consumers from individuals and businesses who have engaged in and committed deceptive acts or practices, or have engaged in and committed unconscionable acts or practices
- (b) supply consumers with pertinent information on the nature of those individuals or businesses who may be engaging in and committing deceptive acts or practices, or may be engaging in and committing unconscionable acts or practices, so as to aid consumers in their decision making
- (c) encourage the development of fair consumer sales practices and wise decision making by consumers in all their consumer purchase decisions

R152-1-2 Definitions

A For the purposes of this rule

- (1) "Buyer Beware List" means the list of individuals or business compiled by the Division in accordance with this rule
- (2) "Department" means the Utah Department of Commerce
- (3) "Director" means the director of the Utah Department of Commerce, Division of Consumer Protection
- (4) "Division" means the Utah Department of Commerce, Division of Consumer Protection

**Utah Admin. R. 152-1**

(5) "Emergency" means facts known or presented to the Utah Department of Commerce, Division of Consumer Protection that show

(a) an immediate and significant danger to the public health, safety, or welfare exists with respect to the statutes listed in Utah Code Section 13- 2-1, and

(b) the threat requires immediate action by the Division

(6) "Executive Director" means the executive director of the Utah Department of Commerce

(7) "Order" means an order of adjudication or a final order by default issued by the Utah Department of Commerce, Division of Consumer Protection after proper notice and hearing, as applicable, in accordance with Utah Code Title 63, Section 46b, Administrative Procedures Act

**R152-1-3 Placement on "Buyer Beware List"**

A (1) The Division shall place the name of an individual or business on the "Buyer Beware List" if the Division concludes through issuance of an order that the individual or business has violated any of the statutes listed in Utah Code Section 13-2-1

(2) The Division shall provide fifteen (15) business days written notice by certified mail prior to placing an individual or business on the Buyer Beware List unless notice has otherwise been given by a previously issued Division subpoena or written inquiry or unless the Director finds that an emergency exists All individuals and businesses placed on the Buyer Beware List shall be notified in writing of the reasons for the proposed inclusion on the list They will also be advised of what actions, if any, they can take to remove their name from the list

B (1) When the Director finds the public interest would be served, the Division may place the name of an individual or business on the "Buyer Beware List" for

(a) failure or refusal to respond to an administrative subpoena of the Division, or

(b) failure or refusal to respond to a consumer complaint on file with the Division alleging violation of one or more of the acts administered by the Division after the business or individual has received notification from the Division and had an opportunity to respond to the Division and address the complaint

(2) Unclaimed, returned or refused certified mail properly addressed to the individual or business that is received back by the Division shall constitute proof of failure or refusal to respond

C (1) Prior to placement on the Buyer Beware List for any reason set forth in R152-1-3B the Division shall, upon receipt of a consumer complaint, make reasonable efforts to communicate with an individual or business identified in the complaint including

(a) at least one (1) initial written notice by certified mail or facsimile transmission,

(b) at least one (1) initial telephone call, and

(c) if the individual or business identified in the complaint is a Utah resident at least one initial (1) face to face contact by a Division representative either at the Division's offices or at the individual's

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or business' Utah address

(2)(a) If the initial efforts set forth at R152-1-3C(1) have proven unsuccessful the Division shall provide fifteen (15) business days written notice by certified mail prior to placing an individual or business on the Buyer Beware List unless

(i) notice has otherwise been given by a previously issued Division subpoena or written inquiry properly addressed, or

(ii) the Director finds that an emergency exists

(b) All individuals and businesses placed on the Buyer Beware List shall be notified in writing of the reasons for the proposed inclusion on the list. They will also be advised of what actions, if any, they can take to remove their name from the list.

D Each listing on the Buyer Beware List shall contain a listing of the individual's or businesses

(1) name(s), including "doing businesses as",

(2) address(es),

(3) phone number(s), and

(4) a detailed basis for the individual or business being placed on the list, including whether

(a) an administrative fine has been assessed and if so what amount, and

(b) a cease and desist order has been issued in accordance with Utah Code Section 13-2-6(1)

E The Buyer Beware List is a public document under Utah Code Title 63, Chapter 2, Government Records Access and Management Act

**R152-1-4 Removal from "Buyer Beware List"**

A The Division of Consumer Protection shall remove the name of the business or individual from the Buyer Beware List if

(1) the individual or business

(a) has had no other complaints with respect to a statute listed in Utah Code Section 13-2-1 for a period of 90 consecutive days after being placed on the list, and

(b) otherwise complies with all aspects of the order entered against the individual or business, including the payment of any administrative fines assessed,

(2) pursuant to R152-1-3B(1)(a), when a sufficient response is provided to an outstanding Division subpoena, or

(3) pursuant to R152-1-3B(1)(b), when a satisfactory response is made to outstanding Division inquiries to which the individual or business previously failed or refused to respond

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KEY: consumer protection

May 16, 2006

Notice of Continuation October 4, 2005

13-2-5(1)

13-11-8(2)

13-15-3(1)

13-16-12

U.A.C. R152-1, UT ADC R152-1

UT ADC R152-1  
END OF DOCUMENT

# **Exhibit 7**



**Effective: December 22, 2006**

United States Code Annotated Currentness

Title 15. Commerce and Trade

▣ Chapter 2. Federal Trade Commission; Promotion of Export Trade and Prevention of Unfair Methods of Competition

▣ Subchapter I. Federal Trade Commission (Refs & Annos)

→ **§ 45. Unfair methods of competition unlawful; prevention by Commission**

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b) ], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.



**(B)** All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

**(b) Proceeding by Commission; modifying and setting aside orders**

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph [FN1] (2) not later than 120 days after the date of the filing of such request.

**(c) Review of order; rehearing**

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty

days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by--

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceed-

ings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

**(1)(A)** The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for

a civil penalty of not more than \$10,000 for each violation.

**(B)** If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--

**(1)** after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

**(2)** with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

**(C)** In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

**(2)** If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

**(3)** The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy consideration

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

CREDIT(S)

(Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, Title XI, § 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21; July 14, 1952, c. 745, § 2, 66 Stat. 632; Aug. 23, 1958, Pub.L. 85-726, Title XIV, §§ 1401(b), 1411, 72 Stat. 806, 809; Aug. 28, 1958, Pub.L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub.L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub.L. 86-507, § 1(13), 74 Stat. 200; Nov. 16, 1973, Pub.L.

93-153, Title IV, § 408(c), (d), 87 Stat. 591, 592; Jan. 4, 1975, Pub.L. 93-637, Title II, §§ 201(a), 204(b), 205(a), 88 Stat. 2193, 2200; Dec. 12, 1975, Pub.L. 94-145, § 3, 89 Stat. 801; July 23, 1979, Pub.L. 96-37, § 1(a), 93 Stat. 95; May 28, 1980, Pub.L. 96-252, § 2, 94 Stat. 374; Oct. 8, 1982, Pub.L. 97-290, Title IV, § 403, 96 Stat. 1246; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(12), 98 Stat. 3358; Aug. 10, 1987, Pub.L. 100-86, Title VII, § 715(a)(1), 101 Stat. 655; Aug. 26, 1994, Pub.L. 103-312, §§ 4, 6, 9, 108 Stat. 1691, 1692, 1695; Dec. 22, 2006, Pub.L. 109-455, § 3, 120 Stat. 3372.)

[FN1] So in original. Probably should be “clause”.

#### TERMINATION OF AMENDMENTS

<For termination of amendments by Pub.L. 109-455, 7 years after December 22, 2006, see Sunset Provisions note set out under 15 U.S.C.A. § 44.>

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

1949 Acts.Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1950 Acts. House Report No. 277, Senate Report No. 309, and Conference Report No. 1731, see 1950 U.S. Code Cong. Service, p. 1968.

1952 Acts. Senate Report No. 1741, see 1952 U.S. Code Cong. and Adm. News, p. 2181.

1958 Acts.House Report No. 2360 and Conference Report No. 2556, see 1958 U.S. Code Cong. and Adm. News, p. 3741.

Senate Report No. 2129, see 1958 U.S. Code Cong. and Adm. News, p. 3996.

House Report No. 1048, see 1958 U.S. Code Cong. and Adm. News, p. 5212.

1960 Acts. Senate Report No. 1489, see 1960 U.S. Code Cong. and Adm. News, p. 2356.

1973 Acts.Senate Report No. 93-207 and House Conference Report No. 93-624, see 1973 U.S. Code Cong. and Adm. News, p. 2417.

1975 Acts.House Report No. 93-1107 and Senate Conference Report No. 93-1408, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Senate Report No. 94-466, see 1975 U.S. Code Cong. and Adm. News, p. 1569.

1979 Acts. House Report No. 96-265(Part I), see 1979 U.S. Code Cong. and Adm. News, p. 372.

1980 Acts.Senate Report Nos. 96-184 and 96-500, and House Conference Report No. 96-917, see 1980 U.S. Code Cong. and Adm. News, p. 1073.

1982 Acts.House Report Nos. 97-637 and 97-629, and House Conference Report No. 97-924, see 1982 U.S. Code Cong. and Adm. News, p. 2431.

1984 Acts. House Report No. 98-1062, see 1984 U.S. Code Cong. and Adm. News, p. 5708.

1987 Acts. Senate Report No. 100-19, House Conference Report No. 100-261, and Statement by President, see 1987 U.S. Code Cong. and Adm. News, p. 489.

1994 Acts. Senate Report No. 103-130 and House Conference Report No. 103-617, see 1994 U.S. Code Cong. and Adm. News, p. 1776.

2006 Acts. Senate Report No. 109-219, see 2006 U.S. Code Cong. and Adm. News, p. 1806.

#### References in Text

The Acts to regulate commerce, referred to in subsec. (a)(2), are defined in section 44 of this title.

The Packers and Stockyards Act, 1921, as amended, referred to in subsec. (a)(2), is Act Aug. 15, 1921, c. 64, 42 Stat. 159, as amended, which is classified to chapter 9 (section 181 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 181 of Title 7 and Tables.

The Antitrust Acts, referred to in subsec. (e), are defined in section 44 of this title.

#### Codifications

In subsec. (a)(2), “part A of subtitle VII of Title 49” substituted for “the Federal Aviation Act of 1958 [49 App.U.S.C.A. § 1301 et seq.]” on authority of Pub.L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

In subsec. (c), “section 1254 of Title 28” substituted for “section 240 of the Judicial Code [28 U.S.C.A. § 347]” on authority of Act June 25, 1948, c. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

#### Amendments

2006 Amendments. Subsec. (a)(4). Pub.L. 109-455, § 3, added par. (4).

1994 Amendments. Subsec. (g)(1). Pub.L. 103-312, § 6(d), substituted a period for “; or”.

Subsec. (g)(2). Pub.L. 103-312, § 6(a), substituted provision respecting finality of orders subject to petition for review reading: “Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by--

“(A) the Commission;

“(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

“(C) the Supreme Court, if an applicable petition for certiorari is pending.” for “Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or”, now covered in subsec. (g)(3)(A) and (4)(A) of this section.

Subsec. (g)(3). Pub.L. 103-312, § 6(b), enacted introductory text; and incorporated in subpars. (A) to (C) former provisions of pars. (2) to (4), which read:

“(2) Upon the expiration of the time allowed for filling a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

“(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

“(4) Upon the expiration of thirty days from the date of issue of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.”

Subsec. (g)(4). Pub.L. 103-312, § 6(c), enacted introductory text; and incorporated in subpars. (A) to (C) former provisions of pars. (2) to (4), which read:

“(2) Upon the expiration of the time allowed for filling a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

“(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

“(4) Upon the expiration of thirty days from the date of issue of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.”

Subsec. (m). Pub.L. 103-312, § 4(a), (b), substituted in subpar. (1)(B) “final cease and desist order, other than a consent order,” for “final cease and desist order” and added in par. (2), provision for judicial review of Commission determinations of law.

Subsec. (n). Pub.L. 103-312, § 9, added subsec. (n).

1987 Amendments. Subsec. (a)(2). Pub.L. 100-86, § 715(a)(1), inserted after “section 57a(f)(3) of this title,” the phrase “Federal credit unions described in section 57a(f)(4) of this title,”.

1984 Amendments. Subsec. (e). Pub.L. 98-620 struck out provision that such proceedings in the court of appeals had to be given precedence over other cases pending therein, and had to be in every way expedited.

1982 Amendments. Subsec. (a)(3). Pub.L. 97-290 added par. (3).

1980 Amendments. Subsec. (b). Pub.L. 96-252 added cl. (2) and provisions requiring that the Commission determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such



request.

1979 Amendments. Subsec. (a)(2). Pub.L. 96-37 added savings and loan institutions described in section 57a(f)(3) of this title to the enumeration of entities exempted from the Commission's power to prevent the use of unfair methods of competition and unfair or deceptive acts or practices.

1975 Amendments. Subsecs. (a), (b). Pub.L. 93-637, § 201(a), substituted "in or affecting commerce" for "in commerce" wherever appearing therein.

Subsec. (a). Pub.L. 94-145 deleted pars. (2) to (5) permitting fair trade pricing of articles for retail sale and State enactment of nonsigner provisions, and redesignated former par. (6) as (2).

Subsec. (m). Pub.L. 93-637, §§ 204(b), 205(a), added subsec. (m). Former subsec. (m), relating to the election by the Commission to appear in its own name after notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission, was struck out.

1973 Amendments. Subsec. (l). Pub.L. 93-153, § 408(c), raised the maximum civil penalty for each violation to \$10,000 and added provisions empowering the United States District Courts to grant mandatory injunctions and such other and further equitable relief as they might deem appropriate for the enforcement of final Commission orders.

Subsec. (m). Pub.L. 93-153, § 408(d), added subsec. (m).

1960 Amendments. Subsec. (f). Pub.L. 86-507 substituted "mailing a copy thereof by registered mail or by certified mail" for "registering and mailing a copy thereof", and "mailed by registered mail or by certified mail" for "registered and mailed".

1958 Amendments. Subsec. (a)(6). Pub.L. 85-909 substituted "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended," for "persons, partnerships or corporations subject to the Packers and Stockyards Act, 1921."

Pub.L. 85-726, § 1411, substituted "Federal Aviation Act of 1958" for "Civil Aeronautics Act of 1938".

Subsec. (b). Pub.L. 85-791, § 3(a), eliminated "the transcript of" preceding "the record in the proceeding" in the sixth sentence.

Subsec. (c). Pub.L. 85-791, § 3(b), in the second sentence, substituted "transmitted by the clerk of the court to" for "served upon", and "Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28" for "Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission", and which, in the third sentence, eliminated "and transcript" following "petition", inserted "concurrently with the Commission until the filing of the record" and eliminated "upon the pleadings, evidence, and proceedings set forth in such transcript" preceding "a decree affirming".

Subsec. (d). Pub.L. 85-791, § 3(c), substituted "Upon the filing of the record with it the" for "The".

1952 Amendments. Subsec. (a). Act July 14, 1952 amended subsection generally to permit fair trade pricing of articles for retail sale.

1950 Amendments. Subsec. (l). Act Mar. 16, 1950 added last sentence to make each separate violation of a cease and desist order a separate offense, except that each day of a continuing failure to obey a final order shall be a separate offense.

1938 Amendments. Subsec. (a). Act June 23, 1938 inserted words “air carriers and foreign air carriers subject to chapter 9 of Title 49” in second paragraph.

Act Mar. 21, 1938, amended section generally.

#### Effective and Applicability Provisions

1994 Acts. Section 15 of Pub.L. 103-312 provided that:

“(a) **In general.**--Except as provided in subsections (b), (c), (d), and (e), the provisions of this Act [enacting section 57b-5 of this title, amending this section and sections 53, 57a, 57b-1, 57b-2, 57c, and 58 of this title, and enacting provisions set out as notes under sections 57c and 58 of this title] shall take effect on the date of enactment of this Act [Aug. 26, 1994].

“(b) **Applicability of section 5.**--The amendment made by section 5 of this Act [amending section 57a of this title] shall apply only to rulemaking proceedings initiated after the date of enactment of this Act. Such amendment shall not be construed to affect in any manner a rulemaking proceeding which was initiated before the date of enactment of this Act. [Aug. 26, 1994].

“(c) **Applicability of section 6.**--The amendments made by section 6 of this Act [amending this section] shall apply only with respect to cease and desist orders issued under section 5 of the Federal Trade Commission Act (15 U.S.C. 45) after the date of enactment of this Act [Aug. 26, 1994]. These amendments shall not be construed to affect in any manner a cease and desist order which was issued before the date of enactment of this Act.

“(d) **Applicability of sections 7 and 8.**--The amendments made by sections 7 and 8 of this Act [amending sections 57b-1 and 57b-2 of this title] shall apply only with respect to compulsory process issued after the date of enactment of this Act [Aug. 26, 1994].

“(e) **Applicability of section 9.**--The amendments made by section 9 of this Act [amending this section] shall apply only with respect to cease and desist orders issued under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), or to rules promulgated under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) after the date of enactment of this Act [Aug. 26, 1994]. These amendments shall not be construed to affect in any manner a cease and desist order which was issued, or a rule which was promulgated, before the date of enactment of this Act. These amendments shall not be construed to affect in any manner a cease and desist order issued after the date of enactment of this Act, if such order was issued pursuant to remand from a court of appeals or the Supreme Court of an order issued by the Federal Trade Commission before the date of enactment of this Act.”

1984 Acts. Amendment by Pub.L. 98-620 not to apply to cases pending on Nov. 8, 1984, see section 403 of Pub.L. 98-620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

1980 Acts. Section 23 of Pub.L. 96-252 provided that: “The provisions of this Act [see Short Title of 1980 Amendments note under section 58 of this title], and the amendments made by this Act, shall take effect on the

date of the enactment of this Act [May 28, 1980].”

1975 Acts. Amendment by Pub.L. 94-145 effective upon expiration of ninety-day period beginning on Dec. 12, 1975, see section 4 of Pub.L. 94-145, set out as a note under section 1 of this title.

Amendment by section 204(b) of Pub.L. 93-637 not applicable to any civil action commenced before Jan. 4, 1975, see section 204(c) of Pub.L. 93-637, set out as a note under section 56 of this title.

Section 205(b) of Pub.L. 93-637 provided that: “The amendment made by subsection (a) of this section [amending this section] shall not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of this Act [Jan. 4, 1975].”

1958 Acts. Amendment by Pub.L. 85-726 effective on the 60th day following the date on which the Administrator of the Federal Aviation Agency first appointed under Pub.L. 85-726 qualifies and takes office, see section 1505(2) of Pub.L. 85-726. The Administrator was appointed, qualified, and took office on Oct. 31, 1958.

1950 Acts. Amendment by Act Mar. 16, 1950, effective July 1, 1950, see note set out under section 347 of Title 21, Food and Drugs.

#### Sunset Provisions

Amendments made by Pub.L. 109-455 terminate 7 years after December 22, 2006, see Pub.L. 109-455, § 13, set out as a note under 15 U.S.C.A. § 44.

#### Change of Name

Act June 25, 1948, eff. Sept. 1, 1948, as amended by Act May 24, 1949, amended section by substituting “court of appeals” for “circuit court of appeals”.

#### Transfer of Functions

All executive and administrative functions of the Federal Trade Commission were, with certain reservations, transferred to the Chairman of such Commission by 1950 Reorg. Plan No. 8, § 1, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1264, set out as a note under section 41 of this title.

#### Repeals

Pub.L. 85-726, Title XIV, § 1401(b), Aug. 28, 1958, 72 Stat. 806, repealed Act June 23, 1938, c. 601, 52 Stat. 977, cited to the credit of this section.

#### Congressional Findings and Declaration of Purpose Covering Grant of Direct Subpena Enforcement Authority and Authority to Grant Preliminary Injunctive Relief

Section 408(a), (b) of Pub.L. 93-153 provided that:

“(a)(1) The Congress hereby finds that the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority to enforce subpoenas and to seek preliminary injunctive relief to avoid unfair competitive practices.

“(2) The Congress further finds that as a direct result of this inadequate legal authority significant delays have occurred in a major investigation into the legality of the structure, conduct, and activities of the petroleum industry, as well as in other major investigations designed to protect the public interest.

“(b) It is the purpose of this Act [amending this section and sections 46, 53, and 56 of this title] to grant the Federal Trade Commission the requisite authority to insure prompt enforcement of the laws the Commission administers by granting statutory authority to directly enforce subpoenas issued by the Commission and to seek preliminary injunctive relief to avoid unfair competitive practices.”

#### Purpose of Act July 14, 1952

Section 1 of Act July 14, 1952, provided: “That it is the purpose of this Act [amending this section] to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.”

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Advertising of foods causing misbranding actions by Secretary of Health and Human Services precluded by action under this section, see 21 USCA § 378.

“Antitrust laws” defined as in this section for purposes of--

Export trade certificates of review, see 15 USCA § 4021.

Export trading companies and trade associations, see 15 USCA § 4002.

“Antitrust laws” defined to include this section for purposes of--

Bank holding companies, see 12 USCA § 1841.

Charitable gift annuities modification of antitrust laws, see 15 USCA § 37a.

Cooperative research, see 15 USCA § 4301.

Copyright limitations on exclusive rights, see 17 USCA § 109.

Defense Production Act of 1950, see 50 App. USCA § 2158.

International antitrust enforcement assistance, see 15 USCA § 6211.

Interstate bank mergers, see 12 USCA § 1831u.

Regulation of electric utility companies engaged in interstate commerce, see 16 USCA § 824k.

Television program improvement, see 47 USCA § 303c.

Automobile fuel economy information violations not considered unfair or deceptive act or practice under this section, see 49 USCA § 32908.

Certiorari and appeal, see 28 USCA § 1254.

Collateral estoppel effect not given to Federal Trade Commission finding under this section giving rise to claim for relief, see 15 USCA § 16.

Jurisdiction of Federal Trade Commission in enforcement of Clayton Act, see 15 USCA § 21.

Possession, sale, or serving of colored oleomargarine or colored margarine in contravention of State laws not authorized by this section, see 21 USCA § 347b.

Preliminary injunctions in actions alleging that proposed acquisition violates this section, see 15 USCA § 18a.

Service of process same as provided in this section for violations by--

Live poultry dealers, see 7 USCA § 228b-2.

Packers generally, see 7 USCA § 193.

Unfair or deceptive acts or practices violations under this section relating to--

Credit reporting agencies, see 15 USCA § 1681s.

Fair packaging and labeling program, see 15 USCA § 1456.

False representations regarding energy use or efficiency of certain consumer products, see 42 USCA § 6303.

Mailing of unordered merchandise, see 39 USCA § 3009.

Octane disclosure, see 15 USCA § 2823.

Pay-per-call services, see 15 USCA § 5711.

Telephone billing and collection, see 15 USCA § 5721.

Violations considered violation of this section relating to--

Comprehensive smokeless tobacco health education, see 15 USCA § 4404.

Consumer product warranties, see 15 USCA § 2310.

Dolphin Protection Consumer Information Act labeling standard for tuna products, see 16 USCA § 1385.

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Federal Trade Commission--

Miscellaneous rules, see 16 CFR § 4.1 et seq.

Preservation of consumers' claims and defenses, see 16 CFR §§ 433.1 et seq. and 435.1 et seq.

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