

An Overview Alaska's Unfair Trade Practices and Consumer Protection Act with Emphasis on Auto Dealer Practices and Lemon Law Claims

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Scope of Today's Presentation

- Overview Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA)
 - Its scope and applicability
 - Elements of a prima facie case
 - Damages
 - Attorney's fees
- Auto Dealer Practices
- Alaska's Lemon Law
 - Motor vehicles
 - Recreational vehicles
- Bonus Consumer Protection Material

The UTPA is Broad in Scope and Liability

- The UTPA broadly prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.”
- There are currently 57 specific practices identified in AS 45.50.471(b) that are *per se* violations of the UTPA.
- The list contained within AS 45.50.471(b) is non-exhaustive.
- Any unfair or deceptive act or practice can be a violation of the UTPA regardless of whether it appears in a specific subsection of AS 45.50.471(b).
- Liability for UTPA claims may extend to agents, employees, officers, directors, and owners. *Borgen v. A&M Motors, Inc.*, 273 P.3d 575, 593 (Alaska 2012); Alaska Civil Pattern Jury Instructions 10.04, 10.05 (citing *Walker v. FDIC*, 970 F.2d 114 (5th Cir. 1992); *FTC v. Publishing Clearinghouse, Inc.*, 104 F. 3d 1168, 1170-71 (9th Cir 1997)).

What UTPA Does Not Cover

- The UTPA not apply to real estate transactions including sales, mortgages, leases, and foreclosures.
 - *Alaska Trustee, LLC v. Bachmeier*, 332 P.3d 1, 5-9 (Alaska 2014) (citations omitted).
- The UTPA not apply to personal injury claims.
 - *Donahue v. Legends, Inc.*, 331 P.3d 342 (2014) (rejecting plaintiff's claim that defendant violated the UTPA for misrepresenting in its advertisements that its rock wall gym was safe).



Elements of a Prima Facie UTPA Claim

- (1) The defendant engaged in an unfair or deceptive act or practice;
 - Can either be a specific provision in AS 45.50.471(b); or
 - Plaintiff can make a an argument that defendant was engaged in an unfair or deceptive act or practice.
- (2) The act or practice occurred in the conduct of trade or commerce; and
- (3) The plaintiff suffered an ascertainable loss of money or property as a result of the deceptive or unfair act or practice.



Specific Violations of the UTPA

The Non-Exhaustive List Contained in AS 45.50.471(b):

- (1) fraudulently conveying or transferring goods or services by representing them to be those of another;
- (2) falsely representing or designating the geographic origin of goods or services;
- (3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;
- . . .
- (11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives, or damages a buyer or a competitor in connection with the sale or advertisement of goods or services.
- . . .
- (12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;
 - Even innocent misrepresentations are a violation of the UTPA. *Borgen v. A&M Motors, Inc.*, 273 P.3d 575, 591 (Alaska 2012).

Unfair or Deceptive Act or Practice Defined

- Deceptive Act or Practice:
 - An act or practice is deceptive if the act or practice is “capable of being interpreted in a misleading way.” *Borgen v. A&M Motors*, 273 P.3d 575, 590 (Alaska 2012) (citing *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980)).
 - The plaintiff is not required to show that the defendant intended to deceive anyone. *Id* at 591.
- Unfair Act or Practice Factors:
 - (1) whether the practice offends public policy, as it decided by society to be unfair through established law or otherwise;
 - (2) “whether it is immoral, unethical, oppressive, or unscrupulous;” or
 - (3) “whether it causes substantial injury to consumers (or competitors or other businessmen).” *Id* at 590.

Trade or Commerce Defined

- There is no Alaska Supreme Court decision defining the meaning of “trade and commerce.”
- But the pattern jury instruction are instructive:
 - “Trade or commerce means the advertising, offering for sale, selling, renting, leasing, or distributing any services, property, or another thing of value.”
 - Alaska Civil Pattern Jury Instructions 10.02 (citing Ill Rev. Stat. Ch. 815, para. 505/1(f) (1993); Conn. Gen. Stat § 42-110a(4)).



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Ascertainable Loss of Money or Property

- The Alaska Supreme Court in dicta has previously equated “ascertainable loss of money or property” language in the statute to be “monetary losses”.
 - *Garrison v. Dixon*, 19 P.3d 1229, 1235 n. 22 (Alaska 2001).
- But the drafters of pattern jury instruction believe this definition would be expanded more broadly to include:
 - Whether the plaintiff “received something other than what he/she bargained for.”
 - Alaska Civil Pattern Jury Instructions 10.04 (citing *Hinchliffe v. American Motors Corp.*, 440 A.2d 810, 814-815 (Conn. 1981) (citations omitted)).

Damages under the UTPA

- The UTPA provides a private right of action pursuant to AS 45.50.531 for:
 - injunctive relief;
 - treble damages or \$500, whichever is greater, for each unlawful act or practice;
 - remedies provided by the common law;
 - any other relief the court considers necessary and proper. AS 45.50.531.
- Full reasonable attorney's fees. AS 45.50.537.



UPTA Provisions Are Not Waivable

- Parties cannot enter into a contract waiving the provisions of the UTPA.
- Pursuant to AS 45.50.542, a waiver of the provisions of AS 45.50.471-45.50.561 is “contrary to public policy and unenforceable and void.”



Auto Dealer Practices Act

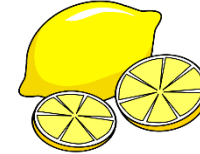
- Auto dealer practices are regulated by the AS 45.25.400-45.25.590.
- A violation of any one of the above provisions is a specific violation of the UTPA. AS 45.50.471(b)(43).



Regulated Auto Dealer Practices

- Auto dealers are prohibited from using certain terms in their advertising and such advertising cannot be deceptive. AS 45.25.400.
- The dealer's advertised price must include all dealer fees and costs, except those actually paid to a government agency. AS 45.25.440.
- Before the sale, the dealer must disclose where the vehicle was obtained by the dealer from (private party, wholesaler, auction). AS 45.25.465.
 - If from a private party, the dealer must make a reasonable inquiry of the seller into the condition of the vehicle, including accident and repair history of the vehicle, and provide this information to the prospective purchaser in writing.
- Alaska Law does NOT require a dealer return a vehicle (sometimes referred to a cooling-off period) when the sale is otherwise lawful.

Alaska's Lemon Law



- Alaska's Motor Vehicle Warranties Act, AS 45.45.300-360.
 - Only applies to new vehicles purchased from a dealer.
 - The vehicle must have four or more wheels, be propelled by a motor, and required to be registered.
 - Must be normally used for personal, family, or household use.
 - It does apply to tractors, farm vehicles, or a vehicle designed primarily for off-road use.
- Alaska's Marine Products and Recreational Products Act, AS 45.27.190-220.
 - Only applies to a new "marine" or "motorized recreational" products.
 - Includes boats, outboard marine gasoline motors, all terrain vehicles, snow machines.
 - Does NOT include watercraft designed for self-propulsion.

Statutory Requirements For Lemon Law Claims

- **Requires there be a defect(s) that:**
 - the dealer/servicing agent is unable to repair;
 - the defect must be one that is covered by the warranty; and
 - it must arise within one year of purchase or within the warranty period, whichever occurs first.
- **A presumption arises that the defect(s) is unable to be repaired if:**
 - the same defect is subject to three or more repairs; or
 - the vehicle is out of repair for 30 or more days for one or multiple repairs.
- Within 60 days of the above timeline, consumer must provide written notice to the manufacture and its dealer/repairing agent.
- Manufacture gets an additional 30 days for one final attempt to repair.
- Consumer has the right to receive a new comparable vehicle or a full refund.
- No attorney's fees provision, unless manufacture fails to issue a refund because then it is UTPA claim.

Bonus Consumer Protection Material

- **Automobile Repair Act, AS 45.45.130-240**
 - If the shop gives the customer a repair order and the authorized repairs exceed the cost of the estimate, the shop must receive authorization the customer's authorization prior to proceeding.
 - If the shop determines that additional repairs are needed than those previously authorized, the shop shall obtain the consumer's authorization prior to undertaking those repairs.
 - The shop may not misrepresent the costs of repairs, terms or conditions of the warranty agreement, that repairs have been made, or that repairs are necessary.
- **Maximum Interest Rates, AS 45.45.010-070**
 - Interest in contracts or loan commitments are capped:
 - 10.5% if principle of loan exceeds \$25,000.
 - 5% points above annual rate charged member banks for advances by 12th Federal Reserve District (currently 1%), if \$25,000 or under.
 - Penalties for violation:
 - double the amount of interest received or collected;
 - forfeiture of entire interest; and
 - attorney's fees.

Thank you

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