

813.05 MODEL UNFAIR OR DECEPTIVE TRADE PRACTICE CHARGE.

NOTE WELL: This instruction is only a sample. Your instruction must be tailored to fit the facts and law applicable to the case at bar. Many possible combinations of charges that may be required under Chapter 75 (see N.C.P.I.-Civil 813.00), and the appropriate issues to be submitted to the jury will vary from case to case. Therefore, DO NOT BLINDLY FOLLOW THIS INSTRUCTION. This is only a guide to a general style of instruction that can be given utilizing the N.C.P.I.-Civil 813.00 series.

This instruction is based on a hypothetical fact situation in which the plaintiff is suing the defendant for alleged unfair or deceptive practices in the sale of a used automobile.¹

Remember, whether a defendant's alleged conduct constitutes an unfair or deceptive trade practice is a question of law for the judge. The jury decides what acts were committed (issue of violation), whether these acts occurred in or affected commerce (issue of commerce), whether these acts had an impact on plaintiff (issue of proximate cause), and the amount of damages (issue of damages). Since the jury decides what acts were committed, and the judge must decide whether these acts violated N.C. Gen. Stat. § 75-1.1, it is recommended that the jury be given special interrogatories in connection with the issue of violation.²

Following the format of N.C.P.I.-Civil 813.00, the following issues would be submitted to the jury in this hypothetical fact situation after the appropriate preliminary instructions have been given:

- 1. Violation- 813.21.*
- 2. Commerce- 813.62.*

3. *Proximate Cause- 813.70.*

4. *Damages- 813.80.*

101.05 Members of the jury: All the evidence has been presented. It is now your duty to decide the facts from the evidence. You must then apply to those facts the law which I am about to give you. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you thought it was or as you might like it to be.

As you know, we are trying a case in which the plaintiff seeks to recover money damages resulting from alleged unfair or deceptive practices in the sale by the defendant of a used automobile.

101.10 In this case you will be called upon to answer four questions- also called issues. As I discuss each issue I will tell you which party has the burden of proof. The party having that burden is required to prove, by the greater weight of the evidence, the existence of those facts which entitle that party to a favorable answer to the issue.

Also, in connection with the first issue you will be asked to answer two special interrogatories or questions. The same rule concerning the burden of proof applies to each of these special interrogatories or questions as applies to the first issue.

101.10 The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

If you are so persuaded, then it would be your duty to answer the issue in favor of the party with the burden of proof. If you are not so persuaded, then it would be your duty to answer the issue against the party with the burden of proof.

101.15 You are the sole judges of the credibility of each

witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness you should use the same tests of truthfulness which you apply in your everyday lives. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony of the witness is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in the case.

101.20 You are also the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case.

101.50 It is your duty to recall and consider all of the evidence introduced during the trial. If your recollection of the evidence differs from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations.

101.60 As I have already indicated, your verdict will take the form of answers to certain questions or issues.

These issues are as follows:

The first issue reads:

"Did the defendant do (at least one of) the following:

(1) Represent to the plaintiff that the automobile was a one-owner vehicle, knowing that the automobile had two previous owners, or

(2) Represent to the plaintiff that the automobile had never been

wrecked, knowing that the automobile had been wrecked.

The second issue reads:

"Was the defendant's conduct in commerce or did it affect commerce?"

The third issue reads:

"Was the defendant's conduct a proximate cause of the plaintiff's injury?"

The fourth issue reads:

"In what amount has the plaintiff been injured?"

I will discuss the issues one at a time and explain the law which you should consider as you deliberate upon your verdict.

813.21 The first issue reads:

"Did the defendant do (at least one of) the following:

(1) Represent to the plaintiff that the automobile was a one-owner vehicle, knowing that the automobile had two previous owners, or

(2) Represent to the plaintiff that the automobile had never been wrecked, knowing that the automobile had been wrecked.³

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant did (at least one of) the act(s) as contended by the plaintiff. In this case the plaintiff contends, and the defendant denies, that the defendant:

(1) Represented to the plaintiff that the automobile was a one-owner vehicle, knowing that the automobile had two previous owners, or

(2) Represented to the plaintiff that the automobile had never been wrecked, knowing that the automobile had been wrecked, and as a result had a defective transmission.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant did (at least one of) the act(s) contended by the plaintiff, then you would answer "Yes" in the space beside each act so found.

If, on the other hand, you fail to so find, then you would answer "No" in the spaces provided.

813.62 The second issue reads:

"Was the defendant's conduct in commerce or did it affect commerce?"

You will answer this issue only if you have found in the plaintiff's favor on the preceding issue. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant's conduct was either "in commerce" or that it "affected commerce."

Conduct is "in commerce" when it involves a business activity.

Conduct "affects commerce" whenever a business activity is adversely and substantially affected.

(A "business activity" is the way a business conducts its regular, day-to-day activities or affairs (such as the purchase and sale of goods), or whatever other activities the business regularly engages in and for which it is organized.)

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant's conduct was "in commerce" or that it "affected commerce," then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find then it would be your duty to answer this issue "No" in favor of the defendant.

813.70 The third issue reads:

"Was the defendant's conduct a proximate cause of the plaintiff's injury?"

You will answer this issue only if you have found in the plaintiff's favor on the preceding two issues.

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:

First, that the plaintiff has suffered injury, and

Second, that the defendant's conduct was a proximate cause of the plaintiff's injury.

Proximate cause is a cause which in a natural and continuous sequence produces the injury, and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result.

There may be more than one proximate cause of an injury. Therefore, the plaintiff need not prove that the defendant's conduct was the sole proximate cause of the plaintiff's injury. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's conduct was a proximate cause.

NOTE WELL: For a representation to be a proximate cause of injury or damage in an unfair trade practice case, the jury must find that the plaintiff "actually relied" on the representation.⁴ Therefore, if the jury has answered "yes," to a special interrogatory whether the defendant represented a fact to the plaintiff (see N.C.P.I.-Civil 813.21), then the following instruction should be given in connection with such representation.

[In the First Issue,⁵ if you answered "Yes" that the defendant

(1) represented to the plaintiff that the automobile was a

one-owner vehicle, knowing that the automobile had two previous owners, or

(2) represented to the plaintiff that the automobile had never been wrecked, knowing that the automobile had been wrecked, then in order to establish that the defendant's conduct was the proximate cause of the plaintiff's injury, the plaintiff must show (1) that *he* actually relied on the representation made by the defendant and (2) that the plaintiff's reliance was reasonable.

"Actual reliance" requires that the plaintiff affirmatively incorporated the alleged misrepresentation into *his* decision-making process; that is, if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether.

The plaintiff's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for *his* own interests, would have relied on the misrepresentation.]

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff has suffered an injury, and that the defendant's conduct proximately caused the plaintiff's injury, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

813.80 The fourth issue reads:

"In what amount has the plaintiff been injured?"

If you have answered all the preceding issues "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage

caused by the wrongful conduct of the defendant.

The plaintiff may also be entitled to recover actual damages. The plaintiff has the burden of proving the amount of actual damages. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages, if any, sustained as a result of *his* injury.

Such damages would include the difference in the value of the 1970 Dodge automobile as represented by the defendant and the value of the automobile as actually delivered.

The plaintiff's damages are to be reasonably determined from the evidence presented in the case. The plaintiff is not required to prove with mathematical certainty the extent of *his* injury in order to recover damages. Thus, the plaintiff should not be denied damages simply because they cannot be calculated with exactness or a high degree of mathematical certainty. An award of damages must be based on evidence which shows the amount of the plaintiff's damages with reasonable certainty. However, you may not award any damages based upon mere speculation or conjecture.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of actual damages sustained by the plaintiff by reason of *his* injury, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

Next, the judge should give the appropriate closing instructions:

Jury Should Consider All Contentions

N.C.P.I.-Civil 150.10

Jury Should Render Verdict Based

N.C.P.I.-Civil. 813.05
MODEL UNFAIR OR DECEPTIVE TRADE PRACTICE CHARGE.
GENERAL CIVIL VOLUME
JUNE 2014

<i>on Fact, Not Consequences</i>	<i>N.C.P.I.-Civil 150.12</i>
<i>The Court Has No Opinion</i>	<i>N.C.P.I.-Civil 150.20</i>
<i>Verdict Must Be Unanimous</i>	<i>N.C.P.I.-Civil 150.30</i>
<i>Selection of Foreman</i>	<i>N.C.P.I.-Civil 150.40</i>

1 This fact situation is based on the case of *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 346 (1975), in which the court held the acts of the defendant to be in violation of N.C. Gen. Stat. § 75-1.1.

2 When one of the *per se* violation instructions is used, it will probably be unnecessary to use special interrogations since an affirmative answer to the issue will mean that defendant is guilty of an unfair or deceptive trade practice under the applicable statute as a matter of law.

3 Not making a representation when there is a statutory duty to disclose also may constitute an unfair or deceptive trade practice. For example, when selling a used motor vehicle, N.C. Gen. Stat. § 20-71.4 imposes a statutory duty to disclose, in writing, whether the vehicle was a flood, salvaged or reconstructed motor vehicle, or, for vehicles up to five model years old, if the vehicle had been involved in a collision where the cost of repair exceeded 25% of the fair market value. See N.C. Gen. Stat. § 20-71.4(a) and (b). See also *Wilson v. Sutton*, 124 N.C. App. 170, 174. 476 S.E.2d 467, 470 (1996) (recognizing a statutory unfair and deceptive trade practice claim under N.C. Gen. Stat. § 20-71.4(a) and N.C. Gen. Stat. § 20-348).

4 *Bumpers v. Community Bank of N. Va.*, ___ N.C. ___, 747 S.E.2d 220, 226 (2013).

5 See N.C.P.J.I.-Civil 813.21 Trade Regulation - Violation - Issue of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices.