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Cover Page Footnote

The author also thanks Alexandria Feinstein, J.D. NSU College of Law (forthcoming 2017) for her outstanding work in the research and writing of this article.

“YOU KNOW, IT’S JUST MARKETING” – UNFAIR AND DECEPTIVE TRADE PRACTICES IN CAR DEALER BUY-BACK OFFERS

Michael Flynn*

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I. INTRODUCTION

It is that time of the year! Labor Day, Veterans Day, Christmas, President’s Day, Memorial Day or the Fourth of July, or just about any day according to car dealers, it is time to buy a car! The television and print and electronic mediums are full of advertising telling us it is time to buy a car.¹ At some point most of us do it and most of us do not enjoy it!² Car dealers, both new and used car dealers, know that for the majority of us, we need to drive a car almost daily.³ Therefore, car dealers offer cars for sale from a superior bargaining position.⁴ This puts the car buyer at a disadvantage from the start.⁵ It seems no matter how hard we may try, even if we think we got a

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¹ See, e.g., Christine DiGangi, *Why Is Now Is The Time to Buy A Car*, FOX BUS. (Nov. 20, 2013), <http://www.foxbusiness.com/personal-finance/2013/11/20/why-is-now-is-time-to-buy-car/> (last visited Apr. 1, 2017); *Now Is The Time to Buy A Fuel-Efficient Car*, USA TODAY, <http://www.usatoday.com/videos/money/2015/03/05/24449591/> (last visited Apr. 1, 2017); Matt Hardigree, *Now Is The Perfect Time To Buy A Car Instead Of An SUV*, JALOPNIK (Mar. 9, 2015, 09:57 AM), <http://jalopnik.com/now-is-the-perfect-time-to-buy-a-car-instead-of-an-suv-1690268674> (last visited Apr. 1, 2017).

² Bill Koenig, *Car Dealers Conundrum: When Customers Think You’re More Profitable Than You Are*, FORBES (July 30, 2014, 06:09 AM), <http://www.forbes.com/sites/billkoenig/2014/07/30/car-dealers-conundrum-when-customers-think-youre-more-profitable-than-you-are/> (last visited Apr. 1, 2017) (consumer report by TrueCar noting only 10% of U.S. consumers enjoy the car buying process).

³ 2 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW 875 n.2 (2013–2014 ed. 2013) (quoting “[a]s auto dealerships across the country struggle to keep afloat, sales of late-model used vehicles continue to be a right spot in an otherwise dismal automotive market. Dave Cosper, CFO of Sonic Automotive, said in an interview with Bloomberg News that Sonic’s used car sales will set a record at the same time new car sales are down. The strong demand for used cars has boosted prices and created a shortage on used car lots” (citation omitted); see Trade Regulation Rule; Sale of Used Motor Vehicles, 49 Fed. Reg. 45,692, 45,695–96 (1984) (codified in 16 C.F.R. pt 455)).

⁴ See Gregory R. Ingalsbe & Raymond G. Ingalsbe, *Spot Delivery: Why it is Illegal and Why Car Dealers Have Been Getting Away With Theft For So Long*, 38 N. KY. L. REV. 221, 256–57 (2011).

⁵ See *id.* at 222.

good deal, we always wonder how much we overpaid or just plain got swindled in a car buying deal.⁶ Perhaps for good reason. The myriad of local, state⁷ and federal statutes, ordinances, and administrative rules that regulate car dealers are designed to protect the car-buying consumer from unfair, deceptive, and unconscionable sales practices.⁸ These statutes and rules have been in existence for many years and new statutes and regulations are enacted to thwart the latest sting attempt by car dealers.⁹ Car dealers are constantly conjuring up ways to dispose of product and make a profit.¹⁰ If selling cars is not enough, then they lease cars. If selling and leasing cars is not enough, then they finance car sales and leases, and so on. To paraphrase a famous lyric, “we got to move these [cars].”¹¹

One of the current developments in the never-ending effort to find a way to profit from dealing in cars is the car dealer acquisition program.¹² At first this sounds incongruent – after all, the purpose of a car dealer is to SELL or LEASE cars, not buy cars. Yes, car dealers take trade-ins and then sell the trade-in vehicles, but this is not the “preferred” type of sale.¹³ Now it is common for car dealerships, after acquiring or buying the list of the names of people who may own a particular brand of car, to send out buy-back offers.¹⁴

⁶ See 2 PRIDGEN & ALDERMAN, *supra* note 3, at 875–77 (discussing sale abuses by car dealers and car dealers as the subject of numerous consumer complaints).

⁷ See 1 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW 16, 46–47 (2013–2014 ed. 2013) (discussing the state of consumer protection and sales practices law and further discussing Unfair and Deceptive Practices Acts).

⁸ Every state has some kind of legislation designed to protect consumers in the marketplace. See CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (8th ed. 2012).

⁹ See *id.* at 307, for examples of UDAP restrictions of car advertisements and other various state UDAP statute requirements for car sellers.

¹⁰ See *id.*, for examples of how deceptive car dealers make profits from consumers.

¹¹ DIRE STRAITS, MONEY FOR NOTHING (Warner Brothers 1985) (singing about selling appliances, “We got to move these refrigerators, We gotta move these color TVs”).

¹² See, e.g., *Sell your vehicle Today!*, 1-800-CAR-CASH, <http://www.carcash.com/index.php> (last visited Apr. 1, 2017) (providing examples of different advertisements listed on websites & electronic articles regarding car dealer acquisition programs); *California Vehicle Buy Back Program*, SMOGTIPS.COM, http://www.smogtips.com/vehicle_buy_back.cfm (last visited Apr. 1, 2017); *Old Car Buy Back Program*, SANTA BARBARA COUNTY AIR POLLUTION CONTROL DISTRICT, <http://www.ourair.org/old-car-buy-back-program/> (last visited Apr. 1, 2017); *Fiat Chrysler Forced into Biggest Vehicle Buyback Ever*, USA TODAY (July 27, 2015, 4:08 PM), <http://www.usatoday.com/story/money/2015/07/27/fiat-chrysler-forced-into-biggest-vehicle-buyback-ever/30739011/> (last visited Apr. 1, 2017).

¹³ The “preferred” type of sale the author is talking about is the sale of a new car opposed to a used one. The profit margin of a car dealer selling a new car is greater compared to a sale of a used car. For example, a new 2015 Hyundai Genesis 5.0L is listed at \$49,063, compared to the pre-owned listing of the same car at \$41,999. The profit margin for this one particular car dealership is greater if the car dealer sells a new car to a consumer opposed to a pre-owned car (approximately an \$8,000 difference). *Compare New Vehicles*, KING HYUNDAI, <http://www.kinghyundai.com/VehicleSearchResults?search=new> (last visited Apr. 1, 2017) (providing current prices for new vehicles), *with Pre-Owned Vehicles*, KING HYUNDAI, <http://www.kinghyundai.com/VehicleSearchResults?search=preowned> (last visited Apr. 1, 2017) (providing current prices for pre-owned vehicles).

¹⁴ See *Ditch Your Car If you Can't Afford It: 6 Steps To Sell Quickly*, BUS. INSIDER (Mar. 15, 2012, 10:15 PM), <http://www.businessinsider.com/sell-quickly-if-you-cant-afford-your-car-anymore-2012-3> (last visited Apr. 1, 2017); Daniel Kurt, *Car Leases: Should You Take the Purchase Option?*, INVESTOPEDIA (Jan. 29, 2015, 2:01 PM), <http://www.investopedia.com/articles/personal-finance/012915/>

These buy-back offers can appear to be very attractive. Here is an example of just one car buy-back offer and what happened afterwards.¹⁵

Michael owns a 2013 four-door sedan. The car, bought new, has a payoff price of \$10,000 with three years left on the long-term installment sales contract. The car-buying documents also state Michael may turn in the car during the fourth year of the installment sales contract and receive a guaranteed \$10,000 credit towards the purchase of any new vehicle. Michael’s car has only 20,000 miles on it; it came with a 100,000-mile warranty and only has a less than two-inch paint chip on the rear bumper from some unknown driver in a parking lot. The car is otherwise in excellent condition inside and out.

Michael then receives in the mail several Official Buy-Back Offers.¹⁶ After combing through several of these almost weekly offers, one catches Michael’s attention. This particular mailer announces in bold lettering a particular “3 Days Only Buy-Back Event” which specifically references Michael’s 2013 car model.¹⁷ The top of the ad states the Official Buy-Back Details for Michael’s car and states Black Book Value of \$12,175 with an asterisk. This offer looks really good to Michael as it is more than he owes on the car. Underneath these details is another box which states Buy-Back Offer \$16,175 with a double asterisk. This offer looks even better to Michael! Michael then goes on to read the small print following the single asterisk. This small print reveals the copyright for this offer and then says that prices are based on the Black Book (average) Trade-in Value and is subject to adjustment for mileage and condition.¹⁸ The small print following the double-asterisk conditions the buy-back offer on buying another vehicle and all of the rebates and credits that go along with that particular buy-back offer. This double-asterisk offer is not what Michael is looking to accomplish, as he does not want to buy a new car from the car dealership.

Reading further, the text in the body of the ad addressed to Michael states that the car dealership is interested in buying back his particular car because there has been an increase in the demand for Michael’s car and the car dealership’s inventory of Michael’s car model is low.¹⁹ The text goes on to say that the car dealership needs Michael’s car and that there is no purchase

car-leases-should-you-take-purchase-option.asp (last visited Dec. 1); *Manufacturer Buy Back*, WORLD IMPORTS USA, <http://www.worldimportsusa.com/manufacturer-buy-back.htm> (last visited Apr. 1, 2017).

¹⁵ This is a true story as told by the Professor of his real life experience with a car dealership’s buy back offer program. The direct quoting told throughout the story is a compilation of advertisements sent by direct mail to the Professor’s residence. Direct Quotes are taken from a total of four advertisements, dated Sept. 5, 2014, which the author responded to.

¹⁶ See *id.*

¹⁷ See *Black Friday Buy Back*, KING HYUNDAI, <http://www.kinghyundai.com/black-friday-buy-back.htm> (last visited Apr. 1, 2017) (providing an example of a “Buy Back Offer” advertisement).

¹⁸ See *supra* note 15.

¹⁹ See *id.*

of another car necessary for the dealership to buy back Michael's car.²⁰ Finally, the text concludes by stating that the dealership is prepared to make Michael²¹ an aggressive offer to purchase his vehicle and that Michael will be able to take the cash and walk away.²² This is exactly what Michael would like to do.

Even with this buy-back offer in writing, Michael does his research. He checks National Automobile Dealers Association,²³ Black Book,²⁴ Kelley's Blue Book,²⁵ and CarMax²⁶ to confirm and get further details about the value of his car. Each one of these car value services confirmed that for his low mileage, better than average condition car, the trade-in value ranged from a low of \$12,025 to a high of \$13,650. Armed with the buy-back offer and his research data, Michael makes an appointment with Ernie at the car dealership to take advantage of the buy-back offer for \$12,175 or higher.

Michael shows up, after traveling for 40 minutes, at the appointment time at the car dealership and meets Ernie. Ernie gives Michael the required paperwork to fill out for the buy-back offer as advertised in the mailer that Michael shows Ernie. After the paperwork is filled out, Ernie takes the paperwork and Michael's car keys and returns with a buy-back offer. Michael is startled and surprised that the buy-back offer is for \$9,000. Michael asks how this can be when the mailer states a buy-back offer with no purchase necessary of \$12,175 and shows Ernie his research which indicates that even this buy-back offer may be lower than what Michael's car is really worth. Ernie says the buy-back offer is based on the auction price. Michael then asks how can the auction price be the buy-back price when nowhere in the mailer is the auction price mentioned. Further, the mailer states that the car dealership wants to aggressively make an offer to buy back Michael's car for their inventory and that the buy-back offer is based on the average trade-in value.

In response, Ernie asks Michael what he does for a living. Michael responds by saying he is a lawyer. At this point, Ernie looks up and says to

²⁰ *Id.*

²¹ The author responded to the offer mentioned. *See id.*

²² *See supra* notes 9–11 and accompanying text.

²³ NADA, National Automobile Dealers Association, has created a website, available to consumers & businesses, to use as a tool for guidelines on new and used cars, boats, and motorcycles. NADA provides the general public with knowledge and education guidance on the automobile industry, regulatory matters, and car manufacturers. *About Us*, NADA, www.nada.org/about/ (last visited Apr. 1, 2017); *see* CARTER & SHELTON, *supra* note 8, at 414–15.

²⁴ Black Book refers to a website that provides insight to consumers about the new and used car industry. Black Book is a group division of the Hearst Business Media Corporation. *Solutions*, BLACK BOOK AUTO, www.blackbookauto.com/solutions/ (last visited Apr. 1, 2017).

²⁵ Kelley's Blue Book is a research tool that allows consumers to compare information about new and used car values. *The History of Kelley Blue Book*, KELLEY BLUE BOOK, www.kbb.com/company/history (last visited Apr. 1, 2017).

²⁶ CarMax is a large used-car retailer that provides customers insight on the car-buying process. *Why CarMax?*, CARMAX, www.carmax.com/car-buying-process/why-carmax (last visited Apr. 1, 2017).

Michael, “You know what this is. It is just marketing. The mailer is a way to get you in the dealership so we can make a deal.”²⁷ Michael responds by leaving.

The purpose of this Article is to dissect car dealership buy-back/car acquisition offers in light of the various laws that govern the behavior of car dealerships; more specifically, to state unfair and deceptive trade practice (UDAP) statutes and the Federal Trade Commission Act (FTCA) and the Federal Trade Commission (FTC) administrative rules, regulations and guidelines.²⁸ The first part of this Article will focus on the FTCA and its application to car dealerships.²⁹ The second part of the Article will examine state UDAP statutes and case law that applies to car dealerships.³⁰ The third section of this Article will then apply both the state law and federal law to Michael’s car buy-back experience.³¹ Finally, this Article will conclude with a commentary on car dealerships, consumers, and the law.³²

II. FTCA AND THE FTC

In the beginning, the Federal Trade Commission Act³³ only prohibited unfair methods of competition, essentially mirroring the prohibitions contained in the Sherman and Clayton Anti-Trust Acts.³⁴ In 1938, the United States Congress enacted the Wheeler-Lea Amendment³⁵ to the FTCA, which established that unfair or deceptive acts or practices in trade or commerce were illegal.³⁶ This Amendment marked the beginning of the FTC’s involvement in prohibiting unfair or deceptive acts or practices.³⁷ The FTC and the federal courts then began wrestling with the question of what constitutes an “unfair trade practice” and what constitutes a “deceptive trade practice.”³⁸ At the outset of this quest, the FTC defined these concepts.³⁹ As approved by the federal courts, including the Supreme Court, the FTC considered a trade practice to be unfair “when it offends established public policy and when the practice is immoral, unethical, oppressive or

²⁷ See *supra* note 15.

²⁸ See *infra* Section IV.

²⁹ See *infra* Section II.

³⁰ See *infra* Section III.

³¹ See *infra* Section IV.

³² See *infra* Section V.

³³ See 15 U.S.C. § 45(a)(1) (2000); FED. TRADE COMM’N, FEDERAL TRADE COMMISSION ACT INCORPORATING U.S. SAFE WEB ACT AMENDMENTS OF 2006 (UNOFFICIAL VERSION), https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf (last visited Apr. 1, 2017).

³⁴ See 15 U.S.C. §§ 1–78 (2000).

³⁵ See *U.S. v. St. Regis Paper Co.*, 355 F.2d 688, 692 (2d Cir. 1966) (noting when Congress enacted the Wheeler-Lea Amendment to the Federal Trade Commission Act and explaining its impact on the Act).

³⁶ 15 U.S.C. § 45(a)(1) (2000).

³⁷ See *id.*

³⁸ 2 PRIDGEN & ALDERMAN, *supra* note 3, at 47.

³⁹ *Id.*

unscrupulous or is injurious to consumers.”⁴⁰

The federal courts endorsed this broad and encompassing consideration of the definition of an unfair trade practice because “[t]here is no limit to human inventiveness” for those who choose to treat people unfairly.⁴¹ In addition, the FTC and the federal courts went on to flesh out the consequences of adopting this broad interpretation of the definition.⁴² The federal courts ruled that proof of intent, fraud, negligence and even actual deception were not required to prove that a practice is unfair.⁴³ Further, the federal courts stated that a subsequent clarification or cessation of a practice did not eliminate the unfair nature of a trade practice.⁴⁴ The federal courts interpreted that if a consumer’s initial contact was obtained by the use of an unfair trade practice then no amount of remedial action to clarify or revise the transaction would undo the unfair trade practice claim.⁴⁵

This definition of an unfair trade practice was the rule of law applied by the FTC and the federal courts until the 1980s when the FTC issued a new policy statement regarding the definition of an unfair trade practice.⁴⁶ This policy statement, which applied to FTC enforcement actions and is now part of the FTCA, stated that an unfair trade practice must be an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by the countervailing benefits to consumers”⁴⁷ This revision and addition to the FTCA caused quite an uproar among the FTC Commissioners.⁴⁸ In applying this new definition of unfairness, the FTC claimed it did not abandon the federal courts’ precedent of not requiring proof of intent, fraud or negligence to make out an unfair trade practice claim, or that curative action could undo an unfair trade practice claim.⁴⁹ In fact, even though the FTC adopted and applied this definition, the federal courts in cases not brought by

⁴⁰ 15 U.S.C.A. §45 (n) (2000).

⁴¹ *Sperry & Hutchinson Co.*, 405 U.S. at 240 (quoting H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)).

⁴² *F.T.C. v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 240–46 (1972).

⁴³ 1 PRIDGEN & ALDERMAN, *supra* note 3, at 48.

⁴⁴ 2 PRIDGEN & ALDERMAN, *supra* note 3, 41–43 (discussing the 1980s unfairness policy statement); *see also* CARTER & SHELDON, *supra* note 8, at 267 (noting the F.T.C. unfairness standard changed in the 1980s) (looking at these standards gives the reader a better understanding of the subtle policy changes).

⁴⁵ 1 PRIDGEN & ALDERMAN, *supra* note 3, at 48–49.

⁴⁶ 2 PRIDGEN & ALDERMAN, *supra* note 3, 41–43 (discussing the 1980s unfairness policy statement); *see also* CARTER & SHELDON, *supra* note 8, at 267 (noting the F.T.C. unfairness standard changed in the 1980s).

⁴⁷ 15 U.S.C. § 45(n); *see* FED. TRADE COMM’N, FEDERAL TRADE COMMISSION ACT INCORPORATING U.S. SAFE WEB ACT AMENDMENTS OF 2006 (UNOFFICIAL VERSION), https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf (last visited Apr. 1, 2017).

⁴⁸ *See F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (noting that there are inconsistencies within state and federal courts due to the addition and revision to the F.T.C.A); *see also* Orkin Exterminating Co., Inc. v. F.T.C., 849 F.2d 1354, 1363 (11th Cir. 1988) (noting the FTC is not constrained “to follow judicial interpretations of state statutes in construing the agency’s section 5 authority”).

⁴⁹ *Charles of the Ritz Distrib. Corp. v. F.T.C.*, 143 F.2d 676, 680 (2d Cir. 1944).

the FTC have not uniformly applied the new FTC definition of unfairness, but have instead relied on the United States Supreme Court definition of unfairness.⁵⁰

There is no question the new FTC definition of unfairness is more restrictive than the Supreme Court’s definition of unfairness.⁵¹ The new, and current, definition of unfairness incorporates a “likely to cause substantial injury to consumers” requirement which appears to just restate the “preponderance of the evidence” burden of proof in an unfair trade practices claim.⁵² The seemingly bigger change is in the inclusion of a “cost-benefit” analysis component in the definition of unfairness.⁵³ Commentators have noted that even with these differences⁵⁴, the FTC and the federal court decisions have not changed much.⁵⁵ In essence, if an unfair trade practice fits the new and current FTC standard of proof for unfairness, then such act or practice will most likely satisfy the Supreme Court’s interpretation of the definition of an unfair trade practice.⁵⁶

The federal courts then undertook the task of defining what constitutes a deceptive trade practice.⁵⁷ The federal courts settled on ruling that any act or practice that has the tendency or capacity to deceive a consumer is a deceptive trade practice.⁵⁸ Again, the federal courts and the FTC confirmed that proof of intent, fraud, negligence or even actual deception is not required to make out a deceptive trade practice claim.⁵⁹ The federal courts and the FTC also held firm to the proposition that subsequent clarification or

⁵⁰ See *F.T.C. v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 240–46 (1972) (finding that the old FTC’s unfairness standard is a broader standard than deception); see also CARTER & SHELDON, *supra* note 8, at 189–90, 278–79 (describing the old FTC “S & H” standard set forth in *Sperry v. Hutchinson*, and elaborating on the differences between that standard and the current F.T.C. standard of the definition of “unfairness,” as well as describing how most courts continue to use the old FTC “S & H” standard); *id.* at 279 n.712 (citing many different jurisdictions and many different cases to support the statement that most courts use the old FTC “S & H” unfairness standard).

⁵¹ See CARTER & SHELDON, *supra* note 8, at 278; see also 2 PRIDGEN & ALDERMAN, *supra* note 3, at 44.

⁵² See CARTER & SHELDON, *supra* note 8, at 268.

⁵³ *Id.* at 275; see *Neovi*, 604 F.3d at 1155 (quoting 15 U.S.C. § 45(n)); see also 2 PRIDGEN & ALDERMAN, *supra* note 3, at 42 (noting the changes to the new unfairness standard with the addition of the cost-benefit analysis).

⁵⁴ See 2 PRIDGEN & ALDERMAN, *supra* note 3, at 41–42 (noting the differences between the old and the new unfairness standards); see also CARTER & SHELDON, *supra* note 8, at 278–79 (noting the small distinctions between the “S&H and the current F.T.C. standard” for unfairness).

⁵⁵ 2 PRIDGEN & ALDERMAN, *supra* note 3, at 45–46.

⁵⁶ See 15 U.S.C. § 45(n); *Charles of the Ritz Distrib. Corps. v. F.T.C.*, 143 F.2d 676, 680 (2d Cir. 1944); see also *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 293 (7th Cir. 1976) (citing *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 (1972)).

⁵⁷ See *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (citing *Chrysler Corp. v. F.T.C.*, 561 F.2d 357, 363 (D.C. Cir. 1977)).

⁵⁸ *Id.*

⁵⁹ *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1368 (11th Cir. 1988); see generally CAROLYN L. CARTER, NAT’L CONSUMER LAW, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 11 (2009), www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf (last visited Apr. 1, 2017) (briefly discussing the FTC’s approach to deceptive trade practices).

curative measures does not remove the act or practice from being deceptive.⁶⁰ In addition, the federal courts and the FTC went further and said that it is the net effect of the act or practice that informs the courts' decisions in this matter, such that ambiguous or confusing or even inconsistent statements do have the tendency or capacity to deceive.⁶¹

Again, in the 1980s, the FTC issued a new policy statement concerning the standard of proof for deception.⁶² The FTC's current definition of deception requires that the act or practice is "likely to mislead consumers acting reasonably under the circumstances."⁶³ This new FTC definition of deception, which is not included in the FTCA, inserts what appears to be some kind of tort analysis language by requiring the consumer to act reasonably under the circumstances.⁶⁴ This inclusion was to incorporate federal court decisions that decided a deceptive trade practice could not be based on some kind of absurd behavior or interpretation posited by an injured person.⁶⁵ This new FTC deception standard will apply to FTC cases in federal court, but not necessarily other deceptive trade practice claims and does not overrule previous precedent.⁶⁶ This means that proof of intent, fraud, negligence and actual deception is still not required.⁶⁷ Further, subsequent clarification or curative measures will not be a valid defense to a deceptive trade practice claim.⁶⁸ Commentators have found the practical result from the FTC and the federal courts applying either the new FTC standard or the original federal court definition of deception has been negligible.⁶⁹

In addition to the FTC enforcement activities, the FTCA empowers the FTC to promulgate guidelines and administrative rules identifying specific types of unfair or deceptive acts or practices.⁷⁰ One of the longest

⁶⁰ CARTER & SHELDON, *supra* note 8, at 204 (citing *Bristol Tech., Inc. v. Microsoft Corp.*, 114 F. Supp. 2d 59 (D. Conn. 2000), *as modified* by 127 F. Supp. 2d 61 (D. Conn. 2000), *vacated pursuant to settlement* by 250 F.3d 152 (2d Cir. 2001); *Cobb v. Monarch Fin. Co.*, 913 F. Supp. 1164 (N.D. Ill. 1995); *State v. United States Steel Corp.*, 919 P.2d 294 (Haw. 1996); *Pappas v. Pella Corp.*, 844 N.E.2d 995, 1002 (Ill. App. Ct. 2006)).

⁶¹ *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010); *see also* *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

⁶² CARTER & SHELDON, *supra* note 8, at 214 (noting the standard of proof of deception changed since the 1980s from a "capacity to deceive standard" to a "likely to deceive standard"). For further discussion concerning the standard of proof for deception, *see id.* at 214 n.99, 215 (citations omitted).

⁶³ *F.T.C. v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992).

⁶⁴ *Cf.* 15 U.S.C. § 45(n) (2000); *see* CARTER & SHELDON, *supra* note 8, at 214–16.

⁶⁵ 2 PRIDGEN & ALDERMAN, *supra* note 3, at 168.

⁶⁶ *See* *Sw. Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1435–36 (9th Cir. 1986); *cf.* *Kraft, Inc.*, 114 F.T.C. 40 (1991) (noting that no proof of actual deception is needed); *Commonwealth v. AmCan Enters.*, 712 N.E.2d 1205, 1209 (Mass. App. Ct. 1999) (noting that the new standard is based on established precedent and that it is not an extreme change in policy).

⁶⁷ *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1368 (11th Cir. 1988) (concluding that proof of deceptive intent is not required).

⁶⁸ 2 PRIDGEN & ALDERMAN, *supra* note 3, 112–13.

⁶⁹ *See id.* at 116–17.

⁷⁰ *Id.* at 2–5.

standing rules prohibits “bait and switch” advertising.⁷¹ This rule states that baiting the consumer to look into an advertised item, only to have the opportunity to switch that consumer to a more expensive or less favorable alternative item, is a “bait and switch” scheme and an unfair and deceptive trade practice.⁷² This FTC rule merely defines one kind of unfair and deceptive trade practice.⁷³ “Bait” advertising on its own can be unfair and deceptive even if there is no attempt to “switch” the consumer to a different item.⁷⁴

III. STATE UDAP STATUTES

State Unfair and Deceptive Trade Statutes are sometimes referred to as “Little FTC Acts,” because, for the most part, these state laws mirror the prohibitions contained the FTCA.⁷⁵ In addition, many state UDAP statutes include unconscionable trade practices in the prohibition section of the statute.⁷⁶ “Unconscionability” is a term borrowed from Article 2⁷⁷ of the Uniform Commercial Code⁷⁸ governing contracts for the sale of goods.⁷⁹ The state courts look to the definition and application of unconscionable as provided in state court decisions.⁸⁰ When it comes to state courts defining and interpreting whether a trade practice is unfair or deceptive, the state courts are presented with a more complex question.⁸¹ Most of these state UDAP statutes specifically require that the state courts look to, and give deference to, the FTC and federal court precedent in interpreting whether a trade practice is unfair or deceptive.⁸² Based on the current FTC definitions of unfairness and deception, and federal court precedent in other cases, state courts are left with two different legal standards from which to choose when determining if a trade practice is unfair or deceptive.⁸³ Therefore, the state

⁷¹ See *id.* at 300–01 (discussing the classic version of the bait and switch scheme); see also CARTER & SHELTON, *supra* note 8, at 301–03 (discussing deceptive pricing inducements).

⁷² CARTER & SHELTON, *supra* note 8, at 301; Bait Advertising Defined, 16 C.F.R. § 238 (2016); *McGough v. Oakwood Mobile Homes, Inc.*, 779 So. 2d 793, 797 (La. Ct. App. 2000) (referencing a salesman’s testimony about how the bait-and-switch scheme operates).

⁷³ 16 C.F.R. § 238; see FED. TRADE COMM’N, DOT COM DISCLOSURES, <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> (last visited Apr. 1, 2017).

⁷⁴ See CARTER & SHELTON, *supra* note 8, at 301–03.

⁷⁵ *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1155–56 (9th Cir. 2010); CARTER & SHELTON, *supra* note 8, at 1.

⁷⁶ CARTER & SHELTON, *supra* note 8, at 1–2.

⁷⁷ Article 2 of the Uniform Commercial Code targets “sales.” U.C.C. ART. 2, § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

⁷⁸ Uniform Commercial Code is a uniform law that covers commercial activities including transactions, sales of goods, secured transactions and negotiable instruments. See *generally* CAROL L. CHOMSKY ET. AL., SELECTED COMMERCIAL STATUTES: FOR PAYMENT SYSTEMS COURSES iii–147 (4d ed. 2012).

⁷⁹ See CARTER & SHELTON, *supra* note 8, at 296.

⁸⁰ See *id.* at 196.

⁸¹ See *id.* at 199.

⁸² See *id.*

⁸³ *Id.*; see *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1345, 1347–48 (N.M. Ct. App. 1984) (referencing some states that do not proscribe unfair practices under state UDAP statutes).

courts can pick the standard for unfairness and deception, and whatever the choice, still comply with the requirement to defer to FTC and federal court precedent.⁸⁴ It is little wonder that the state court rulings in this matter can be confusing, contradictory and internally inconsistent.⁸⁵ It would seem that prudent lawyers would be wise to argue the application of both the FTC and federal court standards for unfairness and deception.

What separates the FTCA from state UDAP statutes is that state UDAP statutes provide for government enforcement actions and private enforcement actions while the FTCA only provides for FTC enforcement actions if such actions are deemed to be in the public interest.⁸⁶ Consequently, localized enforcement actions based on consumers bringing private lawsuits for unfair and deceptive trade practices extend the reach of enforcement.⁸⁷ It is also important to note that in most states a prevailing consumer in a state UDAP statute based claim will be entitled to reimbursement for attorney fees and costs.⁸⁸

In addition to the FTC guidelines and rule prohibiting “bait and switch” trade practices, many states have also enacted administrative rules prohibiting the same.⁸⁹ This means that consumers, using the private enforcement option under state UDAP statutes, may also use not only the FTC, but also the state administrative rule, prohibiting “bait and switch” trade practices in bringing a lawsuit.⁹⁰

IV. APPLICATION OF FTCA AND STATE UDAP STATUTES TO CAR DEALERS

As noted, a complete application of the FTC and state UDAP statutes to the car acquisition/buy-back offer from car dealers requires application of all of the various standards that a federal or state court might choose to apply.⁹¹

The federal court standard (the old FTC “S & H” standard) for unfairness requires proof that an act or practice “offends established public policy . . . and is immoral, unethical, oppressive or unscrupulous or is injurious to consumers.”⁹² Applying this standard to the car acquisition/buy-back offer for Michael’s 2013 car, the buy-back offer violates all of the prongs

⁸⁴ I PRIDGEN & ALDERMAN, *supra* note 7, at 147–48.

⁸⁵ *Id.* at 153–54 (referencing various state court cases that are contradictory and inconsistent).

⁸⁶ See CARTER & SHELDON, *supra* note 8, at 722.

⁸⁷ I PRIDGEN & ALDERMAN, *supra* note 7, at 154–55.

⁸⁸ CARTER & SHELDON, *supra* note 8, at 722; CARTER, *supra* note 59, at 19.

⁸⁹ CARTER & SHELDON, *supra* note 8, at 302.

⁹⁰ *Id.* at 743.

⁹¹ See discussion *supra* Sections II, III.

⁹² *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 293 (7th Cir. 1976) (citing *F.T.C. v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 244 (1972)).

of the test.⁹³ There certainly is no public policy that permits a merchant, like a car dealer, to lure a consumer into a dealership with an offer to purchase back a car only to negate that offer. This kind of practice, where the car dealer changes the price offered to buy back the car to something lower, is merely a recent version of “bait and switch” advertising⁹⁴ for which there is an established public policy against.⁹⁵ Further, it is immoral, unethical, oppressive and unscrupulous when a car dealer chooses to not live up to its advertised promise to buy back a car at the stated price.⁹⁶ Finally, the injury to the consumer is found in not being able to make the deal to have the car bought back at the advertised price.⁹⁷ Take your pick or use all three prongs of the unfairness test approved by the federal courts! In any of these cases the car dealer committed an unfair trade practice.⁹⁸

The FTCA standard for unfairness requires proof that the trade practice “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by the countervailing benefits to consumers”⁹⁹ The car dealer’s failure to buy back Michael’s car at the advertised price caused at least a \$3,000 loss if Michael had taken the offer made by the dealership.¹⁰⁰ Further, Michael did his research to confirm that the car dealer’s buy-back price was reasonable in view of the value of his car.¹⁰¹ Michael had no reason to avoid the car dealer’s offer, but rather his research led him to reasonably believe that the car dealer’s buy back price was legitimate.¹⁰² Perhaps Michael could have privately sold his car and, thus, mitigated his damage, but there is no guarantee that the car would have sold for the price offered by the dealer buy-back.¹⁰³ In fact, the buy-back offer proved to be the best offer Michael was able to find.¹⁰⁴ Finally, there was no benefit to Michael in the dealer buy-back offer because the car dealer would not honor the advertised price.¹⁰⁵ The only countervailing benefit of the car dealer’s failure to honor its offer was for the benefit of the car dealer in purchasing back the car for a decreased cost.¹⁰⁶ Therefore, even using the current FTCA standard for unfairness, Michael can prove the unfair

⁹³ *Id.*

⁹⁴ See 1 PRIDGEN & ALDERMAN, *supra* note 7, at 99 (citing *Truex v. Ocean Dodge, Inc.*, 529 A.2d 1017 (N.J. Super. Ct. App. Div. 1987)).

⁹⁵ CARTER & SHELDON, *supra* note 8, at 301–02.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See discussion *supra* Section III.

⁹⁹ *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (quoting 15 U.S.C. § 45(n)).

¹⁰⁰ See hypothetical *supra* Section I.

¹⁰¹ See *id.*

¹⁰² See *id.*; 15 U.S.C. § 45(n) (2000); see also *F.T.C. v. Patriot Alcohol Testers, Inc.*, 798 F.Supp. 851, 861 (D. Mass 1992).

¹⁰³ See hypothetical *supra* Section I.

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

trade practice.¹⁰⁷

Similarly, the federal court standard for deception requires proof that the trade practice has the tendency or capacity to deceive a consumer.¹⁰⁸ The car dealer baited Michael with its advertisement for a buy back of his car at an advertised price.¹⁰⁹ The car dealer then switched the price to a lower offer to purchase the car.¹¹⁰ This kind of “bait and switch” trade practice not only has the tendency or capacity to deceive Michael, but also in fact deceived Michael into showing up at the car dealership looking to sell his car at the advertised “bait” price.¹¹¹ The car dealer, using the federal court standard, committed a deceptive trade practice.¹¹²

The FTC standard for deception requires proof that the trade practice is likely to deceive a consumer acting reasonably under the circumstances.¹¹³ Michael acted reasonably prior to showing up at the car dealership by researching the value of his car to ensure that the buy-back offer by the car dealer was legitimate.¹¹⁴ He found it was! Once at the car dealership, Michael then found out that the buy-back offer was nothing more than a ruse to bait him to the car dealership, and not a legitimate offer to buy back his car at the advertised price.¹¹⁵ Even using the current FTC standard for deception, the car dealer’s buy-back offer was deceptive.¹¹⁶

This same analysis of unfairness and deception would apply using the FTCA or state UDAP statutes.¹¹⁷ The only variable in either case is which standard the state court chooses to apply.¹¹⁸ This analysis will also apply equally to a government enforcement action or private consumer lawsuit under state UDAP statutes.¹¹⁹

V. CONCLUSION

So why have not car dealers – and for that matter car manufacturers – engaged in promoting these kinds of fake buy-back offers been sued? Specifically, why have not consumers hired lawyers and sued the car dealership for this kind of unfair and deceptive trade practice under state UDAP statutes? Why has not the FTC and the various state government

¹⁰⁷ See hypothetical *supra* Section I; CARTER & SHELDON, *supra* note 8, at 268.

¹⁰⁸ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (citation omitted).

¹⁰⁹ See hypothetical *supra* Section I.

¹¹⁰ See *id.*

¹¹¹ See *id.*; see also 2 PRIDGEN & ALDERMAN, *supra* note 3, at 300–01 (discussing the classic “bait and switch” scheme).

¹¹² See *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (citation omitted); see hypothetical *supra* Section I.

¹¹³ 15 U.S.C. § 45(n) (2000); see *F.T.C. v. Patriot Alcohol Testers, Inc.*, 798 F.Supp. 851, 858 (D. Mass. 1992).

¹¹⁴ See hypothetical *supra* Section I.

¹¹⁵ See *id.*

¹¹⁶ 15 U.S.C.A. § 45(n); see *Patriot Alcohol Testers, Inc.*, 798 F.Supp. at 861.

¹¹⁷ See discussion *supra* Sections II, III.

¹¹⁸ 1 PRIDGEN & ALDERMAN, *supra* note 7, at 147–48.

¹¹⁹ See discussion *supra* Section III.

consumer protection agencies brought claims against car dealerships for this “bait and switch” buy-back offer?

For any consumer, for that matter any person, the process of hiring a lawyer and following through with a lawsuit is not an easy task. First off, the consumer would potentially have to be committed to this lawsuit for a number of years. Such is the court process! The time commitment and emotional toll for any individual involved in a lawsuit is not insubstantial, no matter what kind of lawsuit. Many consumers will just get angry and move on rather than hassle with the legal system. Even if the consumer were to win, it may be hard for the consumer to commit to see a lawsuit through to the end.

Further, the state UDAP statutes may not be as consumer friendly as they seem to be at first glance. State UDAP statutes do provide an incentive for lawyers to take on an individual consumer’s unfair and deceptive trade practice lawsuit by providing for prevailing party attorney fees.¹²⁰ Yet some of these UDAP statutes, upon closer read, give the trial judge discretion in not only the awarding of attorney fees if successful, but also discretion in setting the amount of such fees if successful.¹²¹ This means that the lawyer who takes on such a case is taking a risk that he may not be paid at all or, if paid, may not be fully paid even if successful in representing the consumer victim.¹²² Add to this that most lawyers and, for that matter judges, are not as familiar as perhaps they should be with the FTCA and state UDAP statutes.¹²³ This risk of not being paid and unfamiliarity with the law may act as a disincentive for a lawyer to take on a state UDAP statute lawsuit.¹²⁴ Further, if the consumer loses that case, then the consumer could be saddled with not only paying for his or her own lawyer, but the attorney fees for the prevailing party defendant.¹²⁵ This would have a chilling effect on hiring a lawyer to sue for an unfair or deceptive trade practice.¹²⁶

Perhaps a reasonable solution to this disincentive would be to at least reform state UDAP statutes to provide for an entitlement to attorney fees for only prevailing consumers.¹²⁷ In this way, the decision for the consumer to hire a lawyer to prosecute a state UDAP-based lawsuit is the risk of having to pay for his or her own lawyer if unsuccessful.¹²⁸ This is, in fact, the way most consumer protection lawsuits are handled when there is an attorney fees

¹²⁰ CARTER, *supra* note 59, at 21.

¹²¹ *See id.* at 18–23.

¹²² *Id.* at 19.

¹²³ *See* CARTER & SHELDON, *supra* note 8, at 4 (introducing various ways attorneys can keep current on legislative developments and become familiar with UDAP statutes and FTC Rules).

¹²⁴ CARTER, *supra* note 59, at 19.

¹²⁵ *Id.* at 21.

¹²⁶ *See id.* at 19 (containing information about the negative effects of a deceptive lawsuit on the consumer; consumers not able to recover attorney fees acts as a “powerful deterrent against ever seeking to enforce the UDAP statute[s]”).

¹²⁷ *Id.* at 18–23.

¹²⁸ *Id.* at 19.

award provision.¹²⁹ The consumer can then rely on the lawyer's advice and counsel as to whether to go forward with a lawsuit.¹³⁰ This revision to the UDAP statute's attorney fees provision also removes some of the risk for the lawyer because the lawyer knows that, if successful, the judge will have to award some amount of attorney fees.¹³¹ The fact that the judge would retain discretion as to the amount of attorney fees to award also would permit the lawyer to ask for a multiplier in some instances because the area of UDAP statutory claims is unfamiliar to many lawyers and judges.¹³²

Leaving aside the issue of private UDAP statutory-based consumer lawsuits, the question of why the FTC or state government consumer protection agencies have not prosecuted car dealers for the unfair and deceptive buy-back offers is perhaps even more complex. The decision to go forward with a public enforcement action on either the federal or state level is discretionary.¹³³ This decision is discretionary because neither the federal nor state governments have the resources to prosecute every unfair or deceptive trade practice claim.¹³⁴ This justification when it comes to car dealers rings a bit hollow. What better and more effective government prosecution could be brought than to police the dealers in a product that almost every consumer relies on daily?¹³⁵ In the past, car dealers were a target for public enforcement as evidenced by the long list of federal and state government enforcement actions against car dealers and car manufacturers.¹³⁶ Do we think, because of these enforcement actions, the car dealer industry has reformed? Based on Michael's incident with a car dealership the answer would have to be no!¹³⁷

Perhaps the answer to the question of why there has not been any public enforcement action against car dealers for unfair and deceptive trade practices is resignation. People expect car dealers to lie, cheat and steal – the Internet tells everybody that!¹³⁸ Perhaps there is an acceptance that no matter what anybody does, car dealers will be car dealers and there is nothing we can

¹²⁹ See I PRIDGEN & ALDERMAN, *supra* note 7, at 483–84, 495.

¹³⁰ See *id.*

¹³¹ See *id.* at 483–84.

¹³² See *id.* at 484.

¹³³ CARTER, *supra* note 59, at 6.

¹³⁴ *Id.*

¹³⁵ See *Commuting in the United States: 2009*, CENSUS.GOV 3 (2011), <https://www.census.gov/prod/2011pubs/acs-15.pdf> (last visited Apr. 1, 2017) (containing statistics that over 80% of Americans use a car on a daily basis).

¹³⁶ See *Auto Dealers Are Accused of Cheating 286 Buyers*, N.Y. TIMES, (June 12, 2001), <http://www.nytimes.com/2001/06/12/nyregion/auto-dealers-arc-accused-of-cheating-286-buyers.html> (last visited Apr. 1, 2017) (reporting New Jersey officials sued 16 car dealerships for cheating customers out of thousands of dollars for over six years).

¹³⁷ See hypothetical *supra* Section I.

¹³⁸ See CARTER & SHELDON, *supra* note 8, at 18–23; see also Christopher Kukla, *The Hidden Cost of Car Loans*, U.S. NEWS, (Feb. 27, 2014, 5:35 PM), <http://www.usnews.com/opinion/economic-intelligence/2014/02/27/how-auto-dealers-cheat-borrowers-with-interest-rate-markups> (last visited Apr. 1, 2017) (“Car dealers are cheating buyers by failing to disclose interest rate markups.”).

do about it. This cultural shift is what car dealers and other businesses that dare to engage in unfair and deceptive trade practices are counting on. Lawsuit fatigue on the part of individual consumers and government officials has bred a climate of non-enforcement and deregulation.¹³⁹ Some may even say that this is good for business because any governmental action that targets business is bad for business, and therefore, bad for the economy in a time when global economies struggle.

This kind of a malaise, in fact, undermines legitimate businesses that are the foundation of any economy. The idea that legitimate businesses in a free market, capitalistic structure not only have to compete with other legitimate businesses to survive, but must now also compete with businesses that choose to cunningly apply unfair and deceptive trade practices, damages the prospects of any legitimate business, new or old, of being justly rewarded. In turn, consumers are hurt by this malaise. Consumers become nothing but pawns in an unfair and deceptive game that has no rules. It is not surprising then that consumers just resign themselves to losing out when it comes to dealing with car dealers or other businesses.¹⁴⁰

To sustain a viable economy in a free market capitalistic structure, bad businesses must fail and good businesses succeed.¹⁴¹ Bad businesses include those that profit from unfair and deceptive trade practices.¹⁴² For every Michael there is another consumer who takes the switched buy-back offer from the car dealership.¹⁴³ In addition, consumers and their lawyers, armed with true incentives to bring individual lawsuits for unfair and deceptive trade practices, and government agencies must stand up and seek redress. Would it not be lovely if we knew car dealers and other businesses spent more time delivering quality goods and services at a fair price than on scheming, marketing, and selling techniques designed to swindle us? We can only hope!

¹³⁹ See CARTER, *supra* note 59, 5-23.

¹⁴⁰ *Id.*

¹⁴¹ See *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 503 (3d Cir. 1992) (Sloviter, C.J., concurring and dissenting); see also Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661,700 (1982) (noting competitive markets may be linked to market failures).

¹⁴² See *Town Sound and Custom Tops*, 959 F.2d at 468-503; see also *Betascend, Inc. v. U and I Inc.*, 681 F.2d 1203, 1235 (9th Cir. 1982).

¹⁴³ See hypothetical *supra* Section I.