

SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF STANISLAUS

FILED
FEB 9 2005
CLERK OF SUPERIOR COURT
STANISLAUS

JAIMI DOMINGUEZ, ET AL V.S. SANDERS OLDSMOBILE-CADILLAC, ET AL
PLAINTIFF DEFENDANT

NATURE OF HEARING: STATEMENT OF DECISION No. 311470

JUDGE: ROGER M. BEAUCHESNE Bailiff: None Date: Jan. 24, 2005
Clerk: P. Godfrey Reporter: None Modesto, California

APPEARANCES:

None

This matter came on calendar for jury trial related to the legal issues on May 25, 2004 and concluded on June 3, 2004. The jury returned a verdict in which they found liability under the Consumers Legal Remedies Act (Civil Code §1750, et. seq.) but awarded no damages. Appearing on behalf of the plaintiffs, Eli Paz and Sandra Yanez, was Ms. Kimberly L. Mayhew, Esq. Appearing on behalf of the defendants was Mr. Malcolm H. Stewart, Esq. Upon conclusion of the jury trial, the Court invited opening and reply, post-trial briefs on the equitable issues to be decided by the Court. Originally, the Court was to take the matter under submission as of August 31, 2004, the original due date for the reply briefs.

However, both counsel had not received the trial transcript in time to submit their briefs in a timely fashion. The Court signed a written stipulation between counsel setting the date for submission sixty days after the date of mailing of the trial transcript by the court reporter.

The trial transcript was mailed on July 19, 2004 and the court took the matter under submission as of September 17, 2004. The Court received the post-trial briefs in a timely manner.

On November 16, 2004, the court issued a tentative decision pursuant to California Rules of Court, rule 232.

On November 23, 2004, the Court issued a minute order requesting further briefing on the impact, if any, of the passage by voters of Proposition 64 in the November 2, 2004 election.

The supplemental briefs were due on December 10, 2004.

After due consideration of the jury trial evidence and the post-trial, opening, reply, and supplemental briefs of both counsel, the Court renders the following statement of decision pursuant to CCP § 632 as to the third and fifth causes of action for equitable relief.

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I

THE BASIS FOR RELIEF

The plaintiffs have alleged that defendants, individually and collectively, misrepresented that purchasers of automobiles were required to purchase Extended Service Agreements (hereinafter referred to as ESAs) to obtain third-party financing of their vehicles, and concealed and failed to disclose that ESAs were optional.

Plaintiffs seek restitution and injunctive relief as remedies.

II

TRIAL EVIDENCE

Plaintiff, Eli Paz, purchased a 1999 Chevrolet Cavalier from defendant Sanders in July 2000. Paz did not have good credit. Salesman Robert Bronken negotiated the sale at which time Mr. Paz discovered the total dollar amount was \$1,500 over the negotiated cost. When asked about the overage, Mr. Bronken said the extra charge was for the ESA. Mr. Paz told Mr. Bronken he (Paz) could not afford the ESA but Mr. Bronken said it was required by the bank for credit approval.

Mr. Paz testified he would not have purchased the ESA unless required and would not have purchased the vehicle had he been aware of the dealer's practice.

Mr. Ethan Rix bought a 1998 Pontiac Grand AM, ES in February 2000 from defendants in response to an advertisement in the Modesto Bee newspaper for a \$500 down payment. Salesman Robert Bronken negotiated the sales price with Mr. Rix but also told Rix an ESA must be purchased in order to obtain financing. Rix testified he would not have purchased the ESA if he had not been told it was required because removing it would have lowered his payments.

Jeffrey Adkins bought a 1999 Oldsmobile Alero in April 2000 from defendants. Adkins did not have established credit and wanted to provide transportation for his father. Mr. Adkins went to Sanders in response to an advertisement. Salesman Robert Bronken told Adkins that the ESA would be a favorable thing to buy as far as the lending company was concerned. Bronken also allegedly told Adkins that the more money he (Adkins) financed, the better chance he would have of obtaining financing. Adkins also testified that if he had a choice in purchasing the ESA he would not have bought it because he has a friend who is a mechanic.

Kathleen Espinoza bought a 1999 Chevrolet Malibu in April 2000 in response to a Modesto Bee advertisement directed to individuals with bad credit. Salesman Mike Steffano negotiated the sale and also told Espinoza the ESA was required to complete the deal. Espinoza testified that if she had not been told that purchasing an ESA was required she would not have

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bought one because she does not feel warranties are useful because "nothing goes wrong until the warranty has expired."

Roxanne Cordova bought a 1999 Oldsmobile Alero from Sanders in October 2002. The enticement was easy credit. Salesman Jason Sanders negotiated the deal and included the price of an ESA in the total purchase price. Cordova told Sanders she did not want an ESA but Sanders told her it was needed in order to obtain financing. Cordova also testified that had she been given a choice, she would not have bought an ESA because including it increased her monthly payment.

Robert Vigneau purchased a Dodge Ram pickup in October 1999 from defendants in response to an advertisement appealing to consumers with poor credit. Vigneau spoke with Robert Bronken and Jason Sanders. Vigneau was told by Mr. Bronken that because of his (Vigneau's) poor credit, purchasing an ESA would show the finance company that he intended to keep the truck. Vigneau testified he purchased the ESA because he understood it would assist him in obtaining financing; otherwise, he would not have purchased the ESA because he is a mechanic and has friends who are mechanics.

III

THE UNFAIR COMPETITION LAW (UCL)

Under Business and Professions Code Section 17200, a deceptive business practice is one which is unlawful, unfair, fraudulent or which constitutes unfair, deceptive, untrue or misleading advertising.

"Unlawful" means an act which violates a law. Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 383.

"Unfair" within the context of the case at bar is defined as a business practice which "offends public policy... is immoral, unethical, oppressive, or unscrupulous or ... causes substantial injury to consumers..." People v. Casa Blanca Convalescent Homes (1984) 159 Cal. App. 3d 509, 530.

"Fraudulent" as used in the UCL, does not refer to the common law tort of fraud. Instead, it requires a showing that members of the public are "likely to be deceived". Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 839.

"Unfair", "Deceptive", "Untrue", or "Misleading Advertising" is defined in the same manner as "fraudulent" for the purposes of the UCL. The standard is whether members of the public are "likely to be deceived." Committee on Children's Television v. General Foods (1983) 35 Cal. 3d 211.

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IV

THE COURT'S FINDINGS

As to each of the witness consumers referenced in Section II of this decision, the Court found their testimony to be credible and convincing by more than a preponderance of the evidence.

Each of the listed consumers was particularly vulnerable because of their admittedly less than stellar credit. Despite defendant's efforts to minimize the ESA purchase requirement allegations by asserting the consumers had a choice of whether or not to buy an ESA and the contract indicated in writing the ESA was optional, the Court concludes that each of the salesmen's comments about the need to purchase an ESA to obtain financing was, at the very least, unfair and deceptive, as those terms are defined by law.

Clearly, the salesmen's comments were likely to deceive and in fact, did deceive each of the consumers listed in Section II of this decision.

Testimony at trial revealed a strong profit motive for defendants to sell ESAs. The First Extended ESAs in issue were substantially less expensive to the dealership than a comparable ESA from the automobile manufacturer. The Court also concludes, based upon the expert testimony, that the First Extended ESA was an inferior product compared to other ESAs available to the public.

Based on the above conclusions, the Court finds defendants violated Business and Professions Code § 17200 by engaging in an unfair and deceptive business practice, i.e. informing consumers that an ESA was required to be purchased to obtain third-party financing.

V

PROPOSITION 64

Briefly stated, Proposition 64 (Business and Professions Code §§ 17203, 17204, et. seq.) amended the Unfair Competition Law to provide that a party may bring a representative action only if that party suffered injury in fact and lost money or property, and only if that party complies with class action procedures. The proposition became effective on November 3, 2004. Cal. Const., act. II, § 10(a).

The issue before this court is whether or not the provisions of Proposition 64 are retroactive to cases not yet final on appeal or are prospective only; i.e. do they apply only to cases filed on or after November 3, 2004?

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The court is aware of at least two trial court rulings in other jurisdictions which are inconsistent with one another and have no precedential value. Because of the recent passage of the initiative, there is no published appellate decision addressing the precise issue.

Therefore, in order to avoid further delay in issuing a statement of decision the court rules on the issue based upon existing principles of law.

In Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, the California Supreme Court held that Proposition 51 which eliminated joint and several liability for tort defendants, applied prospectively. The Court relied on the "widely recognized legal principle, specifically embodied in section 3 of the Civil Code that, in absence of a clear legislative intent to the contrary, statutory enactments apply prospectively."

There is no indication in the language of Proposition 64 which suggests legislative intent on the issue of retroactivity.

Although the general rule is that a legislative enactment is retroactive if its primary effect is procedural rather than substantive, the court concludes that modifying the standing requirements of the Unfair Competition Law is tantamount to a substantive change in the law.

Therefore, the court finds the provisions of newly-passed Proposition 64 to be prospective and thus does not bar the action in issue.

VI

THE REMEDIES

Plaintiffs argue the UCL provides for the remedies of restitution and injunctive relief. Specifically, plaintiffs urge the Court to issue an injunction for past, as well as present and future, behavior which the Court has concluded was unfair and deceptive.

Furthermore, plaintiffs contend all consumers who purchased or leased vehicles from defendant Sanders and also purchased ESAs as part of those transactions, for a four-year period, from May 22, 1998 through May 22, 2002 should be awarded restitution in an amount equal to the cost of the ESAs.

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In its tentative decision of November 16, 2004, the court expressed concern that it was "impractical and unworkable" to award restitution beyond that amount referenced in section V of the tentative decision. The court also concluded that awarding restitution to all consumers who purchased ESAs during the pertinent four-year period would be "administratively unfeasible" and "would entail both a legal and administrative morass".

However, upon further consideration and the arguments presented by plaintiffs' counsel in her "Objection to Tentative Decision" filed on December 2, 2004, the court concludes that restitution should be provided to all vehicle buyers who purchased ESAs during the above-referenced four-year period because once a court has found that a defendant's conduct has violated the UCL, "individualized proof of deception, reliance and injury" should not be addressed. Such remedies are necessary to serve the oft-stated purpose and legislative intent of the UCL "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254.

Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, supports an award of restitution for each individual claimant, as specifically authorized under the UCL.

VII

ADMINISTRATION OF CLAIMS

1. Defendant shall immediately compile from its business records the names and addresses of all consumers who purchased or leased vehicles from defendant Sanders and also purchased ESAs as part of those transactions from May 22, 1998 through May 22, 2002. Each and every employee of defendant involved in any way in this activity shall certify under penalty of perjury that he or she undertook and completed the task of compiling such information in good faith and that he or she did not withhold any information required to be disclosed pursuant to this order. In addition, defendant's president shall certify under penalty of perjury that he instructed all of defendant's employees who were involved in any way in such effort to accurately and completely disclose all information required to be disclosed pursuant to this order and that he personally did not withhold any information required to be disclosed pursuant to this order.

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2. No later than March 14, 2005, Defendant's counsel shall provide to Plaintiffs' counsel, via personal delivery or facsimile, all of the names and addresses of consumers compiled pursuant to paragraph 1 hereof.
3. No later than April 14, 2005, Plaintiffs' counsel shall send to each of the consumers the "Notice" in a form to be provided by plaintiffs' counsel, the "Claim Form" in a form to be provided by plaintiffs' counsel, and a postage pre-paid return envelope (collectively "the claim documents"). If any mailings are returned with a forwarding address, Plaintiffs' counsel is ordered to forthwith mail the claim documents to such person at the forwarding address. The "Notice" and "Claim Form" shall be approved by the court before use.
4. Plaintiffs' counsel shall immediately notify defendant's Counsel of any mailings returned as undeliverable and defendant's counsel shall, within 10 days of receipt of such notice, make inquiry of any applicable lender/lienholder arranged for the purchase of the vehicle by defendant for current address information and, if such information is provided, shall forthwith provide such information to plaintiffs' counsel, who shall then mail the claim documents to such person at the address provided. If the lender/lienholder does not provide such information, or if the documents, once mailed to the address provided by the lender/leinholder, are again returned as undeliverable, plaintiff's counsel shall then have an additional 10 days after receipt of such notification to use any public sources she wishes to discover the current address for such persons and mail the claim documents to such persons at such addresses. If such mailings are then returned as undeliverable, no further mailings shall be made.
5. In order to be considered for any award of restitution, all consumers must return the claim documents to defendant's counsel no later than 30 days after they are mailed. In the event the claim documents are returned with a forwarding address, the 30 day period will run from the date of the mailing to the forwarding address. In the event the documents are returned with no forwarding address but a correct address is later located pursuant to paragraph 4 hereof, the 30 day period will run from the subsequent mailing. No restitutionary award will be made to any consumer who either does not return the claim documents or whose claim documents are not received within the time periods established herein.

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6. No later than August 1, 2005, plaintiffs' and defendant's counsel shall prepare and submit to the court a joint statement which provides the following information: (1) the names and addresses of all consumers, an identification of the vehicle purchased, the date of purchase, the purchase price and the price of the ESA sold; (2) the names and addresses of all consumers to whom the claim documents were successfully mailed; (3) the names of all consumers with respect to whom the claim documents were unsuccessfully mailed and, with respect to each, the reason that the mailing was unsuccessful; (4) the names of all consumers who timely returned the claim documents; (5) the names of all consumers who assert a claim for restitution. In addition, plaintiffs' and defendant's counsel shall submit to the court copies of all claim forms which are completed and returned, and defendant's counsel shall submit a copy of the purchase contract (conditional sale contract) applicable to each consumer to whom the claim documents are mailed.

VIII
RESTITUTION

7. Each consumer who successfully submits a claim form as described above shall be awarded restitution in the amount of \$1,500. All payments required to be made pursuant to this order shall be mailed or personally served by defendant no later than September 1, 2005. No later than September 15, 2005, defendants shall certify under penalty of perjury that the restitution payments have been made, and submit the certification to the Court and plaintiffs' counsel.
8. As a condition of receiving restitution, each consumer shall be required to execute a limited release of claims related to defendant's misrepresentations regarding Extended Service Agreements.
9. The Court declines to award restitution to the named plaintiffs based upon the jury's verdict.

IX
INJUNCTION

In its tentative decision, the court declined to award injunctive relief. Upon further consideration, the court concludes that injunctive relief is appropriate.

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10. Defendant is hereby permanently enjoined and shall refrain from making any representations that the purchase of Extended Service Agreements or Extended Warranties is required in order to purchase a vehicle or obtain financing. In particular, defendant is ordered as follows:
- a. Prior to entering into any purchase negotiations or discussions, defendant shall orally inform any prospective purchaser that Extended Service Agreements are optional and the purchase of an Extended Service Agreement is not required in order to purchase a vehicle or obtain third-party financing.
 - b. Immediately following each transaction in which an Extended Service Agreement is purchased, defendant's sales manager on duty at the time such transaction is consummated shall certify, in writing and under penalty of perjury, that all of the disclosures required herein have been made, and such written certification shall be maintained in defendant's file related to such transaction for at least 5 years.

X**FURTHER PROCEEDINGS/ORDERS**

11. In the event any party believes a violation of this order has occurred, such party may apply to the court for such relief as may be thought to be appropriate.
12. The Court awards costs to plaintiffs, as well as attorney's fees provided by statute. Fees and costs shall be awarded pursuant to a separate application made to the Court.


XI**CONCLUSION**

The Court concludes the activity and conduct engaged in by defendants was predatory. Unsuspecting and particularly vulnerable consumers were taken advantage of by persons motivated by profit. Restitution and injunctive relief are both appropriate to deter defendant's conduct and remove the ill-gotten gains.

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Dated: January 24, 2005


ROGER M. BEAUCHESNE,
Judge of the Superior Court

CC: Kimberly L. Mayhew, Esq.
Malcolm Stewart, Esq.

PROOF OF SERVICE BY MAIL
[1013a(3) C.C.P.]

STATE OF CALIFORNIA)
) SS
COUNTY OF STANISLAUS)

I am over the age of 18 years and employed by the Superior Court of the State of California, County of Stanislaus, and not a party to the within action. I certify that I served a copy of the attached STATEMENT OF DECISION by placing said copy in an envelope addressed to the following:

KIMBERLY L. MAYHEW, ESQ.
2014 TULARE STREET, SUITE 700
FRESNO, CA 93721

MALCOLM H. STEWART, ESQ.
AUCHARD & STEWART
2377 W. SHAW, SUITE 106
FRESNO, CA 93711-3438

Said envelope was then sealed and postage thereon fully prepaid, and thereafter was on Jan. 24, 2005, deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan. 24, 2005 at Modesto, California

OFFICE OF SUPERIOR COURT ADMINISTRATOR
State of California, in and for the County of Stanislaus

By P. Godfrey
Deputy Clerk