"You Know, It's Just Marketing" - Unfair And Deceptive Trade Practices In Car Dealer Buy-Back Offers

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1. 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. At some point most of us do it and most of us do not enjoy it! Car dealers, both new and used car dealers, know this for the majority of us, we need to drive a car almost daily. Therefore, car dealers offer cars for sale from a superior bargaining position. This puts the car buyer at a disadvantage from the start. It seems no matter how hard we may try, even if we think we got a


4. See id. at 222.
good deal, we always wonder how much we overpaid or just plain got swindled in a car buying deal. Perhaps for good reason. The myriad of local, state 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. 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. Car dealers are constantly conjuring up ways to dispose of product and make a profit. If selling cars is not enough, they then 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]."

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. 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. 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.

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1 See 2 PERDING & ALDERMAN, supra note 3, at 757-77 (discussing sale abuses by car dealers and car dealers as the subject of numerous consumer complaints).
2 See 1 DEE PERDING & 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 Act)
3 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).
4 See id. at 307, for examples of UDAP restrictions of car advertisements and other state UDAP statute requirements for car sales.
5 See id., for examples of how deceptive car dealers make profits from consumers.
6 See infra, MONEY FOR NOTHING (Walter Brothers 1985) (singing about selling appliances, "We got to move these refrigerators, We gotta move these color TV's.
8 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 $40,956, 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 as a car to a consumer opposed to a pre-owned car (approximately an $8,000 difference), COMPARE NEW VEHICLES, KING HYUNDAI, http://www.kinghyundai.com/vehicle-search/find/results?search-type=new (last visited Apr. 1, 2017) (providing current prices for new vehicles), with Pre-Owned Vehicles, KING HYUNDAI, http://www.kinghyundai.com/vehicle-search/find/results?search-type=used (last visited Apr. 1, 2017) (providing current prices for pre-owned vehicles).
good deal, we always wonder how much we overpaid or just plain got swindled in a car buying deal. Perhaps for good reason. The myriad of local, state 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. 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. Car dealers are constantly conjuring up ways to dispose of product and make a profit. 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]."

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. 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. 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.

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2 See id at 307, for examples of UDP restrictions on car advertisements and other state UDP statutes for car sales.

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of another car necessary for the dealership to buy back Michael’s car. Finally, the text concludes by stating that the dealership is prepared to make Michael an aggressive offer to purchase his vehicle and that Michael will be able to take the cash and walk away. 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, Black Book, Kelley’s Blue Book, and CarMax 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 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.” 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. The first part of this Article will focus on the FTCA and its application to car dealerships. The second part of the Article will examine state UDAP statutes and case law that applies to car dealerships. The third section of this Article will then apply both the state law and federal law to Michael’s car buy-back experience. Finally, this Article will conclude with a commentary on car dealerships, consumers, and the law.

II. FTC AND THE FTC

In the beginning, the Federal Trade Commission Act only prohibited unfair methods of competition, essentially mirroring the prohibitions contained in the Sherman and Clayton Anti-Trust Acts. In 1938, the United States Congress enacted the Wheeler-Lea Amendment to the FTC, which established that unfair or deceptive acts or practices in trade or commerce were illegal. This Amendment marked the beginning of the FTC’s involvement in prohibiting unfair or deceptive acts or practices. 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.” At the outset of this quest, the FTC defined these concepts. 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 coercive.”
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37 See supra note 15.
38 See infra Section IV.
39 See infra Section II.
40 See infra Section III.
41 See infra Section IV.
42 See infra Section V.
47 See id.
48 2 PEDERSON & ALDORFMAN, supra note 3, at 47.
49 Id.
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. In addition, the FTC and the federal courts went on to flesh out the consequences of adopting this broad interpretation of the definition. The federal courts ruled that proof of intent, fraud, negligence and even actual deception were not required to prove that a practice is unfair. Further, the federal courts stated that a subsequent clarification or cessation of a practice did not eliminate the unfair nature of a trade practice. 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.

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. This policy statement, which applied to FTC enforcement actions and is now part of the FTC Act, 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 . . . .” This revision and addition to the FTC Act caused quite an uproar among the FTC Commissioners. 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 cyclical action could undo an unfair trade practice claim. In fact, even though the FTC adopted and applied this definition, the federal courts in cases not brought by 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.

There is no question the new FTC definition of unfairness is more restrictive than the Supreme Court’s definition of unfairness. 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. The seemingly bigger change is in the inclusion of a “cost-benefit” analysis component in the definition of unfairness. Commentators have noted that even with these differences, the FTC and the federal court decisions have not changed much. 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.

The federal courts then undertook the task of defining what constitutes a deceptive trade practice. 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. 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. The federal courts and the FTC also held firm to the principle that subsequent clarification or

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60 See 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 “S & H” standard set forth in Sperry & Hutchinson, and elaborating on the differences between that standard and the current FTC’s standard of the definition of “unfairness,” as well as describing how most courts continue to use the old FTC’s “S & H” standard); id. at 278–79 (citing many different jurisdictions and many different cases to support the statement that most courts use the old FTC’s “S & H” unfairness standard).

61 See CARTER & SHELDON, supra note 8, at 278; see also PREDIGE & ALDERSMANN, supra note 3, at 44.

62 See CARTER & SHELDON, supra note 8, at 268.

63 Id. at 275; see also Notes, 604 F.3d at 1155 (quoting 15 U.S.C. § 45(b); see also 2 PREDIGE & ALDERSMANN, supra note 3, at 42 (noting the changes to the new unfairness standard with the addition of the “cost-benefit analysis”).

64 See 2 PREDIGE & ALDERSMANN, supra note 3, at 41–42 (noting the differences between the old and the new unfairness standard); see also CARTER & SHELDON, supra note 8, at 279–80 (noting the small distinctions between the “S & H” and the current FTC’s standard) for unfairness.

65 See 2 PREDIGE & ALDERSMANN, supra note 3, at 45–46.

66 See 15 U.S.C. § 45(b); Charles of the Ritz Distribs. Corp. 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 T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 (1973)).


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. In addition, the FTC and the federal courts went on to flesh out the consequences of adopting this broad interpretation of the definition. The federal courts ruled that proof of intent, fraud, negligence and even actual deception were not required to prove that a practice is unfair. Further, the federal courts stated that a subsequent clarification or cessation of a practice did not eliminate the unfair nature of a trade practice. 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.

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62 See CARTER & SHIELDS, supra note 8, at 278; see also 2 PREDDEN & ALDERMAN, supra note 3, at 44.
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64 Id. at 275; see also, 2 PREDDEN & ALDERMAN, supra note 3, at 42 (noting the changes to the new unfairness standard with the addition of the cost-benefit analysis).
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67 See 15 U.S.C. § 45(a); Charles of the Ritz Distribs. Corp. v. F.T.C., 143 F.2d 676, 680 (2d Cir. 1944); see also Spiegel, Inc. v. F.T.C., 340 F.2d 287, 293 (7th Cir. 1965) (citing F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 (1972)).
69 Id. at 47.
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 FTC Act, inserts what appears to be some kind of tort analysis language by the consumer 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 practice trade 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 FTC encourages the FTC to promulgate guidelines and administrative rules identifying specific types of unfair or deceptive acts or practices.70 One of the longest 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 the 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 UDPAP 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 in the FTC Act.75 In addition, many state UDPAP statutes include unenforceable trade practices in the prohibition section of the statute.76 “Unenforceability” is a term borrowed from Article 27 of the Uniform Commercial Code,77 governing contracts for the sale of goods.78 The state courts look to the definition and application of unenforceable as provided in state court decisions.79 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.80 Most of these state UDPAP 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.81 Based on the current FTC definitions of unenfairness 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.82 Therefore, the state

71 See id. at 301-04 (discussing the classic version of the bait and switch scheme); see also CARTER & SHELDON, supra note 8, at 301-03 (discussing deceptive pricing inducements).
72 CARTER & SHELDON, supra note 8, at 101; Bait Advertising Defined, 16 C.F.R. § 238 (2016); McKnight v. Oakland Mobile Homes, Inc., 779 So. 2d 793, 797 (Fla. Ct. App. 2000) (referencing a salesman’s testimony about how the bait-and-switch scheme operates).
74 See CARTER & SHELDON, supra note 8, at 301-03.
76 See CARTER & SHELDON, supra note 8, at 101-02.
78 In general, the Uniform Commercial Code is a uniform law that covers commercial activities including transactions, sales of goods, secured transactions and negotiable instruments. See generally CORBIN, CORBIN ON CONTRACTS § 5 (4th ed. 2018).
79 See CARTER & SHELDON, supra note 8, at 296.
80 See id. at 194.
81 See id.
82 Id.; see Richardson Ford Sales, Inc. v. Johnson, 676 P.2d 1344, 1345, 1347-48 (N.M. Ct. App. 1984) (referring some states that do not prescribe unfair practices under state UDPAP statutes).
curative measures does not remove the act or practice from being deceptive.\textsuperscript{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.\textsuperscript{61}

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\textsuperscript{61} F.T.C. v. Noveri, Inc., 604 F.3d 1150, 1156 (9th Cir. 2010), see also F.T.C. v. Winstead History Co., 258 U.S. 483, 494 (1922).

\textsuperscript{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).


\textsuperscript{64} Cf. 15 U.S.C. § 45(a)(2) (2000); see CARTER & SHELDON, supra note 8, at 214–16.

\textsuperscript{65} 2 PRUDEN & ALDISON, supra note 3, at 168.


\textsuperscript{67} Origin Interacting Co. v. F.T.C., 849 F.2d 1354, 1368 (11th Cir. 1988) (concluding that proof of deceptive intent is not required).

\textsuperscript{68} 2 PRUDEN & ALDISON, supra note 3, 112–13.

\textsuperscript{69} See id. at 116–17.

\textsuperscript{70} Id. at 2–5.
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. It is little wonder that the state court rulings in this matter can be confusing, contradictory, and internally inconsistent. 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 FTC from state UDAP statutes is that state UDAP statutes provide for government enforcement actions and private enforcement actions while the FTC only provides for FTC enforcement actions if such actions are deemed to be in the public interest. Consequently, localized enforcement actions based on consumers bringing private lawsuits for unfair and deceptive trade practices extend the reach of enforcement. 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.

In addition to the FTC guidelines and rule prohibiting "bait and switch" trade practices, many states have also enacted administrative rules prohibiting the same. 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.

IV. APPLICATION OF FTC 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.

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." Applying this standard to the car acquisition/buy-back offer for Michael's 2013 car, the buy-back offer violates all of the prongs of the test. 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" advertising for which there is an established public policy against. 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. 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. 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.

The FTC 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." 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. 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. 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. Perhaps Michael could have privately sold his car and, thus, mitigated his damage, but there is no guarantee that the car dealer would have sold for the price offered by the dealer buy-back. In fact, the buy-back offer proved to be the best offer Michael was able to find. Finally, there was no benefit to Michael in the dealer buy-back offer because the car dealer would not honor the advertised price. 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. Therefore, even using the current FTC standard for unfairness, Michael can prove the unfair
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. It is little wonder that the state court rulings in this matter can be confusing, contradictory and internally inconsistent. 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. Consequently, localized enforcement actions based on consumers bringing private lawsuits for unfair and deceptive trade practices extend the reach of enforcement. 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.

In addition to the FTC guidelines and rule prohibiting "bait and switch" trade practices, many states have also enacted administrative rules prohibiting the same. 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.

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trade practice.\footnote{107} Similarly, the federal court standard for deception requires proof that the trade practice has the tendency or capacity to deceive a consumer.\footnote{108} The car dealer baited Michael with its advertisement for a buy back of his car at an advertised price.\footnote{109} The car dealer then switched the price to a lower offer to purchase the car.\footnote{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.\footnote{111} The car dealer, using the federal court standard, committed a deceptive trade practice.\footnote{112}

The FTC standard for deception requires proof that the trade practice is likely to deceive a consumer acting reasonably under the circumstances.\footnote{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.\footnote{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.\footnote{115} Even using the current FTC standard for deception, the car dealer's buy-back offer was deceptive.\footnote{116}

This same analysis of unfairness and deception would apply using the FTCA or state UDAP statutes.\footnote{117} The only variable in either case is which standard the state court chooses to apply.\footnote{118} This analysis will also apply equally to a government enforcement action or private consumer lawsuit under state UDAP statutes.\footnote{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 consumer protection agencies brought claims against car dealerships for this "bait and switch" buy-back offer?\footnote{120}

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 seeing 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.\footnote{121} 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.\footnote{122} 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.\footnote{123}

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.\footnote{124} 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.\footnote{125} 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.\footnote{126} This would have a chilling effect on hiring a lawyer to sue for an unfair or deceptive trade practice.\footnote{127}

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.\footnote{128} 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.\footnote{129} This is, in fact, the way most consumer protection lawsuits are handled when there is an attorney fees

\footnote{107} See hypothetical supra Section I; CARTER & SHELDON, supra note 8, at 268.
\footnote{109} See hypothetical supra Section I.
\footnote{110} See id.
\footnote{111} See id.; see also 2 PROCTOR & ALDERMAN, supra note 3, at 300-01 (discussing the classic "bait and switch" scheme).
\footnote{112} See Clifford Assocs., Inc., 103 F.T.C. 110 (citation omitted); see hypothetical supra Section I.
\footnote{114} See hypothetical supra Section I.
\footnote{115} See id.
\footnote{116} 15 U.S.C.A. § 45(e); see Patria Alcohol Testers, Inc., 798 F. Supp. at 861.
\footnote{117} See discussion supra Sections II, III.
\footnote{118} 1 PROCTOR & ALDERMAN, supra note 7, at 147-48.
\footnote{119} See discussion supra Section III.
\footnote{120} CARTER, supra note 59, at 21.
\footnote{121} See id. at 18-23.
\footnote{122} Id. at 19.
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\footnote{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]").
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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

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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 they perhaps 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

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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. This decision is discretionary because neither the federal nor state governments have the resources to prosecute every unfair or deceptive trade practice claim. 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? 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. We do not know, 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.

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! Perhaps there is an acceptance that no matter what anybody does, car dealers will be car dealers and there is nothing we can 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. 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.

To sustain a viable economy in a free market capitalistic structure, bad businesses must fail and good businesses succeed. Bad businesses include those that profit from unfair and deceptive trade practices. For every Michael there is another consumer who takes the switched buy-back offer from the car dealership. 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!

109 See 1 PREDGEN & ALDEMAN, supra note 7, at 483-84, 495.
110 Id.
111 See id.
112 See id. at 483, 644.
113 See id. at 484.
114 CARTER, supra note 59, at 6.
115 Id.
118 See hypothetical supra Section 1.
120 See CARTER, supra note 59, 5-23.
121 Id.
122 See Town Sound and Custom Tons, Inc. v. Chrysler Motors Corp, 959 F.2d 668, 503 (3d Cir. 1992) (Shriver, C.J., concurring and dissenting).
124 See Town Sound and Custom Tons, 959 F.2d at 668-503, see also Ihlisa Inc., v. U and Inc., 681 F.2d 230, 1233 (9th Cir. 1982).
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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.

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134 Id.
137 See hypothetical supra Section I.
139 See CARTER, supra note 59, 3-23.
140 Id.
142 See Town Sound and Custom Tops, 959 F.2d at 468–503; see also Dettelmann, Inc. v. U-1 Inc., 681 F.2d 1200, 1235 (9th Cir. 1982).
143 See hypothetical supra Section I.