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BUSINESS LAW

I. LENDER HAS STANDING TO SUE ON MOBILE HOME DEALER'S STATUTORY BOND

In Action Mortgage Corp. v. Van Deusen\(^1\) the South Carolina Court of Appeals held that a lending institution may maintain an action against a surety on the statutory bond required of a licensed manufactured home dealer.\(^2\) Action Mortgage demonstrates the court's continued willingness to expand standing to sue the surety of the statutory bond required of certain licensed occupational groups.\(^3\)

Van Deusen was a licensed manufactured home dealer doing business as Greater Greenville Homes.\(^4\) Pursuant to a dealer agreement, Action Mortgage Corporation financed Van Deusen's sale of a mobile home\(^5\) to Samuel Mobley. Van Deusen misrepresented the length of the mobile home to Mobley and Action Mortgage. When Mobley discovered the misrepresentation, he sued Van Deusen, Greater Greenville Homes, and Action Mortgage. Mobley obtained a default judgment against Action Mortgage in which the trial judge ordered Action Mortgage to reduce Mobley's debt on the mobile home by $5,000.\(^6\) Action Mortgage then instituted this action against Van Deusen, Greater Greenville Homes, and Sentry Indemnity Company. Sentry Indemnity was joined in this action as the surety on the bond required of Van Deusen and Greater Greenville Homes by section 31-17-110 of the South Carolina Code.\(^7\) The trial judge granted Sentry In-

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2. Id. at 213, 352 S.E.2d at 714.
3. In Watson v. Harmon, 280 S.C. 214, 312 S.E.2d 8 (Ct. App. 1984), the court held that a homeowner could maintain an action on the statutory bond required of a licensed home builder.
6. Van Deusen and Greater Greenville Homes were never served. Brief of Appellant at 2.
7. S.C. CODE ANN. § 31-17-110 (Law. Co-op. Supp. 1987) provides in part: All licensees for a manufactured housing license shall . . . furnish a corporate surety bond in the sum of ten thousand dollars. The bond shall provide against

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Indemnity’s motion for involuntary nonsuit solely on the ground that Action Mortgage lacked standing to sue on the statutory bond.  

The court of appeals rejected the lower court’s opinion that standing to maintain an action on the statutory bond was limited to “the consumer, to the person who buys the home.” The court reached its decision by applying the two-tiered test of Watson v. Harmon. In applying the first tier of the test, the court analyzed the purpose of the applicable statute and implementing regulations that require the bond. In doing so, the court gave great weight to the language of the regulations adopted by the South Carolina Manufactured Housing Board. These regulations require that the manufactured home dealer’s bond be “in favor of any person who shall suffer any loss as a result of any violation of the conditions herein contained.” The term “person” is defined in the regulations to mean “every natural person, firm, partnership or corporation.” Consequently, the court found that the bond required by section 31-17-110 protects not only purchasers but also “any person,” including a lending institution, who suffers a loss due to a manufactured home dealer’s noncompliance with the statute.

In applying the second tier of the test, the court of appeals had to determine whether a member of the protected class may maintain an action on the bond required by section 31-17-110.

8. Action Mortgage recovered a jury verdict against Van Deusen and Greater Greenville Homes in the amount of $5,000. The sole subject of the appeal by Action Mortgage is the trial court’s granting Sentry Indemnity’s motion for involuntary nonsuit.

9. 291 S.C. at 210, 352 S.E.2d at 713.


15. Id. at 19-425.1(H).
The court determined that since there is no clear statutory language to the contrary, Action Mortgage, as a beneficiary of the bond, had standing to maintain an action on the bond.\textsuperscript{16}

Other jurisdictions considering the issue raised in Action Mortgage have reached conflicting results. These results, however, may be reconciled by comparing the statutory language on which they were based. For example, the court of appeals supported its opinion by citing cases decided under Florida and North Dakota licensing statutes.\textsuperscript{17} Both statutes require the dealer’s bond to indemnify “any person.”\textsuperscript{18} Additionally, both jurisdictions construed the term “any person” to include a lending institution and, therefore, allowed the lending institution to sue under the dealer’s bond.\textsuperscript{19} Likewise, the South Carolina Manufactured Housing Board’s regulations require that the dealer’s bond be in favor of “any person.”\textsuperscript{20}

The court of appeals noted a different result reached under Iowa law.\textsuperscript{21} The Iowa licensing statute provides that the dealer’s bond shall indemnify “any person who buys a motor vehicle from the dealer.”\textsuperscript{22} The Iowa court construed the statute to protect only purchasers, not lenders.\textsuperscript{23} One can reconcile the Iowa holding and Action Mortgage by comparing the language of the Iowa statute with that of the South Carolina Manufactured Housing Board’s regulation. The Iowa statute limits bond protection to “any person who buys a motor vehicle”;\textsuperscript{24} on the other hand, the South Carolina regulation provides bond protection to “any person.”\textsuperscript{25}

\textsuperscript{16} 291 S.C. at 213, 352 S.E.2d at 714.
\textsuperscript{17} Interstate Sec. v. Hamrick’s Auto Sales, 238 So. 2d 482 (Fla. Dist. Ct. App. 1970); Ramsey Nat’l Bank & Trust Co. v. Suburban Sales & Serv., 231 N.W.2d 732 (N.D. 1975).
\textsuperscript{18} The applicable Florida statute requires that the dealer’s bond be “in favor of any person in a retail or wholesale transaction.” Fla. STAT. ANN. § 320.27(10) (West 1986). The applicable North Dakota statute requires that the dealer’s bond indemnify “any person dealing or transacting business with said dealer.” N.D. CENT. CODE § 39-33-05 (1987).
\textsuperscript{19} State v. General Ins. Co. of Am., 179 N.W.2d 123, 127 (N.D. 1970); Interstate Sec., 238 So. 2d at 484.
\textsuperscript{21} Boone State Bank & Trust Co. v. Westfield Ins., 298 N.W.2d 315 (Iowa 1980).
\textsuperscript{22} IOWA CODE ANN. § 322.4(7) (West 1985).
\textsuperscript{23} 298 N.W.2d at 318.
\textsuperscript{24} IOWA CODE ANN. § 322.4(7) (West 1985).
The cases cited by the court of appeals deal with bonds required for the licensing of motor vehicles. South Carolina also requires, as a prerequisite to licensure, that motor vehicle dealers furnish a surety bond. The bond must provide indemnification for "any loss or damage suffered by an owner of a motor vehicle." The statute further states that "[a]n owner . . . who suffers the loss or damage has a right of action against . . . the dealer's . . . surety upon the bond." This statute appears to limit standing for maintaining a cause of action to the "owner of a motor vehicle." As a result, lenders who, pursuant to dealer plans, finance the sale of motor vehicles may not have the same protection granted lenders who finance the sale of mobile homes.

Action Mortgage allows a lending institution to maintain an action against a surety on the statutory bond required of a licensed manufactured home dealer. This holding provides protection to innocent lenders who suffer loss because of statutory noncompliance by a manufactured home dealer. Accordingly, the South Carolina Legislature should extend this protection to lenders who finance motor vehicles.

Sharon S. Roach

II. Scope of Unfair Trade Practices Act Narrowed

In Chuck's Feed & Seed Co. v. Ralston Purina Co., the Fourth Circuit Court of Appeals held that a manufacturer's inequitable termination of a dealer for selling a competing product does not violate South Carolina's Unfair Trade Practices Act

26. See cases cited supra notes 17 and 21.
28. Id.
29. Id.
30. Other legislatures have recognized the restrictive meaning of the word "purchaser" in statutes requiring motor vehicle dealer bonds. The Florida legislature amended its statute which required that the dealer's bond be in favor of "any purchaser" to read "any person." See Barnett First Nat'l Bank v. Fidelity & Deposit Co., 221 So. 2d 11, 12 (Fla. Dist. Ct. App. 1969). In 1966 the Michigan legislature expanded bond protection from "any purchaser" to "any purchaser, seller, financing agency." See Mich. Comp. Laws § 257.248(g) (1977). On the other hand, the Washington legislature, in 1961, amended its statute to provide that only a "retail purchaser" rather than "any person" could maintain an action against the surety of the dealer's bond. See Home Indem. Co. v. McClellan Motors, 77 Wash. 2d 1, 3, 459 P.2d 389, 391 (Wash. 1969).
(UTPA)\textsuperscript{32} when the dealer can neither sustain a common law wrongful termination claim nor prove that the manufacturer’s action is an anticompetitive practice.\textsuperscript{33} The court implicitly narrowed the unfair or deceptive practices prong of the UTPA\textsuperscript{34} by holding that the UTPA does not extend to facts that would not support a wrongful termination claim.\textsuperscript{35}

From 1975 through 1982, the plaintiff, Chuck’s Feed and Seed Company, a retail feed store owned by Charles Lambert, was a dealer for the defendant, Ralston Purina Company. By virtue of his dealership arrangement, Lambert was entitled to purchase feed directly from Purina. Purina promised Lambert that no other Purina dealerships would be established within ten miles of Lambert’s store. The relationship continued amiably until the summer of 1981 when Lambert informed Purina that he planned to sell a competing brand of feed in his store. Purina’s agent initially threatened to terminate Lambert’s dealership but later apologized and approved Lambert’s plan. Six months later, however, Purina terminated Lambert’s dealership. Purina claimed that the reason was Lambert’s “failure to obtain market penetration.”\textsuperscript{36} Lambert challenged Purina’s claim by demonstrating that he operated one of the leading Purina dealerships in the Charleston area.\textsuperscript{37}

In 1977 Purina, following the advice of its legal counsel, had established a policy that dealers would not be terminated for selling competing products. Counsel recommended that other grounds should be found: grounds such as “failure to achieve market penetration.”\textsuperscript{38} This policy merely prevented Purina’s

\textsuperscript{32} S.C. Code Ann. § 39-5-10 to -160 (Law. Co-op. 1976). The operative portion of the UTPA states: “Unfair methods of competition and unfair or deceptive acts or practices in conduct of any trade or commerce are hereby declared unlawful.” Id. § 39-5-20(a).

\textsuperscript{33} 810 F.2d at 1292-95.

\textsuperscript{34} “[T]he South Carolina statute is aimed at two distinct kinds of conduct: unfair or deceptive practices and anticompetitive practices.” Id. at 1292. See also Day, The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?, 33 S.C.L. Rev. 479, 480 (1982).

\textsuperscript{35} 810 F.2d at 1292.

\textsuperscript{36} Id. at 1291.

\textsuperscript{37} Record at 46-53.

\textsuperscript{38} Id. at 77. There is no legal reason for counsel to advise against terminating dealers who carry competing brands. The Supreme Court has held that exclusive dealing contracts in which manufacturers restrict dealers from selling competing brands are legal unless the restrictions exclude a substantial share of the relevant market. Tampa Elec.
district managers from advising their dealers that selling competing products jeopardized their dealerships. Thus, by terminating Lambert without reasonable notice, Purina denied Lambert an opportunity to choose between selling a competing brand or continuing to sell Purina products.\(^\text{39}\)

Lambert sued Purina alleging a violation of the UTPA and the tort of wrongful termination.\(^\text{40}\) The United States District Court for the District of South Carolina directed a verdict in favor of Purina on the common law wrongful termination charge.\(^\text{41}\) The jury returned a verdict for Lambert on the UTPA claim and assessed actual damages at $78,750. The district court ruled Purina's violation was willful, trebled the damages, and awarded Lambert an additional $86,880 in attorney's fees.\(^\text{42}\) Purina appealed.

The Fourth Circuit reversed the lower court, reasoning that since the trial court had directed a verdict on Lambert's common law wrongful termination cause of action, the only issue was anticompetitive practices.\(^\text{43}\) Analyzing the alleged anticompeti-

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41. The district court determined a wrongful termination claim could not be sustained when the underlying contract was strictly for services. The court further held that Lambert's contract was strictly for services. Record at 720. Under South Carolina common law, the tort of wrongful termination is limited to those situations in which the injured party forfeits a substantial investment. See Glaesner v. Beck/Arnley Corp., 790 F.2d 384, 388-89 (4th Cir. 1986). Lambert's outlay was not substantial.


43. The court stated:

In directing a verdict for Purina on Lambert's common-law wrongful termination claim, the district court found the evidence insufficient to support such a common-law claim. Necessarily, then, the court also found evidence insufficient to support an identical claim brought under the label of the Unfair Trade Practices Act. . . . Like the Federal Trade Commission Act, the South Carolina statute is aimed at two distinct kinds of conduct: unfair or deceptive practices and anticompetitive practices. Only anticompetitive practices are at issue.
tive practices, the court determined that the parties had an exclusive dealing arrangement. Under federal law exclusive dealing is a vertical restraint. Nonprice vertical restraints are not violative of federal antitrust laws unless they foreclose competition to a substantial share of the relevant market. Courts employ the "rule of reason" analysis to determine whether a vertical restraint forecloses a substantial share of the market. The Purina court held that, under the "rule of reason" analysis, Lambert failed to meet his burden of proof. In a dissenting opinion, Judge Sprouse concurred with the majority that the evidence was insufficient to find anticompetitive conduct but argued that Lambert presented enough evidence for a jury to conclude Purina committed an unfair trade practice.

The Fourth Circuit narrowed the scope of the UTPA by de-

here.

810 F.2d at 1292.
44. Id. at 1293.
   It is the intent of the legislature that in construing paragraph (a) of this section (§ 39-5-20) the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
46. 810 F.2d at 1294 n.2.
47. Id. at 1293. Vertical restraints affecting prices, however, are generally per se illegal. See United States v. Parke, Davis & Co., 362 U.S. 29 (1960).
48. 810 F.2d at 1294. The following are the elements of the "rule of reason" analysis: (1) a determination of the line of commerce; (2) a demonstration of the geographic area of effective competition; and (3) a showing that the exclusive dealing excludes a substantial share of the relevant market. The plaintiff has the burden of proof. Id. at 1293. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Beltone Elec. Corp., [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,934 at 22,375, 22,387-95 (1982). See generally Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (in all nonprice vertical restraints, plaintiff must show a significant negative impact on competition between manufacturers).
50. In his dissenting opinion, Judge Sprouse stated:
   The trial court, however, visualized the factual predicate for maintaining the common law action as separate from that for upholding an action based on the UTPA. As a result, the court instructed the jury on the necessary factual elements for finding an unfair practice that would violate the statute. The jury found these facts to exist.
810 F.2d at 1296.
ciding that the directed verdict on Lambert’s wrongful termination claim precluded his claim of unfair practices under the UTPA.\textsuperscript{51} Unfair practices under the UTPA are, arguably, much broader in scope than common law wrongful termination. The broadest of antitrust laws is the UTPA.\textsuperscript{52} In \textit{Bostic Oil v. Michelin}\textsuperscript{53} the Fourth Circuit reversed a South Carolina district court for overly restricting the UTPA’s scope “to only those practices which would be unlawful under § 5(a)(1) of the Federal Trade Commission Act.”\textsuperscript{54} The \textit{Bostic} court speculated that the scope of UTPA protection extended to South Carolina’s definition of unfair terminations “contrary to equity and good conscience.”\textsuperscript{55} Under South Carolina common law, contract terminations that are “contrary to equity and good conscience” are unfair.\textsuperscript{56} Accepting \textit{Bostic}, as Judge Sprouse did in his dissent,\textsuperscript{57} leads to the conclusion that the jury’s determination should remain undisturbed.

Other states liberally interpret similar versions of antitrust statutes. The Supreme Court of North Carolina held that “[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.”\textsuperscript{58} Massachusetts also broadly defines the term “unfair” under its Regulation of Business Practice and Consumer Protection Act: “The existence of unfair acts and practices must be determined from the circumstances of each case.”\textsuperscript{59} The

\textsuperscript{51} See supra note 34 and accompanying text.
\textsuperscript{52} The Sherman and Clayton Acts form the heart of antitrust regulation. They are the narrowest in scope. 810 F.2d at 1293. The FTC Act, described as a penumbra around the federal antitrust statutes, “was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts.” Federal Trade Comm’n v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394-95 (1953) (citations omitted). State antitrust statutes compose the third layer of antitrust regulation. The South Carolina UTPA is broader in scope than the FTC Act. See Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir. 1983), cert. denied, 464 U.S. 894 (1983). UTPA provides protection against unfair local and private practices while, generally, the FTC Act only has jurisdiction when an act or practice affects interstate commerce. See Day, supra note 34, at 480 n.7.
\textsuperscript{53} 702 F.2d 1207 (4th Cir. 1983).
\textsuperscript{54} Id. at 1220.
\textsuperscript{55} Id.
\textsuperscript{56} deTreville v. Outboard Marine Corp., 439 F.2d 1099, 1100 (4th Cir. 1971).
\textsuperscript{57} 810 F.2d at 1296.
Fourth Circuit, therefore, had ample authority to bolster the liberal interpretation of an unfair practice under the UTPA but elected, instead, to retreat.

The court has overly restricted the definition of an unfair practice by holding that a dealer's cause of action for an unfair termination is not actionable unless a wrongful termination claim can be maintained. The tort of wrongful termination has limited application in South Carolina: "Courts have found wrongful termination only in extraordinary circumstances . . ." Therefore, outside of extraordinary circumstances, manufacturers may terminate their dealers, inequitably and in bad faith, and the UTPA may not provide a method of redress. In other words, manufacturers have discretion outside the boundaries of the UTPA to engage in inequitable conduct toward dealers.

The Fourth Circuit's limitation of the definition of unfair practices under the UTPA to common law wrongful terminations is narrower than the definition of unfair practices under the Federal Trade Commission (FTC) Act. The Supreme Court uses three criteria for identification of unfair acts or practices:

1. whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
2. whether it is immoral, unethical, oppressive, or unscrupulous;
3. whether it causes substantial injury to consumers (or competitors or other businessmen).

Often, conduct which is either immoral, unethical, oppressive, or unscrupulous may not provide a civil claim under the common law tort of wrongful termination. Therefore, by strictly limiting the interpretation of an unfair practice, the UTPA scope of protection is narrower than what the FTC Act provides. Such a constriction plainly is offensive to the legislature's intent. The UTPA specifically directs courts to be guided by the FTC Act

60. 810 F.2d at 1296 (Sprouse, J., dissenting).
and federal interpretations.\textsuperscript{63}

The Fourth Circuit has conservatively interpreted the UTPA in \textit{Chuck's Feed & Seed}. In recent decisions the Supreme Court has ruled conservatively when interpreting the federal antitrust laws.\textsuperscript{64} Since the South Carolina legislature has directed courts to look to federal decisions to interpret the UTPA, a conservative trend by the United States Supreme Court should manifest itself through our state courts' conservative interpretations of South Carolina's UTPA. The Fourth Circuit's method, however, narrowing the UTPA scope by limiting the UTPA definition of unfair practices to those which would give rise to wrongful termination claims, is questionable.

If the Fourth Circuit wishes to narrow the UTPA, it might approach the problem, not by limiting the definition of unfair practices, but by restricting the standing of the parties. Under the FTC Act, plaintiffs generally may not bring an action unless they show that the public would be affected adversely.\textsuperscript{65} Since the UTPA states that courts are to be guided by the FTC Act, it is logical that the UTPA would restrict claims to those that affect the public. A number of states follow this reasoning.\textsuperscript{66} Indeed, in \textit{Noack Enterprises v. Country Corner Interiors of Hilton Head Island, Inc.}\textsuperscript{67} South Carolina adopted this reasoning.\textsuperscript{68}

In \textit{Chuck's Feed & Seed} the Fourth Circuit narrowed the scope of South Carolina's UTPA. The conservative \textit{result}, a limitation of the UTPA, parallels recent conservative federal interpretations of federal antitrust laws. The \textit{method} chosen by the court, limiting the Act's protection against unfair practices to those circumstances in which a common law wrongful termination claim could be maintained by the plaintiff, is contrary to the legislative intent that the FTC Act guide the UTPA. This

limitation is narrower than the protection afforded under the FTC Act because wrongful termination is an extraordinary tort in South Carolina. Therefore, the result reached in Chuck's Feed & Seed, dismissal of the UTPA claim, was correct, but the method chosen, narrowing the definition of an unfair practice, was incorrect.

Edwin Lake Turnage

III. RESTRICTIVE COVENANTS ON REAL ESTATE SALES DO NOT VIOLATE ANTITRUST ACT

In Fran Welch Real Estate Sales v. Seabrook Island Co. the Fourth Circuit interpreted section 1 of the Sherman Antitrust Act in the context of real estate sales. The district court granted summary judgment in favor of the defendant, Seabrook Island Company (SIC), and denied the plaintiff's request for a preliminary injunction. The Fourth Circuit affirmed, holding that neither the restrictive covenants prohibiting commercial signs on Seabrook Island nor the restricted access visitor policy were unreasonable restraints of trade.

Seabrook Island Company is the developer of a luxury residential resort on Seabrook Island, a barrier island off the coast of South Carolina. Much of the success of the resort is attributed to the efforts of SIC and the island's residents to maintain the island's natural beauty and noncommercial nature. Restrictive covenants prohibit activities or structures, including "For Sale" and "For Rent" signs, that are inconsistent with the character of the island. Privacy and security are maintained through a limited visitor-access policy whereby a visitor may gain access to the island only through a guarded gate and for a suitable,

69. 809 F.2d 1030 (4th Cir. 1987).

70. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

71. The district court denied plaintiff's motion for summary judgment on one claim that alleged an unlawful tying arrangement when Seabrook Island Company obtained an exclusive listing by a promoter to whom they had sold a tract of land for the construction of speculative houses. 809 F.2d at 1034.

72. The court also declined to fashion a per se rule for the restriction on commercial signs, stating that they had "no 'considerable experience' with such a restriction." 809 F.2d at 1032 (quoting United States v. Topco Assocs., 405 U.S. 596, 607-08 (1972)).
specified purpose. Real estate agents who are not employees of SIC must obtain a pass at the gate house to obtain admission to the island, and access is limited to three agents from one firm on the island at one time. SIC sales agents are not subject to the restrictions imposed on other agents.

Fran Welch Real Estate is a real estate brokerage firm that, by its own admission,73 has been very successful in the property resale market on Seabrook Island. Fran Welch alleged that the prohibition of its "For Sale" and "For Rent" signs and the restrictive access policies violated section 1 of the Sherman Antitrust Act.74

In holding that the ban on "For Sale" and "For Rent" signs was not an unreasonable restraint of trade, the court emphasized that the ban was complete and nondiscriminatory, banning SIC's signs as well as those of Fran Welch. The court found evidence that the motivation behind the sign restriction was purely aesthetic and that no anticompetitive motive or purpose existed.75 Finally, the court found that "[i]n the context of the restricted access to the island, there is no basis for an inference that the prohibition of signs on the properties is unreasonable."76

In holding that the visitor access policy was not an unreasonable restraint of trade, the court relied on the fact that the policy was adopted by the property owners association and was designed to protect the privacy and enhance the security of the island residents. The court reasoned that since SIC was the island's developer, there was a constant need for its employees to have access to the island. Furthermore, SIC was able to vouch for the character and integrity of its employees.77 Therefore, the

73. 809 F.2d at 1031.
74. Welch also alleged that a program, under which SIC would not accept purchaser referrals from brokers who had listings of Seabrook Property for sale, was a per se illegal boycott. The Fourth Circuit found that there was "nothing remotely suggesting a concerted refusal to deal with Fran Welch." 809 F.2d at 1033.
75. The court distinguished Cantor v. Multiple Listing Serv., 588 F. Supp. 424 (S.D.N.Y. 1983), on the grounds that the restriction in Cantor was designed to deprive the plaintiff of his competitive advantage and that no such purpose or motive existed here. 809 F.2d at 1033.
76. 809 F.2d at 1032.
77. The court also noted that on only one occasion was an agent denied access to the island, and Fran Welch had apparently lived comfortably with the policy. Id. at 1034.
court held that since compliance with the rule was only minimally inconvenient, the rule was not an unreasonable restraint of trade.78

In determining whether restrictions unreasonably restrain trade, the Supreme Court has enumerated a number of factors to be balanced.79 The Supreme Court has stated that the proper focus is "directly on the challenged restraint's impact on competitive conditions."80 While the Fourth Circuit did not articulate a detailed application of the Supreme Court's factors,81 viewing the decision in the framework of these factors may give some insight into the scope of the court's holding. The nature of the business to which the sign restrictions applied presented the court with a situation in which covenants restricted real estate signs on a noncommercial resort island. From the emphasis the court placed on the noncommercial nature of the island,82 one can assume that a more in-depth analysis would be required in a different type of real estate development.

Analysis of the effect and history of the restraints also gives insight into the scope of the decision. The court was unconvinced that more than a minimal adverse effect was caused by the restraint,83 but the court determined that there were adequate means of advertising the property that Fran Welch had successfully utilized.84 If a similar restraint were shown to have a more substantial effect, the court might be more willing to strike the restraint. Additionally, the fact that the property owners purchased their property in reliance on the restriction of signs was important to the trial court85 and probably influenced the

78. Id.
79. Chicago Board of Trade v. United States, 246 U.S. 231 (1918). These factors include: the nature of the business to which the restraint is applied; its condition both before and after the restraint was imposed; the nature, effect and history of the restraint; the evil which it was intended to remedy; the reason for choosing the particular remedy and the end sought to be achieved. Id. at 238.
81. See supra note 79.
82. The court specifically limited its holding with regard to the sign restrictions to "the context of the restricted access to the island." 809 F.2d at 1032.
83. The court quoted Fran Welch as boasting that it was competing in the top group in the number of sales on Seabrook Island. Id. at 1033.
84. Id. at 1032.
Fourth Circuit as well. Finally, the Fourth Circuit deemed the end sought to be achieved, maintaining the noncommercial nature of the island, to be legitimate and also determined that the restriction was adopted for the sole purpose of obtaining this end. Thus, had there been evidence that the restriction was adopted for the purpose of reducing competition or for any other illegitimate purpose, a different ruling may have resulted.

Regarding the restricted access policy, which limited access to the general public as well as to Fran Welch agents, the court emphasized that the property owners association adopted the policy and no illicit purpose was shown. The court further emphasized that the policy had caused Fran Welch little inconvenience. Thus, the court implied that neither a total ban on outside agents nor a policy adopted for an illicit purpose would be permissible.

The decision of the Fourth Circuit presents a straightforward application of established antitrust principles to a specific set of facts. The court gave considerable weight to the aesthetic purpose behind the restrictions, and one could expect the court to reach a different decision if the same restrictions were applied to a real estate development lacking a legitimate protectable environment.

Mark C. Dukes

IV. PUBLIC INTEREST IMPACT NECESSARY TO RECOVERY UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

The South Carolina Court of Appeals once again expressed the view that for plaintiffs to recover under the South Carolina Unfair Trade Practices Act (SCUTPA) they must prove that the unfair or deceptive acts complained of have a sufficient impact on the public interest. In Key Co. v. Fameco Distribu-

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86. The property owners association is independent of the Seabrook Island Company. 809 F.2d at 1032.
tors⁸⁸ the court held that an intentional breach of a contract between two corporate parties, without more, does not affect the public interest and, therefore, does not violate SCUTPA. The court’s reaffirmance of the public interest requirement places South Carolina in the distinct minority of jurisdictions that have interpreted unfair trade practices acts.⁹⁰

The plaintiff, Key, had entered into a contract with the defendant, Fameco. The contract provided that Key would place coin-operated machines in Fameco’s nightclub establishment for a period of eighteen months. The parties agreed to share equally in the proceeds from these machines.⁹¹

Several months into the contract, Key began to receive complaints from Fameco concerning the machines. Key’s subsequent investigation revealed that the machines simply had been disconnected.⁹² Key asked Fameco to refrain from unplugging the machines because repeated disconnecting reduces the life of the machines.⁹³ Fameco, however, continued to unplug the video machines and also moved them to a less visible location in the bar.⁹⁴ Key determined that Fameco’s actions constituted an intentional breach of the contract and, consequently, brought an action under SCUTPA.⁹⁵

At trial, Fameco made two motions for a directed verdict⁹⁶ and a motion for judgment n.o.v.⁹⁷ on the theory that corporations are not entitled to bring a cause of action under
SCUTPA.98 These motions were denied, and the jury awarded the plaintiff $8,000, which the trial court trebled.99

In reversing the lower court, the court of appeals relied on Noack Enterprises v. Country Corner Interiors of Hilton Head Island, Inc.,100 which required that the public interest be affected in order to substantiate a claim under SCUTPA.101 The Key court stated that the acts complained of did "not involve practices that either directly or indirectly affected the rights of anyone but the contracting parties."102 As the public interest had not been affected, the court concluded that Key Co. had not established a cause of action under SCUTPA.103

While the court of appeals has maintained its position requiring the public interest be affected for SCUTPA to be violated, it has not taken the opportunity to articulate a test to determine what acts affect the public interest. Noack is the seminal case in South Carolina mandating that the public interest must be affected.104 The Noack court, however, made no attempt to define public interest but merely concluded that the "complaint nowhere alleges any facts demonstrating that these acts [misrepresentations regarding the sale of a retail business]105 or

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98. The defendant argued that the intent of SCUTPA was to protect consumers; therefore, consumers were the only parties allowed to bring claims under SCUTPA. As Key is a corporation of the state of South Carolina, it is not a consumer and, hence, cannot maintain an action under SCUTPA. Record at 36.


102. 292 S.C. at 526, 357 S.E.2d at 478.

103. Id.

104. The Noack court stated that although SCUTPA created a private right of action pursuant to S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1976), the private action must serve the same objective and be similarly restricted in scope as an action brought by the attorney general. S.C. CODE ANN. § 39-5-50 (Law. Co-op. 1976) authorizes the attorney general to bring an action in the name of the state to enjoin unfair trade practices when to do so would be in the public interest. The private plaintiff's claim, therefore, must affect the public interest. 290 S.C. at 477, 351 S.E.2d at 347. See also Business Law, supra note 101.

105. The seller of this retail establishment was not in the business of selling retail establishments. If the defendant had been in the business of selling retail establishments, the actions might have been held to violate SCUTPA. See Barnes v. Jones Chevrolet Co., 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987).
practices adversely affect the public.”

The court of appeals shed some light on what constitutes “affecting the public interest” in Barnes v. Jones Chevrolet Co. In Barnes the plaintiff, claiming the defendant had “padded” his automobile repair bill, brought an action under SCUTPA. The court concluded that unfair or deceptive acts with the potential for repetition have an impact on the public. The repair shop has the potential to “pad” the bills of other customers; therefore, this type of conduct violates SCUTPA.

The “potential for repetition” test is the most specific the court of appeals has been on the public interest issue. Additionally, it is difficult to examine other jurisdictions for persuasive value in defining “public interest” because no state has a statute worded exactly like South Carolina’s, and few states even require an impact on public interest. Only Washington and Georgia have made attempts to promulgate tests to determine public interest.

In Hangman Ridge Training v. SAFECO Title Insurance the Washington Supreme Court stated that the trier of fact must determine public interest from several factors, depending upon the context in which the alleged acts were committed. The factors for determining public interest differ for acts committed in a consumer transaction context and for those committed in a private dispute. The relevant factors to establish a public interest in the consumer context include:

1) Whether the alleged acts were committed in the course of defendant’s business?
2) Whether the acts were part of a pattern or generalized course of conduct?

106. 290 S.C. at 480, 351 S.E.2d at 350.
108. Id. at 613, 358 S.E.2d at 160.
109. 290 S.C. at 477, 351 S.E.2d at 349.
110. See supra note 90.
111. Other jurisdictions requiring a public interest have not provided a useful framework for evaluating this issue. See Newman-Green, Inc. v. Alfonzo-Larrain, 590 F. Supp. 1083, 1087 (N.D. Ill. 1984) (the “public interest” requirement has not been uniformly applied in Illinois); see also Genesco Entertainment, a Div. of Lymutt, Inc. v. Koch, 593 F. Supp. 743 (S.D.N.Y. 1984); Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980).
113. Id. at 789-90, 719 P.2d at 537.
3) Whether repeated acts were committed prior to the act involving the plaintiff?

4) Whether there is a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff?

5) Whether the act complained of involved a single transaction?

6) Whether many consumers were affected, or likely to be affected, by it?\textsuperscript{114}

Where the context is essentially a private dispute,\textsuperscript{115} the factors indicating a public interest are the following:

1) Whether the acts were committed in the course of defendant’s business?

2) Whether defendant advertised to the general public?

3) Whether defendant actively solicited this particular plaintiff, indicating potential soliciting of others?

4) Whether the plaintiff and defendant occupied unequal bargaining positions?\textsuperscript{116}

The court further stated that these factors, as applied in both the consumer- and private-dispute contexts, are merely indicia of a public interest, and none are dispositive.\textsuperscript{117}

The \textit{Hangman Ridge} court also stated that the public interest element may be satisfied per se. The per se method requires a showing that defendant’s conduct violated a statute that contains a specific legislative declaration stating that the proscribed conduct is against the public interest.\textsuperscript{118}

Georgia courts also have promulgated a framework to determine public interest with respect to a violation of their state’s analogue to the SCUTPA. In \textit{Benchmark Carpet Mills v. Fiber Industries}\textsuperscript{119} the defendant counterclaimed under the Georgia Deceptive Trade Practices Act\textsuperscript{120} for an intentional cancellation

\begin{thebibliography}{9}
\bibitem{114} Id. at 790, 719 P.2d at 538.
\bibitem{115} Examples given of a private dispute are attorney-client, insurer-insured, realtor-property purchaser, and escrow closing agent-client. \textit{Id}.
\bibitem{116} \textit{Id}. at 790-91, 719 P.2d at 538.
\bibitem{117} The Washington Supreme Court has conceded that the distinction between a private dispute and a consumer transaction is sometimes difficult to ascertain. \textit{Nordstrom, Inc. v. Tamprurious}, 107 Wash. 2d 735, 733 P.2d 203 (1987).
\bibitem{118} 105 Wash. 2d at 791, 719 P.2d at 538.
\end{thebibliography}
of a yarn contract. The defendant claimed that the plaintiff knew it would not be able to fill the contract at the time of execution. The court held that no recovery could be had under the act as the "allegedly offensive activity must have taken place in the conduct of . . . consumer acts or practices, i.e., within the context of the consumer marketplace."

The court's two-step analysis to determine impact on the public interest focuses on: 1) the medium through which the act or practice is introduced into the stream of commerce and 2) the market on which the act or practice is reasonably intended to impact. The court illustrated the application of this test by stating that if the deceptive act, such as advertising, were addressed to the consuming public, the act would be violated. If the advertising, however, was limited to a nonconsumer market, such as professional journals, the conduct would be outside the scope of the act even though a public medium was used.

Although South Carolina courts have not stated explicitly what constitutes a public interest, the policy behind this construction of SCUTPA is to limit the broad range of recovery that may have been possible. One commentator points out that "[c]onservative state courts might resist such a potential revolutionary cause of action." While the legislature did not avoid enacting the SCUTPA, the court of appeals has limited the potential broad coverage of the act, fearing a proliferation of

121. 168 Ga. App. at 993, 311 S.E.2d at 218. This analysis is similar to the argument that the defendant advanced in Key at trial. The defendant, relying on Benchmark and Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), argued that SCUTPA did not provide protection to the plaintiff corporation, which is presumed to be a sophisticated purchaser. Brief of Appellant at 6. The trial court seemed to agree with the defendant that SCUTPA does not apply to sophisticated corporations since the court stated that it did not think that "General Motors could sue Toyota . . . under the Unfair Trade Practices Act." Record at 38. The court, however, decided that because the plaintiff was a small family corporation, it was not precluded from suing under SCUTPA. Record at 34.


123. Id.

124. Id.

125. The wording of most unfair trade practices acts is so broad and pervasive that many have been constitutionally challenged on grounds of vagueness. See, e.g., State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980); Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 501 P.2d 290 (1972).

litigation would result because of successful plaintiffs’ ability to collect treble damages\textsuperscript{127} and attorney’s fees.\textsuperscript{128}

The practitioner may find it beneficial to rely on \textit{Hangman Ridge} and \textit{Benchmark} for guidance as to what constitutes a public interest. It is impossible, however, to predict what direction the court may take in defining public interest. Attorneys should stay abreast of developments regarding SCUTPA, as the court of appeals seems to be taking an ad hoc approach to the public interest issue. SCUTPA, which at one time appeared to be a valuable plaintiff’s tool, has been gutted by recent court of appeals decisions.\textsuperscript{129} These decisions seem to have answered Professor Day’s question of whether SCUTPA is a “[s]leeping giant or [i]llusive panacea.”\textsuperscript{130}

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\textsuperscript{128.} \textit{Id.}

\textsuperscript{129.} \textit{But see} Leaffer & Lipson, \textit{supra} note 90, at 557 (predicting the expansive future uses of state unfair trade practices acts).

\textsuperscript{130.} Day, \textit{supra} note 126, at 479.