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Indiana Court Expands Interpretation of Consumer Protection Law

Indiana, like many of her sister states, has a law on the books to protect consumers. This consumer protection statute is called the Indiana Deceptive Consumer Sales Act or occasionally referred to as the Indiana Deceptive Consumer Sales Practices Act. I add the second name because that is how I learned the title of Indiana's consumer protection statute but I realize that it is not a very frequently used title. This week's post is dedicated to a discussion of the purpose and functions of the Act and the recent Indiana Court of Appeals decision in the case *Kesling v. Hubler Nissan, Inc.* that provided an interpretation that functionally expanded Indiana's law protecting Hoosier consumers.

The Deceptive Consumer Sales Act was first adopted by the General Assembly in 1971. When the legislature adopted the Act they wrote into the law the specific purpose for which it was adopted. Recognizing how important the Act is in furthering the protections to consumers and in preventing consumer fraud, the legislature stated:

> The purposes and policies of this chapter are to: (1) simplify, clarify, and modernize the law governing deceptive and unconscionable

> consumer sales practices; (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and (3) encourage the development of fair consumer sales practices.

In furtherance of these policies, the legislature also wrote into the Act that it "shall be liberally construed and applied to promote its purposes and policies."

Despite the best intentions of the Indiana General Assembly, the Deceptive Consumer Sales Act has not always lived up to its most noble intentions. Nevertheless, it does provide some very meaningful protections to Indiana consumers. The Act lists no less than 36 specific deceptive consumer sales practices. Of these various practices, the most frequently cited in lawsuits is that the "subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have."

This was the exact practice that was alleged in the recent case *Kesling v. Hubler Nissan, Inc.* The facts of the case are ones in which any reasonable person could easily envision finding him or herself. The buyer read an advertisement that stated, "Sporty Car at a Great Value Price." The plaintiff, Miss Heather Kesling, went to the dealership with her boyfriend. After test driving the car, she noticed some issues with the car while idling. She rasised the issue with the Hubler Nissan salesperson who told her "that it had been 'sitting for a while and probably just needed a tune-up.'" The car had only been on the lot for a fortnight. After only putting forty-four miles on the car, Heather had the vehicle inspected. The inspection revealed several problems including:

> (1) a plugged fuel return line that could cause the vehicle to catch on fire while driving; (2) an incorrectly routed air conditioning belt that could cause loss of steering control if the belt were to break or come off the pulleys; and (3) a loose left tie rod that allowed the left front wheel to steer independently to some degree from the rest of the steering system and would lead to total loss of steering control if it were to completely disconnect.

In the inspector's opinion, the car "had serious problems and was unsafe to drive."

Heather filed a claim against Hubler Nissan for (I) violations of the Deceptive Consumer Sales Act, (II) recovery under the Indiana Crime Victim's Relief Act, and (III) fraud. The trial court found in favor of Hubler Nissan on a summary judgment motion prior to trial and dismissed Heather's case. Heather appealed her case to the Indiana Court of Appeals, which held in a 2-1 split decision that Heather's claims

could progress to be decided by a jury at trial. Senior Judge Sharpnack, writing for the majority with Judge Darden in one of his first cases since retiring from the bench into Senior Judge status concurring, found that the representations by Hubler Nissan both through its salesperson and its marketing/advertisements could be found to violate the Indiana Deceptive Consumer Sales Act.

In the case, the defendant argued that the plaintiff was not relying on the words “Sporty Car at a Great Value Price” but rather the inference that those words meant that the vehicle could be safely operated. Now before we probe into the findings of the court, let us take a step back and actually look at what the defendant was arguing in the case. Hubler Nissan was actually arguing that they never implied at any point while selling the car to Heather that “the [car] could be safely operated.”

Forget the parsing of the language for just a second and realize that here you have a company that is trying to escape liability by arguing some legal technicality and trying to say that the specific language of an advertisement never stated that the car they sold Heather for $2,981 – not some $500 junker on blocks in your buddy’s backyard – “**could be safely operated**.” My point here is that the car lot was actually trying to say that the law allowed them to sell a car that they knew was not safe to drive just so long as they never expressly said that it was. Now I ask you this rhetorically; have you ever gone to a car lot to buy a car and thought, “I wonder if this car that is being sold on the lot *can be safely operated*?” If you can honestly say that you have, to quote Steven Tyler of Aerosmith, “then mister you're a better man than I.” Granted, due to the legal aspects of the case trying to argue that the car was actually safe was not really the issue in this appeal. Nevertheless, the defendant tried to convince a court that they were just allowed to hide the fact that the car was not safe to drive. The thought is just jaw dropping.

Returning to the legal aspects of the case, the court held that the representation did not have to be affirmative. The car lot did not need to explicitly state that the car was safe to drive. It was sufficient that the car lot implied that the vehicle was safe to operate. After looking to the language of the advertisement the court held that a reasonable jury could find that the advertisement implied that the car was safe to operate.

Recall that the case was a split decision. There was one judge that disagreed with the majority on this issue. Judge Friedlander was willing to jump into word parsing along with the defendant. Now mind you, Judge Friedlander did not indicate that he disagreed with the decision by the majority that a representation could be implied. However, he did disagree that the phrase “Sporty Car at a Great Value Price” could mean that the car was safe to operate. He dissected the

marketing phrase as such:

> (1) that the car is "sporty," which is commonly understood to mean resembling or styled after a sports car; and (2) that the purchase price is low relative to the vehicle's market value. Leaving aside the fact that this very generic advertising phrase is widely regarded as typical used-car-sales puffery that conveys virtually nothing about the particular vehicle to which it is attached, the phrase is devoid of content relative to the vehicle's operating status. In my view, the Majority's conclusion that the phrase may be interpreted to infer that the vehicle may be safely operated in its current condition is simply unreasonable.

I respectfully disagree with the Honorable Judge.

I cannot possibly read the word "car" in such close proximity as "great value" and not believe that the vehicle is "safe to operate." Nothing in that phrase tells me that the car is a junker that needs serious repairs or can only be used for parts. Thus, my inclination is to believe that the vehicle is a "car" and can perform its functions as a car. These functions include safe operation. I cannot see how a vehicle that is not able to perform one of its most basic functions can ever constitute a "great value." Indeed, this basic premise is what underlies the concept of the implied warranty of merchantability, which requires that a product sold be suitable for the usual intended purpose. I assume that this legal concept is not an issue in the case because it was disclaimed, likely in an owner's manual or on the bottom of a sales form.

Nevertheless, the majority opinion got it right. It did what we at Pavlack Law often praise the Indiana Court of Appeals for doing – realizing that the law and common sense should rarely, if ever, be in conflict. To finish off the case, the court also found that Heather could present her claims for the Crime Victim's Relief Act and fraud to a jury as well. Recall from our previous discussion on the Crime Victim's Relief Act that a plaintiff can bring a civil claim for damages sustained from something that constitutes a criminal act. In this case the alleged criminal act was Deception.

The Indiana Code defines the crime of deception as occurring when "a person 'disseminates to the public an advertisement that the person knows is false, misleading, or deceptive, with intent to promote the purchase or sale of property or the acceptance of employment' commits deception." The court found that the same grounds that supported its findings on the Deceptive Consumer Sales Act could support a claim for deception. The court also held that it could support a claim for

common law fraud.

All-in-all the Court of Appeals wrote a phenomenal opinion for the triumph of common sense with regard to consumer expectations. This decision helps to extend the protections for Indiana consumers and helps to protect against consumer fraud.

If you find yourself the victim of consumer fraud it is of the utmost importance that you find counsel that is experienced and knows the intricacies of the law. Though the *Kesling* decision is a major step in the right direction for consumer rights in Indiana, there are still very many difficulties and complexities in Indiana law regarding consumer protection.

Join us again for further insight into the complex nature of the law.

****UPDATE****

The Indiana Supreme Court has granted transfer of this case and will review the decision. Thus, the Court of Appeals opinion has been vacated.

Sources

- Indiana Deceptive Consumer Sales Act – Ind. Code chapter 24-5-0.5.
- *Kesling v. Hubler Nissan, Inc.*, 975 N.E.2d 367 (Ind. Ct. App. 2012), *trans. granted*, 982 N.E.2d 298 (Ind. 2013).
- Indiana Crime Victim's Relief Act – Ind. Code chapter 34-24-3.

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