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New Case Summaries

Buyer's Remorse Continues to be Seller's Remorse Post-Goglin.

By Austin B. Kenney[i] and Colin T. Murphy[ii]

In the second post-*Goglin v. BMW of N. Am. LLC* (2016) 4 Cal.App. 5th 562 ("*Goglin*") decision this year, the Court of Appeal in *Flores v. Southcoast Automotive Liquidators, Inc.* (Cal. Ct. App., Nov. 27, 2017, No. B268271) 2017 WL 5663590, held that a seller's reasonable correction offer in response to a 30-day demand for correction under the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code, §1782) prevents the consumer plaintiff from maintaining a cause of action for damages under the statute. The Court of Appeal held, however, that the correction offer does not prevent the plaintiff from pursuing remedies based on other statutory violations or common law causes of action based on the same conduct "because the [CLRA's] remedies are cumulative" and "non-exhaustive." (Cal. Civ. Code, § 1752.)

In *Flores*, defendant Southcoast Automotive Liquidators, Inc. dba Discount Auto Plaza (the "Dealer") employed a marketing strategy that included targeted publications advertising low prices for specific cars. Fine print at the bottom of each advertisement stated that the price expired at noon on the day of the publication. A customer who called before noon would be quoted the sale price. If the customer arrived at the dealership in the afternoon, they would be sold the car at full price. The Dealer also posted the advertisements online for about three hours. The online advertisements did not contain expiration information. (*Flores, supra*, at 1.)

Plaintiff/Respondent Krystal Flores saw the Dealer's online advertisement for a 2009 Dodge Charger for $9,995. Her mother printed the advertisement and called the next day to inquire about the car. She spoke with an employee named "Sergio," who represented that "the car had 42,000 miles and was in excellent condition." After Flores's mother pressed, Sergio said he "might be able to drop the price to $9,000." Flores's father called an hour later. He was told by a different employee that the car had "42,000 miles on it" and that there were "no mechanical issues with the car." (*Flores*, at 1.)

The next day, Flores and her mother drove to the dealership and asked to see Sergio. Another salesperson falsely responded that he was Sergio. Flores showed the imposter the advertisement that her mother had printed. The employee showed her a black 2009 Dodge Charger with body damage and mileage of 107,000. He said "it was the only black Charger on the lot, but the Dealer could repair the damage." (*Flores*, at 1.) Flores decided to purchase the car despite the visible damage and 2.5x the advertised mileage. When her mother expressed reservations about the states financed price ($17,401), the employee said "not to worry about it, because they were just throwing numbers out and that number would not stay." Flores bought the car on the basis of that representation. (*Flores*, at 2.)

The engine light went on in Flores's "new" car on her drive home from the dealership. She informed the Dealer and was told to bring the car back for repairs. Three days later, suspecting trouble from the Dealer, she picked up the car and took it to a third-party mechanic who confirmed that no repairs had been made. (*Flores*, at 2.)

Flores hired an attorney, who sent a demand letter to the Dealer alleging that the Dealer's acts constituted unfair competition and/or unfair or deceptive acts in violation of the CLRA. The letter specifically demanded that the Dealer remedy the alleged violations within 30 days. A week later, Flores sued the Dealer and her lender alleging several causes of action, including violation of the CLRA, violation of the UCL, fraud, violation of the Song-Beverly Consumer Warranty Act, and violation of the Magnuson-Moss Consumer Warranty Act. She sought an injunction under the CLRA, as well as an award of attorneys' fees and costs. (*Flores*, at 2.) Three weeks later the Dealer offered Flores complete rescission, plus $1,500 for incidental costs. The Dealer further advised that, if Flores rejected the offer, it would deposit with the court the amount that the Dealer believed to be a full remedy and seek a determination that it was the prevailing party and entitled to attorneys' fees and costs because it had offered an appropriate remedy within 30 days of Flores's demand. Flores rejected the offer because she "did not believe it compensated her attorneys." (*Flores*, at 3.)

At a bench trial, Flores's counsel acknowledged the UCL and CLRA claims overlapped and that the Dealer's offer did not address the request for an injunction. The trial court agreed with the Dealer and held that the Dealer made a valid settlement offer to resolve the situation in good faith, and therefore, damages were not justified as to either defendant for violation of the CLRA. The court also found in favor of the defendants on the cause of action for fraud. However, the court found violations of the UCL, Song-Beverly Act, and the Magnuson-Moss Act based on breach of warranty and awarded actual and punitive damages, plus attorneys' fees under Song-Beverly, to Flores. The defendants appealed on the ground that the CLRA provided the exclusive remedy for conduct encompassed by its terms, and Flores could not recover for fraud or under the UCL based on the same conduct. (*Flores*, *supra,* at 3.)

In line with *Goglin*, the Court of Appeal, Division Five, held that the defendants' position was "incorrect." The consumer in *Goglin* pursued the dealership under the CLRA and Song-Beverly Act, but only sought attorneys' fees under Song-Beverly. (*Goglin, supra*, 4 Cal.App.5th at 464, 470.) The Court held that a pre-litigation *Benson*[1]-type tender (rescission, plus a minimum offer of $2,500 for attorneys' fees) had no effect outside the CLRA since, unlike the CLRA, the Song-Beverly Act has no pre-litigation notice requirement. (*Id.* at 472.)

The Court of Appeal in *Flores* echoed *Goglin* when it observed that the "provisions of [the CLRA] are not exclusive." (*Flores*, *supra*, at 5.) The Court disagreed with the defendants' contention that Flores could not avoid the CLRA's safe harbor by recasting her claim as a violation of the UCL and seeking injunctive relief. Flores's UCL claim was based directly on evidence of fraudulent advertising practices and was not dependent on finding an underlying

[1] See generally *Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198 , review denied (Nov. 24, 2015).

violation of the CLRA. (*Flores*, *supra*, at 7.) The CLRA expressly provides that the effect of a reasonable correction offer is to prevent the consumer from maintaining an action for damages under the CLRA, but, as noted, the remedies of the CLRA are cumulative and non-exhaustive. (Cal. Civ. Code, § 1752.)

Accordingly, the appellate court held that the Dealer's reasonable correction offer prevented Flores from maintaining a cause of action for damages under the CLRA only. It did not prevent her from pursuing remedies based on causes of action for violation of other statutes arising from similar conduct.

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