Substantial Aggravating Circumstances: When is a Breach of Contract Unfair and Deceptive?

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I previously wrote an article titled “What’s NOT Unfair,” discussing claims that are outside of the scope of the Unfair and Deceptive Trade Practices Act (the “Act”), N.C.G.S. § 75-1.1, et al., which included the garden-variety breach of contract claim. Absent “substantial aggravating circumstances,” a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under the Act. Eastover Ridge, LLC v. Metric Constructors, Inc., 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (2000). But what I didn’t discuss is what exactly constitutes “substantial aggravating circumstances.” The best way to illustrate this concept is through North Carolina case examples.

Case Examples

In Johnson v. Colonial Life & Accident Ins. Co., 173 N.C. App. 365, 618 S.E.2d 867 (2005), the Court of Appeals affirmed a jury verdict from Pitt County Superior Court finding a breach of contract was accompanied by substantial aggravating factors in the context of the termination of an employee and the deprivation of his benefits under the Consolidated Omnibus Budget Reconciliation Act of 1996 (COBRA). Plaintiff Johnson was a sales representative for Colonial Life on a contractual basis. The contract provided for termination for cause. One of the enumerated acts constituting cause for termination was “mak[ing] or knowingly allow[ing] to be made false or misleading statements on any application or claim or other document or communication submitted to Colonial.” In 1996, Johnson filed a claim giving notice to Colonial of an eye injury he had suffered. Colonial presented evidence that a doctor’s statement with no patient name was attached to the claim for treatment of a facial cut. Colonial had found that a similar doctor’s statement had been filed by another policyholder. Colonial claimed Johnson manipulated policyholder claims to his own benefit. Johnson denied any nefarious conduct on his part. At a meeting with Colonial representatives to discuss suspicions about the claim, Johnson was accused of attempting to steal from Colonial, threatened with the loss of his job, loss of medical insurance, and the filing of a report with the fraud division of the NC Insurance Commissioner’s Office. Johnson was told to “see how you take care of a wife with a history of cancer now.” Johnson was terminated. Colonial said it was because of his suspected fraud, but Johnson suspected it was because Johnson assisted policyholders in filling out insurance claims against Colonial, which Colonial was not happy about. The jury, at the close of the evidence, specifically found that Colonial breached Johnson’s employment contract along with the following aggravating circumstances: (1) Failed to adequately investigate that Johnson submitted a false or fraudulent claim before submitting a fraud report to the NC DOJ; and (2) Wrongfully used the accusation of a false claim as a pretext for terminating Johnson when there was otherwise no...
cause, as defined in the contract. The judge concluded as a matter of law that a claim under the Act had been satisfied and the Court of Appeals affirmed that conclusion of law. As such, Johnson’s breach of contract damages were trebled.

In Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838 (2000), the Court of Appeals held that a breach of contract was accompanied by sufficient aggravating circumstances to warrant a jury verdict for unfair and deceptive trade practices and trebled damages. The Plaintiffs entered into three separate contracts to purchase three lots of property from the Defendants. The Plaintiffs put earnest money deposits on each lot and waited for evidence of clear title before closing would take place. While the Plaintiffs waited to close on the lots, the Defendants entered into a contract for at least one of the lots with a third party for a higher price, unbeknownst to the Plaintiffs. Defendants were not able to get clear title to the lots in a reasonable time, preventing them from closing. When the Plaintiffs inquired about closing, the Defendants sent a letter to the Plaintiffs stating that the Plaintiffs had breached by not closing earlier, that the Defendants were ready and willing to close and had been waiting on the Plaintiffs to perform, and that they were instructed by an attorney that they no longer had to honor the lot contracts. Defendants further explained that they were entitled to recover damages from the Plaintiffs for having the lots off the market for so long, and that they had relisted the lots at a higher price. Defendants offered to sell those same lots to the Plaintiffs at the higher price, but demanded increased earnest money deposits for each and refused to refund their previous earnest money deposits. The Court held that Defendants conduct was deceptive and that it did actually deceive the Plaintiffs. Since that deceptive conduct accompanied the breach, it constituted unfair and deceptive conduct, warranting trebled damages.

The common thread in each case is fraudulent or deceptive conduct by the breaching party. Simply not performing is not enough, but using fraud or deception as a basis for or mechanism for the breach seems to be sufficient to warrant a breach of contract falling within the Act. Before moving forward with a claim for breach of contract or unfair and deceptive trade practices, consult a competent attorney to evaluate the strength of your claim and discuss your options.