

South Carolina Unfair Trade Practices Act

Related Professionals

Cheryl D. Shoun
843.720.1762
cshoun@maynardnexsen.com

Practices

Litigation

Insurance Coverage & Bad Faith

Product Liability

Property Subrogation & Recovery

10.10.2017

To prevail in a claim for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), a claimant must establish 1) the opposing party engaged in an unlawful trade practice, 2) the claimant suffered actual, ascertainable damages as a result of the opposing party's use of the unlawful trade practice and 3) the unlawful trade practice had an adverse impact on the public interest.

In meeting these elements, what constitutes actual damages? Our District Court recently revisited this question in *SIB Development & Consulting, Inc. v. Save Mart Supermarkets*. In *SIB Development*, Defendant alleged the time and money it spent and continued to spend responding to Plaintiff's claims constituted actual damages sufficient to meet that requirement under SCUTPA. The case came before the court on Plaintiff's motion to dismiss Defendant's counterclaim for SCUTPA, arguing SCUTPA provides no relief when the only damages claimed are attorney's fees.

Despite a myriad of authority to the contrary, Defendant maintained its position that its claim for attorney's fees was sufficient for SCUTPA because actual damages under SCUTPA include special or consequential damages. The court was unpersuaded. While the Defendant was correct in its position attorney's fees may constitute special damages, such is the case only in specific circumstances and reliance on that position in a SCUTPA claim is misplaced.

While SCUTPA allows a prevailing party to recover attorney's fees, to do so requires the party first establish actual damages. The court found Defendant's argument that its attorney's fees satisfy SCUTPA's requirement of actual damages failed as a matter of law.

Litigants take note: It is difficult to masquerade attorney's fees as actual damages, particularly if it cannot be shown how such fees are different from those any typical litigant incurs as a result of litigation. The American Rule is controlling; thus, each litigant pays his or her own attorney's fees, regardless of outcome, unless otherwise provided in a statute or by contract. While there are circumstances in which attorney's fees may qualify as special damages, parties should remember such circumstances are limited. *SIB Development* signals the court's unwillingness to extend those circumstances to a SCUTPA claim.

Cheryl D. Shoun is a trial attorney and certified mediator whose experience includes construction law, insurance defense, personal injury defense, employment litigation and medical malpractice. As a frequent writer, she serves as editor for Nexsen Pruet's TIPS: Torts, Insurance and Products Blog.