

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

FILED  
POLK COUNTY  
JANUARY 11 AM 11:22

STATE OF IOWA ex rel.  
THOMAS J. MILLER,  
ATTORNEY GENERAL OF IOWA,  
99AG25112;

Plaintiff,

v.

SMART AUTOMOTIVE GROUP, L.L.C.,  
d/b/a The Smart Automotive Group and  
Smart Automotive, and,

BERNARD E. BURST, III, in his corporate  
capacity and in his individual capacity,

Defendants.

CLERK DISTRICT COURT

EQUITY NO. CE 65395

**PETITION**

The State of Iowa ex rel. Attorney General Thomas J. Miller, by Special Assistant Attorney General William L. Brauch, brings this action against Smart Automotive Group, Inc., d/b/a The Smart Automotive Group and Smart Automotive ("Smart Automotive"), and Bernard E. Burst, III, President of Smart Automotive Group, LLC, pursuant to the provisions of Iowa Code § 714.16, commonly known as the Iowa Consumer Fraud Act, and in support of its claims states as follows:

**INTRODUCTION**

The Attorney General brings this civil action regarding the acts and practices of Defendants Smart Automotive and Bernard Burst. Defendants, with the help of certain Iowa auto dealers, have subjected Iowa consumers to a variety of deceptive and unfair advertisements and sales practices concerning used vehicles offered for sale.

In short, Defendants sell promotional advertising and sales packages to auto dealers designed to increase possible sales of the dealers' used vehicle inventories. These promotional packages uniformly result in dealers sending false messages to consumers by presenting a false premise for a sale. The promotional packages are designed to trick consumers into believing that the vehicles in inventory come from a source other than the dealer's usual used vehicle inventory and are available at lower than usual retail prices. Some of Defendants' promotional packages falsely represent that the selling party isn't the dealer offering the vehicles but, rather, that the dealer is merely a conduit for some third party who has a strong interest in selling the vehicles at well below average retail prices.

In addition, the advertisements included in the promotional packages are deceptive in other ways, including that they represent the recipient of the mailer is a "winner" of a prize through a misleading scratch-off card which is a subterfuge designed to trick consumers into visiting the dealership, subjecting the consumers to undesired sales pitches. Also, Defendants contract with companies which send sales teams of individuals to the dealerships who unlawfully interact with potential customers and use high-pressure sales tactics to sell them vehicles under false pretenses.

The Attorney General brings this action to stop Defendants' unlawful practices, obtain restitution for injured Iowa consumers, and penalize Defendants for their past conduct.

#### **PARTIES**

1. Plaintiff is the State of Iowa ex rel. Thomas J. Miller, the duly elected Attorney General of the State of Iowa.

2. Defendant Smart Automotive Group, Inc., is a for-profit corporation organized under the laws of the state of Louisiana and is located at 1329 Gardenia Drive, Metairie, Louisiana. It has transacted business in the State of Iowa.

3. Defendant Bernard E. Burst, III, is now and has been at all times relevant to this action, President of Smart Automotive Group and has individually controlled, directed, participated in, and formulated the policies relating to the acts, practices, and activities of said corporation that are the subject of this Petition. Defendant Bernard E. Burst, III, lives at 421 Audubon Street, New Orleans, Louisiana. He has transacted business in the State of Iowa.

4. For the purposes of this Petition, the term, "Defendants," unless otherwise specified, shall refer to all Defendants; and when used in conjunction with allegations of unlawful conduct, shall mean that each defendant committed such act or is legally accountable for such act.

#### JURISDICTION

5. The Attorney General of Iowa has the authority to initiate an action for consumer fraud in violation of Iowa Code § 714.16.

6. The Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a), provides in pertinent part:

The act use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise ... whether or not a person has in fact been misled, deceived, or damaged is an unlawful practice.

7. Iowa Code § 714.16(1) provides, among others, the following definitions:

(f) "Deception" means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

(n) "Unfair practice" means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.

8. Iowa Code § 714.16(7) explains that except in the case of a material omission, it is not necessary for the Attorney General to prove reliance, damages, intent, or knowledge, stating in pertinent part:

Except in an action for the concealment, suppression, or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction, to allege or to prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth.

9. Iowa Code § 714.16(7) in pertinent part, authorizes the Attorney General to bring this action:

A civil action pursuant to this section shall be by equitable proceedings. If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice. The court may make orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices, or which are necessary to restore to any person in interest any moneys or property, real or personal, which have been acquired by means of a practice declared to be unlawful by this section, including the appointment of a receiver in cases of substantial and willful violation of this section.

In addition to the remedies otherwise provided for in this subsection, the attorney general may request and the court may impose a civil penalty not to exceed forty thousand dollars per violation against a person found by the court to have engaged in a method, act, or practice declared unlawful under this section; provided, however, a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person. In addition, on the motion of the attorney general or its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of intentional violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under authority of this section.

## VENUE

10. Venue is proper in Polk County, pursuant to Iowa Code § 714.16(10), for the Consumer Fraud Act violations because the Defendants have conducted business in Polk County, and one or more of the victims reside in Polk County.

## FACTUAL ALLEGATIONS

11. Defendants engaged in the advertisement and sale of merchandise to consumers located in the state of Iowa through advertising designed by Defendants and sold to Iowa motor vehicle dealers who broadcast or disseminated the advertising within the state of Iowa to promote the retail sale of motor vehicles.

12. Defendants created a false premise for advertised sales by representing or implying to Iowa consumers through motor vehicle dealership advertising that the vehicles included in a sale were from sources other than the dealer's regular used vehicle inventory by using terms such as, "Statewide Used Vehicle Liquidation," "Mandated Forced Vehicle Elimination," "Seized and Repossessed Vehicle Event," and "Emergency Disposal Event," and that vehicles were "coming to" the city where the advertising dealership is located or were being sold "directly to the public" and by holding the sales at locations other than the dealerships' regular places of business.

13. Defendants misrepresented to Iowa consumers through motor vehicle dealership advertising that a repeated promotion was a "1<sup>st</sup> Ever" sale.

14. Defendants misrepresented retail price comparisons to Iowa consumers through motor vehicle dealership advertising including but not limited to by representing "90% Off their original price" without in the same advertisement clearly and conspicuously stating a basis for determining the meaning of "original price."

15. Defendants represented a false sense of urgency through motor vehicle dealership advertising to Iowa consumers by use of terms such as "Liquidation" and "Emergency Disposal" and by stating a sales event was for "5 Days Only," when, in fact, the "event" recurred at certain dealer locations.

16. Defendants engaged in deception in motor vehicle dealership advertising solicitations to Iowa consumers by misrepresenting that the recipients had been specially selected to receive certain prizes when, in fact, all recipients of the mailed solicitation received at least one of the prizes in violation of Iowa Code § 714B.3(1)(c).

17. Defendants engaged in unfair practices by offering Iowa consumers, through motor vehicle dealership advertising, the ability to participate in a contest, game, sweepstakes or other opportunity of chance that, in order to participate, required consumers to purchase a motor vehicle, including but not limited to advertisements of a "Spin to Win" game without first sending the recipient the written prize notice required by Iowa Code § 714B.2.

18. Defendants misrepresented the odds of winning particular prizes in motor vehicle dealership advertising to Iowa consumers by omitting to disclose that the stated odds were not the odds of winning at the dealership event featured in a particular advertisement, but reflected the odds of winning over a series of events possibly held across the country or a region of the country over an extended period of time of which the advertised event was only a part.

19. Defendants misrepresented retail prices in motor vehicle dealership advertising to Iowa consumers by failing to include in the advertised price all mandatory charges imposed by the dealer on consumers who purchased a motor vehicle from the dealer, including but not limited to fees for documentary services.

20. Defendants misrepresented material facts in motor vehicle dealership advertising to Iowa consumers by using footnotes or asterisks which contradicted or materially modified material terms of the advertisement, such as stating "387 vehicles will be sold to the public for \$55 month," with a corresponding footnote that states "vehicles subject to prior sale," or by informing consumers that they were approved for financing at a stated amount with a corresponding footnote which stated that the offer was limited only to consumers with a certain minimum credit score or better.

21. Defendants engaged in deception in motor vehicle dealership advertising to Iowa consumers by offering free gifts or incentives in connection with the purchase or lease of a vehicle normally sold or leased through bargaining or negotiation and by using terms such as "additional dealer discount of \$3,896," "Down payment Assistance of \$4,000," or "Don't make your next car payment. We'll make the next 6 for you!".

22. Defendants engaged in deception in motor vehicle dealership advertising to Iowa consumers by representing that a specific number of vehicles would be sold at a certain monthly payment, such as "\$55.00 per month," when, in fact, no vehicles included in the advertisement were available with that low a monthly payment.

23. Defendants engaged in deception and omissions with intent that others rely on the omissions in motor vehicle dealership advertising by representing monthly payment amounts without clearly and conspicuously stating that the availability of the payment amounts was contingent upon the negotiated price of the vehicle, each consumer's credit score, the amount of the purchase that is financed, the rate of financing (APR), the number of payments, the consumer's down payment and the value of any trade-in vehicle.

24. Defendants misrepresented through motor vehicle dealership advertising directed to Iowa consumers the cost of vehicles and the ability of consumers to obtain financing.

25. Defendants omitted to disclose in motor vehicle dealership advertising directed to Iowa consumers, with intent that others rely on the omissions, the terms and conditions of prizes offered during certain "sales events."

26. Iowa Code section 322.3, subsections 1 - 3, states as follows:

1. A person shall not engage in this state in the business of selling at retail new motor vehicles of any make or represent or advertise that the person is engaged or intends to engage in such business in this state unless the person is authorized to do so by a contract in writing with the manufacturer or distributor of such make of new motor vehicles and unless the department has licensed the person as a motor vehicle dealer in this state in motor vehicles of such make and has issued to the person a license in writing as provided in this chapter.

2. A person other than a licensed dealer in new motor vehicles shall not engage in this state in the business of selling at retail used motor vehicles or represent or advertise that the person is engaged or intends to engage in such business in this state unless and until the department has licensed the person as a used motor vehicle dealer in the state and has issued to the person a license in writing as provided in this chapter.

3. Subsections 1 and 2 shall not be construed to require the separate licensing of persons employed as salespersons of motor vehicles by a retail motor vehicle dealer. However, the department may promulgate reasonable rules as necessary for the proper identification of persons employed as salespersons.

27. Pursuant to Defendants' contracts with certain Iowa motor vehicle dealerships, Defendants contracted with companies or individuals to interact with consumers in attempting to sell motor vehicles at retail on behalf of the contracting dealers and these companies or individuals did, in fact, interact with Iowa consumers in an attempt to sell vehicles at retail in violation of Iowa Code section 322.3.

28. Neither all nor any part of the application for injunctive relief herein has been previously presented to or refused by any court or justice. Iowa R. Civ. P. 1.1504.



29. In an action by the state, no security shall be required of the state. Iowa R. Civ. P. 1.207.

**CAUSES OF ACTION**

30. Paragraphs 1 through 29 are incorporated herein by reference.

**COUNT I**

**CONSUMER FRAUD ACT VIOLATIONS**

31. Defendants engaged in conduct in Iowa in connection with the lease, sale, or advertisement of merchandise.

32. Defendants violated Iowa Code § 714.16(2)(a) by engaging in deception, unfair practices, misrepresentation, false pretense or false promise in connection with retail advertisements for motor vehicles directed to Iowa consumers as set forth in paragraphs 11-23, 24 and 27.

33. Defendants violated Iowa Code § 714.16(2)(a) by engaging in the concealment, suppression or omission of material fact with intent that others rely on the concealment, suppression, or omission in connection with retail advertisements for motor vehicles directed to Iowa consumers as set forth in paragraphs 23 and 25.

34. Defendants violated Iowa Code § 714.16(2)(a), pursuant to Iowa Code § 714B.7, by engaging in violations of Iowa Code § 714B.3(1)(c), as set forth in paragraph 16, and by engaging in violations of Iowa Code § 714B.2, as set forth in paragraph 17.

**REQUEST FOR RELIEF**

The State respectfully requests the Court grant relief against the Defendants as follows:

**Consumer Fraud Act**

A. That the Court, pursuant to Iowa Code § 714.16(7), permanently enjoin each of the Defendants and (as applicable) each Defendant's directors, officers, principals, partners, employees, agents, representatives, subsidiaries, affiliates, successors, assigns, merged or acquired predecessors, parent or controlling entities, and all other persons, corporations, or other entities, acting in concert or participating with Defendants who have actual or constructive notice of the Court's injunction from engaging in the deceptive, misleading, unfair, and omissive acts and practices or otherwise violating the Iowa Consumer Fraud Act as alleged in this Petition.

B. That the Court expand the provisions of the permanent injunctions as necessary by including such "fencing in" provisions as are reasonably necessary to ensure that the Defendants and other enjoined persons and entities do not return to the unlawful practices alleged herein, or commit comparable violations of law.

C. That the Court, pursuant to Iowa Code § 714.16(7), enter judgment against Defendants, jointly and severally, for amounts necessary to restore to consumers all money acquired by means of acts or practices that violate the Consumer Fraud Act.

D. That the Court, pursuant to Iowa Code § 714.16(7), enter judgment against Defendants, jointly and severally, for such additional funds as are necessary to ensure complete disgorgement of all ill-gotten gain traceable to the unlawful practices alleged herein.

E. That the Court, pursuant to Iowa Code § 714.16(7), enter judgment against Defendants, jointly and severally, for civil penalties up to \$40,000.00 for each separate violation

of the Consumer Fraud Act, by each Defendant.

F. That the Court award the State interest as permitted by law.

G. That the Court, pursuant to Iowa Code § 714.16(11), enter judgment against Defendants, jointly and severally, for mandatory attorney fees, state's costs and court costs.

H. That the Court grant such additional relief as the Court deems just and equitable.

Respectfully submitted,

**THOMAS J. MILLER**  
Attorney General of Iowa



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