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Long v. Dell and its Decoding of Rhode Island Consumer Protection Law

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By erroneously taxing its Rhode Island customers for computer-related maintenance services, Dell, Inc. has triggered a decade of litigation and breathed life into what otherwise has been Rhode Island's mostly underdeveloped Unfair Trade Practice and Consumer Protection Act (the "Act"). As the case recently was remanded back to the Rhode Island Superior Court for the second time following a third decision of the Rhode Island Supreme Court – this time presumably for certification of a class and then a trial on the merits – now is an opportune time to assess how this single dispute has shaped, and in some instances reshaped, the Act.

The facts of the dispute are relatively straightforward: In Rhode Island, an optional service maintenance contract that is charged separately from the purchase of a product such as a computer is not taxable. In or around the year 2000, Dell imposed a tax on service charges, even

though the customers could choose whether to purchase the additional service contract and the separate charge was noted elsewhere on the sales paperwork as being a service contract with a third-party computer maintenance company, such as QualServ, LLC and BancTec, Inc. All taxes collected were remitted to the Rhode Island Department of Taxation. A putative class action lawsuit was instituted in 2004, and the matter was referred to Judge Michael Silverstein on the Providence Superior Court Business Calendar.

First, like many consumer transactions, Dell sought to avoid the court system altogether through the inclusion of a mandatory arbitration provision in the sales contract, yet that provision was held to be unenforceable. *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071 (R.I. 2009), *aff'g sub nom. DeFontes v. Dell Computer Corp.*, No. PB 03-2636, 2004 WL 253560 (R.I. Super. Ct. Jan. 29, 2004). The enforceability of a so-called "shrinkwrap" agreement containing an arbitration provision, however, hinges on whether the consumer is put on notice that "by accepting the [seller's] product[,] the consumer was accepting the terms and conditions contained within" that agreement and "the consumer could reject the terms and conditions by returning the product." *DeFontes*, 984 A.2d at 1071 (discussing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996) and progeny). Because Dell's agreement did not include language advising the customer of his or her right to reject the goods and/or the terms of the agreement, the Supreme Court affirmed the Superior Court's refusal to enforce the arbitration provision. *Id.* at 1073.

Next, the Rhode Island Supreme Court delved into the jurisdictional limitations set forth in the Act. Exempt from suit under the Act are all "actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting

under statutory authority of this state or the United States." R.I. GEN. LAWS § 6-13.1-4; *see also State v. Piedmont Funding Corp.* 382 A.2d 819 (R.I. 1978). While this statutory exemption is where a variety of claims under the Act have met their demise, the Rhode Island Supreme Court did an about-face and affirmed the Superior Court's determination that this action was not exempted by virtue of the regulatory oversight of the State Division of Taxation. *Long v. Dell, Inc.*, 984 A.2d 1074, 1080-81 (R.I. 2009) (hereinafter, "*Long I*"), *aff'g sub nom. Long v. Dell Computer Corp.*, No. PB 03-2636, 2007 WL 2463742 (R.I. Super. Ct. Aug. 22, 2007). Because "[t]he plaintiffs are aggrieved by the actions of the defendants, not the tax administrator," the Act's provision vesting jurisdiction in the Superior Court trumped other statutory provisions suggesting jurisdiction lied with the state's administrative agency. *Id.* at 1080.

With jurisdiction firmly established in the Superior Court, the litigation moved to whether the plaintiffs could set forth evidence upon which a reasonable jury could find in their favor in accordance with the Act. In the course of doing so, the claims brought by the original named defendant – Nicholas Long – were dismissed. *See Long v. Dell, Inc.*, __ A.2d __, 2014 WL 2917064, at *3 (R.I. 2014) (hereinafter, "*Long II*"). While the record is unclear as to exactly why the Long claims were dismissed and/or whether they were dismissed voluntarily, the Supreme Court noted that Long "purchased his Dell computer for business purposes," which means his claims were likely prohibited by the Act. *Id.* at *1. A plaintiff may only maintain suit under the Act if he or she "purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal." R.I. GEN. LAWS § 6-13.1-1(3); *see also, e.g., Magnum Defense, Inc. v. Harbour Group*, 248 F. Supp. 2d 64, 71 (D.R.I. 2003). Whether customers purchased Dell computers for "personal,

family, or household purposes" also may have complicated the certification of a class prior to Dell seeking summary judgment. *See Long II*, 2014 WL 2917064, at *5-6 (discussing the effects of plaintiff's failure to certify a class prior to summary judgment).

Finally, Dell's summary judgment motions afforded the Supreme Court an opportunity not only to refine the definition of "unfair" trade practices, but also to articulate for the first time the definition of "deceptive" trade practices. In doing so, the Supreme Court reversed the Superior Court's entry of summary judgment, which held that the evidence adduced in discovery suggested only that the tax charge was the result of an "honest misinterpretation of a delicate area of state tax law," and the tax charge – which increased the total cost of the services, and, therefore, was unlikely to encourage consumers to purchase those services – could not be considered "deceptive" within the meaning of the Act. *Long v. Dell, Inc.*, No. PB 03-2636, 2012 WL 1144683, at *31 (R.I. Super. Ct. Apr. 2, 2012); *see also Long II*, 2014 WL 2917064, at *14-18 (Robinson, J., dissenting) ("[m]oreover, in what I consider to be a further departure from common sense, the majority perceives a possible deception and unfairness in a practice from which Dell does not profit one whit."). The Supreme Court majority equated the Superior Court's pragmatic holding as requiring a "bad faith" element to claims brought under the Act, which the Supreme Court declined to adopt. *Long II*, 2014 WL 2917064, at *9.

The latest *Long v. Dell* opinion is most notable for its clarification on the meaning of "unfair" trade practices and "deceptive" trade practices. While it identifies twenty different types of "unfair" and/or "deceptive" trade practices, R.I. GEN. LAWS § 6-13.1-1(6), the Act incorporates by reference "the Federal Trade Commission's and federal courts' interpretations of section 5(a) of

the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)," rather than set forth specific definitions of those operative terms. R.I. GEN. LAWS § 6-13.1-2. In determining that the erroneous tax could be considered "deceptive" under the Act, the Supreme Court adopted a three-part test:

> (1) a representation, omission, or practice, that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3), the representation, omission, or practice is material," meaning the representation is important to the consumer and likely to affect their decisions with respect to the product.

Long II, 2014 WL 2917064, at *11, *12 (quoting *F.T.C. v. Verity Inter'l, Ltd.*, 443 F.3d 48, 63 (2d. Cir. 1984)). A representation is material if it is important to the consumer and likely to affect his or her decision making with respect to the transaction. *Long II*, 2014 WL 2917064, at *11. Intent to deceive is not a required element. *Id.* The Supreme Court also refined the "Cigarette Rule," which sets forth a three-factor test for determining whether a practice is "unfair":

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

Id. at *9 (quoting *Ames v. Oceanside Welding and Towing, Co.*, 767 A.2d 677, 681 (R.I. 2001)). Because this is a factor test, a plaintiff need not establish each of the three factors, and a greater showing under one factor can offset the lack of evidence under another factor. *Long II*, 2014 WL 2917064, at *11, *12. In remanding back to the Superior Court, the majority appeared to fault Dell for possibly seeking to avoid a "tax nexus" with the State of Rhode Island, yet the precise relationship between Dell's erroneous tax charge and the lack of a tax nexus is unclear

from the opinion. *See id.* at *10. Perhaps that relationship will become clear during the trial upon remand when a jury is asked to determine whether Dell's erroneous tax charges, which were remitted to the State of Rhode Island and did not encourage consumers to purchase Dell computers, are "unfair" and/or "deceptive" under the Act.

In *Long v. Dell*, a single, tax-related dispute has spawned more than ten years of litigation that has at least touched on all of the central facets of Rhode Island's Unfair Trade Practice and Consumer Protection Act, ranging from the enforceability of arbitration provisions in consumer transactions to jurisdictional limitations based on overlapping regulatory authority. Now class certification and trial loom, with the meaning of "unfair" and "deceptive" trade practices firmly established in Rhode Island law. The case of *Long v. Dell*, in all its various iterations, has become the seminal consumer protection case in Rhode Island jurisprudence. It will be interesting to see where this dispute takes the Act next.

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