

Kentucky Consumer Law Outline

▼ 1 Kentucky Consumer Protection Act

▼ 1.1 Legislative Intent

- 1.1.1 KRS 367.120 “The General Assembly finds that the public health, welfare and interest require a strong consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services...”
- 1.1.2 “The Kentucky legislature created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts. In addition, KRS 446.080 requires the statutes of this Commonwealth are to be liberally construed.” *Stevens v. Motorist Mutual Ins. Co.*, Ky. S.W. 2d 819 (1988).

▼ 1.2 Who is protected?

▼ 1.2.1 Statutory Language

- 1.2.1.1 Any person who 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, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action under the Rules of Civil Procedure in the Circuit Court in which the seller or lessor resides or has his principal place of business or is doing business, or in the Circuit Court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, to recover actual damages. The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

Ky. Rev. Stat. Ann. § 367.220

▼ 1.3 Who's Covered in Practice

▼ 1.3.1 A person (not business) who “purchases or leases goods or services primarily for personal family, or household purposes”

- 1.3.1.1 But the absence of a finding of a valid contract is not fatal to a claim for unfair trade practices under the KCPA as it would be to a breach of contract claim. Nothing in the KCPA—particularly KRS 367.170 and KRS 367.220—explicitly requires that a binding contract be reached for a purchaser damaged by unlawful trade practices to have a private right of action. Rather, because Piles and Warner qualified as purchasers under the KCPA, they were entitled to sue for any damages resulting from unfair trade practices by Sonny Bishop Cars under KRS 367.220.

Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 903 (Ky. 2008);

▼ 1.3.2 Renters

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- 1.3.2.1 In both matters the tenant asserts that the landlord's failure to make needed repairs and his violations of the local housing code constitute unfair, false, misleading or deceptive acts. As a violation of a housing code does not create a cause of action in favor of the tenant, the failure of the landlord to comply with a housing code cannot be deceptive in the absence of an express covenant or agreement that the landlord would comply with such housing code. Likewise, in the absence of a duty or obligation *519 to make repairs to a rental unit, the failure to make such repairs cannot be construed to constitute an unfair, false, misleading or deceptive act.

Miles v. Shauntee, 664 S.W.2d 512, 518-19 (Ky. 1983)

▼ 1.3.3 Homebuyers/Homeowners

- 1.3.3.1 “That brings us to the violation of the Kentucky Consumer Protection Act, KRS 367.110, et seq. The jury did make a finding of a breach, but with zero damages. We need not get into a discussion as to whether the verdict is an oxymoron because we do not believe that the Kentucky Consumer Protection Act applies to real estate transactions by an individual homeowner.”

Craig v. Keene, 32 S.W.3d 90, 91 (Ky. Ct. App. 2000)

- 1.3.3.2 Summary: Buyers of “as is” mobile home can still maintain causes of action for fraudulent misrepresentation and KCPA. Elendt v. Green Tree Servicing, LLC (Ky.App. 2014) 443 S.W.3d 612.

▼ 1.3.4 People Seeking the Extension of Credit

- 1.3.4.1 A federal court has interpreted case law and the KCPA to determine that the sale of credit, so long as it was purchased for personal use, is covered by KCPA. Stafford v. Cross Co. Bank, 262 F. Supp. 2d 776, 792-3 (W.D.Ky. 2003).

▼ 1.3.5 Purchasers of Insurance Policies

- 1.3.5.1 “It is the holding of this Court that the Kentucky Consumer Protection Act provides a homeowner with a remedy against the conduct of their own insurance company pursuant to KRS 367.220(1) and KRS 367.170.”

Stevens v. Motorists Mut. Ins. Co., 759 S.W.2d 819, 821-22 (Ky. 1988)

▼ 1.4 What are they protected from?

▼ 1.4.1 Statutory Language

- 1.4.1.1 KRS 367.170: (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
(2) For the purposes of this section, unfair shall be construed to mean unconscionable.
- 1.4.1.2 “The terms ‘false, misleading and deceptive’ has sufficient meaning to be understood by a reasonably prudent person of common intelligence. Therefore, when the evidence creates an issue of fact, that any particular

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action is unfair, false, misleading or deceptive it is to be decided by a jury.”
Stevens v. Motorist Mutual Ins. Co., 759 S.W.2d 819, 820 (Ky. 1988).

▼ 1.5 What are they not protected from?

▼ 1.5.1 Not covered: incompetence

- 1.5.1.1 “While there can be no doubt Gamble was initially buried in the wrong plot in contravention of the burial contract, “[n]ot every failure to perform a contract is sufficient to trigger application of the Consumer Protection Act. The statute requires some evidence of “unfair, false, misleading or deceptive acts” and does not apply to simple incompetent performance of contractual duties unless some element of intentional or grossly negligent conduct is also present.”

Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 546 (Ky. Ct. App. 2013) quoting Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287, 291 (Ky.1991).

▼ 1.5.2 Not covered: “mere breach of promise”

- 1.5.2.1 A mere breach of promise does not constitute an unfair, false, misleading or deceptive act. The facts in Miles v. Shauntee indicate that the landlord made assurances of repair which were never significantly honored or fulfilled. This Court cannot hold as a matter of law that such assurances constitute unfair, false, misleading or deceptive acts declared unlawful under the Consumer Protection Act.

Miles v. Shauntee, 664 S.W.2d 512, 519 (Ky. 1983).

▼ 1.5.2.2 But, breach of promise to do something in the future is actionable when there is no present intent to perform that future act.

- 1.5.2.2.1 An accepted rule is, a misrepresentation, to be actionable, must concern an existing or past fact, and not a future promise, prophecy, or opinion of a future event, unless declarant falsely represents his opinion of a future happening.” “One may commit ‘fraud in the inducement’ by making representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out.”

PCR Contractors, Inc. v. Daniel, 354 S.W.3d 610, 614 (Ky. App. 2011) quoting Bear, Inc. v. Smith, 303 S.W.3d 137, 142, 614 (Ky. App. 2010).

▼ 1.6 Damages

▼ 1.6.1 Compensatory Damages

▼ 1.6.1.1 Logical and natural consequences

- 1.6.1.1.1 Diminished value
- 1.6.1.1.2 Higher repair costs

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- 1.6.1.1.3 Time missed from work dealing with issue

▼ 1.6.1.1.4 Inconvenience

- 1.6.1.1.4.1 Clearly, the inconvenience award was not duplicative of the loss of use award. No loss of use award was permitted for Piles.²¹ Thus, without an inconvenience award to her, Piles would stand to recover no compensatory damages at all, despite testimony that she had to miss work and suffered difficulties at her job caused by constant telephoning and trips to the dealership.

Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 907 (Ky. 2008);

▼ 1.6.1.2 Mental and emotional suffering

- ▼ 1.6.1.2.1 No case that says damages for mental and emotional suffering are available under KCPA. No Kentucky case says they're not.

- 1.6.1.2.1.1 "Defendants also assert that Plaintiffs are not entitled to mental suffering or emotional distress damages. Kentucky courts have been clear that these types of damages are not recoverable under a contract-type cause of action. See, e.g., Combs v. Southern Bell Tel. & Tel. Co., 38 S.W.2d 3, 5, 238 Ky. 341, 345-46 (Ky.1931). Plaintiffs cite no persuasive authority to the contrary. No Kentucky court has concluded that the KCPA entitles plaintiffs to mental suffering or emotional distress damages. This Court declines to do so now."

Peacock v. Damon Corp., 458 F. Supp. 2d 411, 420 (W.D. Ky. 2006);

▼ 1.6.2 Rescission (equitable relief)

- KRS 367.220 explicitly allows the Court the power to "in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper."

▼ 1.6.3 Punitive Damages

- 1.6.3.1 KRS 367.220(1): Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

▼ 1.6.3.2 Because actual damages will likely be relatively small, punitive damages in consumer cases can be larger than punitive damages in other kinds of cases.

- 1.6.3.2.1 "It appears that the amount of the punitive damages award was rationally imposed by the jury to serve the deterrent effect for which punitive damages were designed, especially in consumer protection cases where the economic harm is relatively small." Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 906-07 (2008);

- 1.6.3.2.2 The United States Supreme Court has provided three factors trial courts may consider:
 - 1) the degree of reprehensibility of the conduct;
 - 2) the disparity between the actual harm and the punitive damages, generally expressed as a ratio; and

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3) a comparison of penalties that could be imposed for similar conduct in similar analogous cases.

Paraphrasing *BMW v. Gore*, 116 S.Ct. 1589, 1598–99 (1996.)

Of these three factors, the first—the degree of reprehensibility of the conduct—is the most important. See *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 419 (2003)

- ▼ 1.6.4 Attorney’s fees should be included in the damages awarded when determining the reasonableness of the ratio between actual harm and punitive damages.
 - 1.6.4.1 In *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, the Third Circuit Court of Appeals included the attorney’s fees into the ratio calculus of an insurance bad faith case (called a Section 8371 action in Pennsylvania). It explained, “Section 8371’s attorney fees and costs provisions vindicate the statute’s policy by enabling plaintiffs such as Willow Inn to bring § 8371 actions alleging bad faith delays to secure counsel on a contingency fee. Moreover, “one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes,” *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir.2003), and the structure of § 8371 enlists counsel to perform a filtering function akin to prosecutorial discretion, because rational attorneys will refuse to work on a contingent fee arrangement when their investigation reveals the bad faith allegations of prospective clients to be meritless.” *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 236 (3d Cir. 2005).
 - 1.6.4.2 The Third Circuit noted that its decision to include attorney’s fees in the ratio analysis “is supported in the case law” and explained that a recent Pennsylvania state court decision also included the attorney’s fees incurred in a bad faith claim in the ratio analysis. This position has also been adopted by the 11th Circuit in *Action Marine, Inc. v. Cont’l Carbon Inc.*, 481 F.3d 1302 (11th Cir. 2007) and Illinois state courts in *Kirkpatrick v. Strosberg*, 894 N.E.2d 781 (Ill. App. Ct. 2008).
- ▼ 1.6.5 Attorney’s Fees
 - 1.6.5.1 KRS 367.220(3) In any action brought by a person under this section, the court may award, to the prevailing party, in addition to the relief provided in this section, reasonable attorney’s fees and costs.
 - 1.6.5.2 The seminal case on the award of fees pursuant to the Kentucky Consumer Protection Act is *Alexander v. S&M Motors, Inc.*, 28 S.W.3d 303 (Ky. 2000). That case holds that the award of fees is in the sound discretion of the trial court. In *Alexander*, the Kentucky Supreme Court explained that permitting the additional recovery of attorney’s fees in consumer protection cases serves two purposes. First, it is “intended to compensate the prevailing party for the expense of bringing an action under the statute.” The Court continued, “[a] further aim is to provide attorneys with incentive for representing litigants who assert claims which serve an ultimate public purpose (i.e. a deterrent to conduct resulting in unfair trade practices which perpetrate fraud and deception upon the public.)” *Alexander* at 305.;

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▼ 1.6.5.3 Attorney's fees are determined by using the "lodestar method"

- 1.6.5.3.1 In *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), the United States Supreme Court noted that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."
- 1.6.5.3.2 You must keep your time contemporaneously. I suggest using a time-tracking service like Harvest (<https://www.getharvest.com/>) to capture and track time.

▼ 2 Kentucky Lemon Law (KRS 367.840, et seq.)

▼ 2.1 Purpose

- 2.1.1 Kentucky's "Lemon Law" is intended to accomplish three goals: (1) To protect consumers who buy or lease new motor vehicles that do not conform to applicable warranties by holding manufacturers accountable for certain nonconformities; (2) To limit the number of attempts and the amount of times that a manufacturer or its agents shall have to cure such nonconformities; and (3) To require manufacturers to provide, in as expeditious a manner as possible, a refund, not to exceed the amount in KRS 367.842, or replacement vehicle that is acceptable to the aggrieved consumer when the manufacturer or its agents fail to cure any nonconformity within the specified limits.
Ky. Rev. Stat. Ann. § 367.840
- 2.1.2 Note: the Magnuson-Moss Warranty Act (15 USC § 2301, et seq.) may also offer remedies for breach of warranty issues arising from the sale of a new vehicle.

▼ 2.2 Application

- 2.2.1 Kentucky's Lemon Law applies to new motor vehicles and not to: (a) Any vehicle substantially altered after its initial sale from a dealer to an individual; (b) Motor homes; (c) Motorcycles; (d) Mopeds; (e) Farm tractors and other machines used in the production, harvesting, and care of farm products; or (f) Vehicles which have more than two (2) axles.
Ky. Rev. Stat. Ann. § 367.841

▼ 2.3 Process

- ▼ 2.3.1 KRS 367.842 outlines the process and rights of consumers afflicted with a "lemon".
 - ▼ 2.3.1.1 Consumers must give the manufacturer a "reasonable number" of attempts to repair any nonconformity.
 - 2.3.1.1.1 A presumption that the consumer has given the manufacturer a reasonable opportunity to repair the vehicle if he or she has a) returned the vehicle for repair of the same nonconformity 4 times or b) lost use of the vehicle for the nonconformity for more than 30 days.
 - 2.3.1.2 The nonconformity must "substantially impact" the "use, value, or safety" of the motor vehicle".

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- 2.3.1.3 The consumer must report the failure to repair the nonconformity in writing to the manufacturer in the first 12 months or 12,000 miles of use, whichever comes sooner.
- 2.3.2 KRS 367.842(4) requires consumers to participate in an informal dispute resolution process before filing suit

▼ 2.3.3 Damages

- ▼ 2.3.3.1 The consumer can choose between replacement of the vehicle or refunding the money he or she paid for the vehicle.
 - 2.3.3.1.1 Under KRS 367.842(2), “the manufacturer, at the option of the buyer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the buyer and refund to the buyer the full purchase price. The full purchase price shall include the amount paid for the motor vehicle, finance charge, all sales tax, license fee, registration fee, and any similar governmental charges plus all collateral charges, less a reasonable allowance for the buyer's use of the vehicle.
 - 2.3.3.2 A court may award reasonable attorney's fees to a prevailing plaintiff. KRS 367.842(9)

▼ 3 Kentucky Repossessions

- 3.1 There is an entire book published by the National Consumer Law Center on protecting consumers from repossession, prosecuting wrongful repossession, and helping consumers recover from repossessions.
- ▼ 3.2 Repossessions in Kentucky are governed by KRS 355.9-601, et seq.
 - 3.2.1 Repossessions must be 1) after default and must not 2) breach the peace. KRS 355.9-609
 - 3.2.2 The repossessing business can resell the collateral but only after providing notice to the consumer KRS 355.9-610 and 9-611.
 - 3.2.3 Remedies for violations of UCC’s repossession provisions are located at KRS 355.9-625.

▼ 4 Usury

▼ 4.1 Legal rate of interest

▼ 4.1.1 KRS 360.010 states that the legal rate of interest is 8%

- 4.1.1.1 On loans of \$15,000 or less, the parties can contract for up to 19%, and
- 4.1.1.2 On loans greater than \$15,000, the parties can contract for whatever interest rate they want.

▼ 4.1.2 Damages under KRS 360.020

- 4.1.2.1 The taking, receiving, reserving, or charging a rate of interest greater than is allowed by KRS 360.010, when knowingly done, shall be deemed a forfeiture

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of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the creditors taking or receiving the same: provided, that such action is commenced within two (2) years from the time the usurious transaction occurred.

- 4.1.3 Often, businesses effectively charge interest greater than the legal or contractual rate by padding the deal with additional charges and fees. You must acquaint yourself with the case law on these statutes to determine whether certain charges are “interest” and therefore usurious.

▼ 5 Federal Laws

▼ 5.1 Fair Debt Collection Practices Act (FDCPA)

- 5.1.1 Protects people from abusive debt collection practices
- 5.1.2 15 USC 41 § 1692, et seq. <http://www.law.cornell.edu/uscode/text/15/chapter-41/subchapter-V>
- 5.1.3 Prohibits false or misleading representations, unfair practices, harrassment or abuse
- 5.1.4 Again, the National Consumer Law Center publishes an entire book on this subject and some practitioners focus exclusively on prosecuting these claims.
- 5.1.5 Report on Debt Collection from the Center for Responsible Lending: <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf>

▼ 5.1.6 Damages

- 5.1.6.1 § 1692k allows people to recover their actual damages suffered as a result of the violation, up to \$1,000 in statutory damages, and attorney’s fees

▼ 5.1.7 This area of law is extremely rewarding and challenging. Abuse is rampant and the issues that arise are novel and nuanced.

- 5.1.7.1 *Conway v. Portfolio Recovery Associates, LLC*, 13 F.Supp.3d 711 held that a person stated a cause of action for FDCPA violations when a debt collector that received payments in Virginia sued on the debt in Kentucky. Conway’s attorney argued that the debt collector violated the FDCPA because it sued beyond the statute of limitations of the debt and the Court held that the SOL that applied was Virginia’s (3 years), not Kentucky’s (5 or 15 years).

▼ 5.2 Fair Credit Reporting Act (FCRA) 15 USC § 1681 et seq.

- 5.2.1 Provides a mechanism for consumers to dispute inaccurate information on their credit reports and imposes penalties on credit reporting agencies and furnishers of credit information for failure to correct inaccuracies.
- 5.2.2 FTC’s Summary of Consumer Rights under FCRA: <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>

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▼ 5.2.3 Damages (§ 1681(n))

- 5.2.3.1 Actual damages in any amount or statutory damages not to exceed \$1,000
- 5.2.3.2 Punitive damages
- 5.2.3.3 reasonable attorney's fees

▼ 5.3 Truth in Lending Act (TILA) 15 USC ch 41 § 1601 et seq.

- 5.3.1 Standardizes how fees and interest are calculated in consumer finance transactions
- 5.3.2 Creates environment in which consumers can comparison shop by requiring businesses to calculate the "true cost" of the loan and the "real" interest rate after taking into account fees, charges, and other costs of credit
- 5.3.3 TILA's specific requirements are in the awesome-sounding "Regulation Z": 12 CFR 226

▼ 5.4 Real Estate Settlement and Procedures Act (RESPA)

- 5.4.1 The CFPB's new Regulation X provides a private cause of action for violations of many of the regulations governing mortgage servicers. Read more here: <http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/>

▼ 5.5 Telephone Consumer Protection Act (TCPA): 47 USC § 227

- 5.5.1 The Telephone Consumer Protection Act prohibits obnoxious and costly use of telephones. It limits the circumstances under which businesses can contact consumers and places meaningful restrictions on telemarketers and the use of automated dialing systems ("autodialers" or "robodialers"), text messages, voice recordings, and fax machines.

▼ 5.5.2 Damages

- 5.5.2.1 Actual damages
- 5.5.2.2 Statutory damages up to \$1,500 per violation
- 5.5.2.3 No attorney's fees under the TCPA

▼ 6 Other Causes of Action

▼ 6.1 URLTA (Uniform Residential Landlord Tenant Act) KRS 383.505

- 6.1.1 KRS 383.500 requires local governments to adopt URLTA in its entirety and without amendment. As of 2009, the following jurisdictions had adopted URLTA's provisions: Barbourville, Bellevue, Bromley, Covington, Dayton, Florence, Lexington-Fayette County, Georgetown, Louisville-Jefferson County, Ludlow, Melbourne, Newport,

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Oldham County, Pulaski County, Shelbyville, Silver Grove, Southgate, Taylor Mill and Woodlaw.

▼ 6.1.2 Remedies include a private right of action

- 6.1.2.1 KRS 383.520: (1) The remedies provided by KRS 383.505 to 383.715 shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages. (2) Any right or obligation declared by KRS 383.505 to 383.715 is enforceable by action unless the provision declaring it specifies a different and limited effect.
- 6.1.2.2 No decision on whether attorney's fees are "appropriate damages" under URLTA.

▼ 6.2 Equitable Estoppel: Fluke Corporation v. LeMaster, 306 SW 3d 55 (Ky. 2010).

- 6.2.1 Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party:
The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

▼ 6.3 IIED

- 6.3.1 In certain circumstances, unscrupulous businesses' actions will rise to the level of Intentional Infliction of Emotional Distress.
- 6.3.2 Our Commonwealth first adopted the tort of intentional infliction of mental distress in the case of *Craft v. Rice*, Ky., 671 S.W.2d 247 (1984). In *Craft*, we adopted Restatement (Second) of Torts, section 46, and recognized the elements of proof necessary for this new tort: 1. The wrongdoer's conduct must be intentional or reckless; 2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; 3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and 4. The emotional distress must be severe.

Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996)

▼ 6.4 Breach of Contract

- 6.4.1 Of course, in many cases, not only will you have KCPA violations and tortious activity, you will also have breach of contract claims.

▼ 6.5 Insurance Bad Faith

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- 6.5.1 Kentucky's Unfair Claims Settlement Practices Act (KRS 304.12-230) supplements common law "bad faith" administration of insurance claims.
- 6.5.2 It prohibits specific activities that are unfortunately common during the process of making a claim for coverage including, but not limited to, "failing to acknowledge and act reasonably promptly upon communications", failing to investigate claims, "failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed", and "not attempting in good faith to effectuate prompt, fair, equitable settlements of claims in which liability has become reasonably clear." Reading the entire statute and surrounding jurisprudence is, of course, necessary.

▼ 6.6 Fraud

▼ 6.6.1 Elements

- 6.6.1.1 In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. *Wahba v. Don Corlett Motors, Inc.*, Ky.App., 573 S.W.2d 357, 359 (1978).

United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999)

▼ 6.6.2 Promises of future performance

- 6.6.2.1 An accepted rule is, a misrepresentation, to be actionable, must concern an existing or past fact, and not a future promise, prophecy, or opinion of a future event, unless declarant falsely represents his opinion of a future happening." "One may commit 'fraud in the inducement' by making representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out."
PCR Contractors, Inc. v. Daniel, 354 S.W.3d 610, 614 (Ky. App. 2011) quoting *Bear, Inc. v. Smith*, 303 S.W.3d 137, 142, 614 (Ky. App. 2010).

▼ 6.6.3 Fraudulent Omission

- 6.6.3.1 This subset of "fraud" is a common cause of action in consumer law practice.
- 6.6.3.2 To prevail on a claim of fraudulent omission, a plaintiff must prove: (a) a duty to disclose a material fact; (b) a failure to disclose a material fact; and (c) that the failure to disclose a material fact induced the plaintiff to act and, as a consequence, (d) to suffer actual damages. *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App.2003). A caveat to the necessary elements under either claim is that "mere silence does not constitute fraud where it relates to facts open to common observation or discoverable by the exercise of ordinary diligence, or where means of information are as accessible to one party as to the other." *Bryant v. Troutman*, 287 S.W.2d 918, 920–921 (Ky.1956).

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Waldrige v. Homeservices of Kentucky, Inc., 384 S.W.3d 165, 171 (Ky. Ct. App. 2011).;

- 6.6.3.3 A duty to disclose facts is created only where a confidential or fiduciary relationship between the parties exists, or when a statute imposes such a duty, or when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure. Dennis v. Thomson, Ky., 240 Ky. 727, 43 S.W.2d 18 (1931).

Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky. Ct. App. 2003);

- ▼ 6.6.3.4 Beyond these three situations cited in Rivermont in which a duty arises, Kentucky courts have found other circumstances in which a party may commit fraudulent concealment:

- 6.6.3.4.1 A duty to disclose may arise from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose same.

Smith v. Gen. Motors Corp., 979 S.W.2d 127, 129 (Ky. Ct. App. 1998)

- 6.6.3.4.2 We may readily agree with the appellants that mere silence with respect to something related to a transaction is not necessarily misrepresentation and does not itself constitute fraud. However, it is otherwise when the circumstances surrounding a transaction impose a duty or obligation upon one of the parties to disclose all the material facts known to him and not known to the other party. The suppression or concealment of the truth under such circumstances may constitute a means of committing a fraud as well as misrepresentation openly made. Since the beginning of our jurisprudence, the principle has been consistently adhered to that the concealment by a seller of a material defect in property being sold, or the suppression by him of the true conditions respecting the property, so as to withhold from the buyer information he is entitled to, violates good faith and constitutes deception which may relieve the buyer from an obligation or may permit him to maintain an action for damages or to vacate the transaction.

Hall v. Carter, 324 S.W.2d 410, 412 (Ky. 1959)

▼ 6.7 Negligent Misrepresentation

- 6.7.1 A majority of jurisdictions have adopted Restatement (Second) of Torts § 552, which outlines the elements of negligent misrepresentation as follows:(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose

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benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 580 (Ky. 2004)

▼ 7 Foreclosure Defense

- 7.1 See outline that follows

▼ 7.2 Foreclosure Defense includes helping your client rigorously pursue all loss mitigation options

- 7.2.1 http://www.makinghomeaffordable.gov/for-partners/understanding-guidelines/Documents/mhahandbook_41.pdf