

UNFAIR AND DECEPTIVE TRADE PRACTICES
STATUTES AND DAMAGES:
**HOW TO PREVENT AND DEFEND DISRUPTIVE
CHALLENGES TO YOUR CLIENT'S BUSINESS PRACTICES**

**FDCC Annual Meeting
Fairmont Banff Springs Hotel
Banff, Alberta, Canada
July 25 – August 1, 2015**

Presented by:

**Charles E. Griffin
P. Ryan Beckett
BUTLER SNOW, LLP
Jackson, MS**

**Michael C. Bruck
WILLIAMS MONTGOMERY & JOHN, LTD.
Chicago, IL**

**Russell B. Morgan
BRADLEY ARANT BOULT CUMMINGS, LLP
Nashville, TN**

Authors:
Russell B. Morgan and Casey Miller
Charles E. Griffin, P. Ryan Beckett and Haley F. Gregory
Michael C. Bruck

Chapter One

Russ Morgan is a partner in the Nashville office of Bradley Arant Boult Cummings, LLP. He represents clients in business, products liability, and intellectual property litigation and is licensed to practice law in both Tennessee and Kentucky. Russ has been recognized in several publications, including *The Best Lawyers in America*; *Chambers USA: America's Leading Lawyers for Business*; *Nashville Business Journal's* "Best of the Bar"; and *Super Lawyers*.

Casey Miller also works in the Nashville office of Bradley Arant Boult Cummings, LLP. She is licensed to practice law in New York and is awaiting admission in Tennessee. She focuses on a wide range of commercial litigation and financial services matters. Casey received her law degree from Vanderbilt University.

Chapter Two

P. Ryan Beckett is a partner in the Jackson, Mississippi office of Butler Snow, LLP. Ryan is a commercial litigator with extensive experience in governmental, elections and voting rights, energy, complex commercial, consumer protection, antitrust and financial services litigation. He has represented major pharmaceutical and products manufacturers in consumer protection action and antitrust matters adverse to government regulators, State Attorneys General and consumers. He has represented major oil and natural gas and pipeline companies in litigation over pipeline facilities. He has represented federal and state public officials, including the Governor, the Secretary of State, and a U.S. Senator, in elections litigation and the Mississippi Legislature in litigation over state legislative redistricting. Ryan graduated from Millsaps College in 1996 with a B.S. in Economics, *summa cum laude*. He graduated from the University of Mississippi School of Law in 1999 with a J.D., *magna cum laude*. Ryan is AV-rated by *Martindale-Hubbell* and listed in *Best Lawyers*, *Mid-South Super Lawyers*, and *The American Lawyer and Corporate Counsel* for business and commercial litigation. Ryan can be reached at ryan.beckett@butlersnow.com and (601) 985-4557.

Haley F. Gregory is an associate in the Jackson, Mississippi office of Butler Snow, LLP. Haley is a commercial litigator with experience in commercial, products liability and premises liability litigation. She has represented companies in commercial litigation in both state and federal courts in Mississippi. Haley graduated from Mississippi College in 2008 with a B.A. in English Literature, *cum laude*, and in 2009 with an M.B.A., *summa cum laude*. She graduated from the University of Mississippi School of Law in 2013 with a J.D. *cum laude*. Haley can be reached at haley.gregory@butlersnow.com and (601) 985-4458.

Chapter Three

Charles E. Griffin is a partner in the Jackson, Mississippi office of Butler Snow, LLP. Charles is a commercial litigator with extensive experience in insurance, complex commercial, consumer protection, and financial services litigation. He has represented insurers, banks, finance companies and other financial services institutions in consumer protection action matters throughout the Southeast. Charles graduated from the University of Mississippi in 1984 with a B.A. in Philosophy, and from the University of Mississippi School of Law in 1987 with a J.D. Charles is AV-rated by *Martindale-Hubbell* and listed in *Best Lawyers* and *Mid-South Super Lawyers* for business and commercial litigation. Charles is a Fellow of the American Bar Association and the Litigation Counsel of America. Charles can be reached at Charles.griffin@butlersnow.com and (601) 985-4583.

Chapter Four

Michael C. Bruck is a partner with Williams Montgomery & John Ltd., a law firm in Chicago, Illinois. He is a former member of the firm's Executive Committee and current co-chair of the firm's professional liability and insurance practice groups. Mr. Bruck is a trial lawyer who focuses his practice on complex commercial disputes, professional and financial malpractice, and insurance litigation. Mr. Bruck has over twenty-five years of jury trial, litigation and client advisory experience, handling hundreds of high-stakes cases in state and federal courts across the country. Mr. Bruck is an active member of several legal associations, including the Federation of Defense and Corporate Counsel, Defense Research Institute, Professional Liability Underwriting Society, Illinois State Bar Association, Illinois Society of Trial Lawyers, and the Illinois Association of Defense Trial Counsel, among many others. Mr. Bruck received his B.S. degree from Purdue University in Lafayette, Indiana and his J.D. from DePaul College of Law in Chicago, Illinois. He is Martindale Hubbell AV-rated, an Illinois *Super Lawyer* and an Illinois *Leading Lawyer*. Mr. Bruck can be reached at (312) 443-3235 or mcb@willmont.com.

Chapter One

Unfair and Deceptive Trade Practices and Consumer Protection:

A History and State Law Distinctions

Russell B. Morgan
Casey L. Miller
BRADLEY ARANT BOULT CUMMINGS, LLP

I. History and Development of Federal and State Consumer Protection Acts

A. Federal protection

Prior to the implementation of consumer protection acts in the U.S., theories of freedom of contract and caveat emptor – “let the buyer beware” – controlled the merchant-consumer relationship. Spencer Webber Waller et al., *Consumer Protection in the United States: An Overview*, 4 EUR. J. CONSUMER L. 803 (2011). The economic boom in the early- and mid-twentieth century brought with it many new products and innovations, creating the need for a means to remedy breaches in the merchant-consumer relationship. Joanna M. Shepherd-Bailey, *Consumer Protection Acts or Consumer Litigation Acts? A Historical and Empirical Examination of State CPAs*, AMERICAN TORT REFORM FOUNDATION, www.atra.org. At that time, consumers’ recourse options were limited to suing merchants either for breach of contract or, more commonly, for the common-law tort of deceit (today’s fraud). *Id.* However, fraud claims presented challenges for consumers who were often unable to prove an objective and deliberate false statement or who had insufficient damages to warrant the expense of a lawsuit. *Id.*

In response to a lack of consumer protection, Congress created the Federal Trade Commission Act (“FTC Act”) in 1914, which prohibited “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). Given the overarching prohibition on “unfair or deceptive acts,” Congress limited enforcement of the FTC Act to a federal agency, rather than allowing suit by private plaintiffs, by creating the Federal Trade Commission (“FTC” or “Commission”). Shepherd-Bailey, *supra* note 4. The purpose of this limitation was to allow for prosecution of actual violations of the FTC Act, while preventing over-prosecution by private parties for potentially baseless claims of unfairness and deception. Shepherd-Bailey, *supra* note 4.

The FTC has a “dual mission to protect consumers and promote competition.” <https://www.ftc.gov/about-ftc/what-we-do>. It protects consumers by “conduct[ing]

investigations, su[ing] companies and people that violate the law, develop[ing] rules to ensure a vibrant marketplace, and educat[ing] consumers and businesses about their rights and responsibilities.” *Id.* As another check on enforcement of the FTC Act, Congress limited the Commission’s power by making injunctive relief the primary goal of any lawsuit brought under the FTC Act, setting an expectation that the Commission’s members would be well versed in business and commercial matters, and requiring the Commission to consider the public interest, not merely an individual’s interest, in bringing suit. Shepherd-Bailey, *supra* note 4.

Other federal agencies are also tasked with protecting consumers. For example, the U.S. Consumer Product Safety Commission (“CPSC”) is “charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products.” <http://www.cpsc.gov>. The U.S. Food and Drug Administration (“FDA”) is responsible for “protecting the public health by assuring the safety, efficacy and security of human and veterinary drugs, biological products, medical devices, our nation’s food supply, cosmetics, and products that emit radiation.” <http://www.fda.gov>. In addition, the National Highway Traffic Safety Administration (“NHTSA”) is tasked with ensuring consumer protection for automobiles, trucks, and motorcycles. <http://www.nhtsa.gov>. The Federal Communications Commission (“FCC”) is responsible for broadcast communications and communication common carriers. <http://www.fcc.gov>. Most recently enacted, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 (“Dodd-Frank”) includes the “Consumer Financial Protection Act of 2010,” which established the Consumer Financial Protection Bureau to provide for regulation of various consumer financial products and services. <http://www.consumerfinance.gov>.

B. State Action

In the 1960’s, states began to enact a series of their own consumer protection acts (“CPAs”), both in response to the public’s view that the FTC was vastly ineffective and in response to a continuously growing marketplace that made recourse for the average consumer increasingly difficult. See Albert Norman Sheldon & Stephen Gardner, *A Truncated Overview of State Consumer Protection Laws*, C888 ALI-ABA 375, 380 (1994). Many states initially adopted “Little FTC Acts,” which were modeled off of the FTC Act and which similarly made unlawful “unfair and deceptive acts.” Shepherd-Bailey, *supra* note 4. In addition, several model laws were developed to address consumer-merchant issues at the state level. Sheldon & Gardner, *supra* note 18, at 380.

In 1964, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Unfair and Deceptive Trade Practices Act (“UDTPA”). Sheldon & Gardner, *supra* note 18, at 380. The UDTPA only provided for injunctive relief from future harm, but some states that adopted forms of the UDTPA also allowed plaintiffs to collect damages. Sheldon & Gardner, *supra* note 18, at 381. It specifically defined deceptive trade practices to include trademark and trade name infringement, passing off goods as those of another, bait and switch, disparagement, misrepresentations of standards, origins or quality of goods, and

misleading price comparisons. Sheldon & Gardner, *supra* note 18, at 381. The UDTPA did not require consumers to prove actual confusion, reliance, damage, or intent to deceive. Sheldon & Gardner, *supra* note 18, at 381. In addition, in 1971, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Consumer Sales Practices Act ("UCSPA"). Sheldon & Gardner, *supra* note 18, at 381. The UCSPA also provided specific examples of deceptive conduct as did the UDTPA, set forth non-exclusive factors to consider when determining if sales practices were "unconscionable," and established an enforcement agency with general administrative powers. Sheldon & Gardner, *supra* note 18, at 381-82.

Also in 1971, the Commission issued the Model Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), which synthesized many state laws and other model laws. Shepherd-Bailey, *supra* note 4. The UTPCPL greatly expanded private remedies by allowing for both injunctive relief and civil penalties. Shepherd-Bailey, *supra* note 4. It authorized consumer class actions, individual rights of action if the damages exceed two-hundred dollars, and provided for attorneys' fees against any violator. Shepherd-Bailey, *supra* note 4. Today, most states have adopted some form of the FTC Act and variations of the model laws.

In addition to state statutory causes of action, the common law also provides consumer protection. Common law torts available to consumers include deceit, fraud, and misrepresentation. Waller et al., *supra* note 3. However, the torts of deceit and fraud require proof that a merchant intentionally concealed or made a false representation of a material fact, knowing that the representation was false, and intending to induce the consumer to act based on the false statement. Waller et al., *supra* note 3. Such causes of action allow consumers to recover actual or punitive damages, rescission of the transaction, or benefit-of-the-bargain damages. Waller et al., *supra* note 3.

Consumers also have the option of bringing a cause of action under breach of warranty theories. Warranties ensure that consumers receive what they have bargained for, despite a lack of merchant misrepresentation. Waller et al., *supra* note 3. Every state, except for Louisiana, has adopted the framework of Article 2 of the Uniform Commercial Code, which provides consumer protection through express and implied warranties. U.C.C. § 2-313. While express warranties only provide protection with regard to a merchant's explicit statements, all goods sold by a merchant have an implicit warranty that they are "fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314.

II. State Consumer Protection Act Distinctions

Today, most states have implemented statutes modeled after the FTC Act and other model laws to some extent, which are aimed at prohibiting unfair and deceptive acts by merchants. Under these state statutes, State Attorney Generals typically have

the authority to seek injunctions, and certain states allow for use of civil and criminal penalties.

While most states have adopted some form of consumer protection laws, these laws vary greatly from state to state in both statutory language and interpretation. For example, what constitutes a “consumer” for standing purposes varies by state. In Tennessee, a business can sue another business or supplier under the Tennessee CPA when the plaintiff acted as a consumer. T.C.A. §§ 47-18-101 *et seq.*; see also D. Wes Sullenger, *Only We Can Save You: When and Why Non-Consumer Businesses Have Standing to Sue Business Competitors Under the Tennessee Consumer Protection Act*, 35 U. MEM. L. REV. 485, 486 (2005). Also in Tennessee, purchasers of real estate are considered consumers under the CPA, *Klotz v. Underwood*, 563 F. Supp. 335 (E.D. Tenn. 1982), while some states do not allow such purchasers to sue as consumers. See e.g., *Stagner v. Friendswood Development Co.*, 620 S.W.2d 103 (Tex. 1981). Applying Tennessee law, the court in *Klotz* denied a seller’s motion to dismiss for failure to state a claim when purchasers experienced problems with an old home that had been remodeled and sued under the Tennessee Consumer Protection Act. *Klotz*, 563 F. Supp. at 335. However, the court in *Stagner* held that purchasers of real property who brought suit against the developer of a subdivision were not consumers under the Texas Deceptive Trade Practices Consumer Protection Act. *Stagner*, 620 S.W.2d at 103.

In addition, some state CPAs narrowly prohibit “deceptive” acts or practice (see e.g., Ga. Code Ann. § 10-1-372; Kan. Stat. Ann. § 50-626; S.D. Codified Laws Ann. § 37-24-6), while others are more expansive in prohibiting “unfair” and “unconscionable” behavior (see, e.g., Ala. Code § 8-19-5; Alaska Stat. § 45.50.471; Fla. Stat. Ann. § 501.201; Miss. Code Ann. § 75-24-5; N.J. Rev. Stat. § 56:8-2; N.C. Gen. Stat. § 75-1.(a); S.C. Code Ann. § 39-5-20). What constitutes “unfair” or “unconscionable” behavior also varies by state.

Another variation in state CPAs is that only some states allow for consumers to bring private causes of action. See, e.g., Mich. Comp. Laws § 19.418(11); N.J. Stat. Ann. § 56:8-2.12; [Or. Rev. Stat. § 646.150](#). Further, some states explicitly allow claims to be brought as class actions, while others do not. Two of the states that provide for the use of class actions limit the recovery of damages for these suits (see e.g., Cal. Civ. Code §§ 1752, 1781; Ind. Code Ann. § 24-5-0.5-4(b); Kan. Stat. Ann. § 50-634(c), (d); Mass. Gen. Laws Ann. ch. 93A, § 9; Mo. Ann. Stat. § 407.025; N.M. Stat. Ann. § 57-12-10; Ohio Rev. Code Ann. § 1345.09; R.I. Gen. Laws § 6-13.1-5.1; Utah Code Ann. § 13-11-20; Wyo. Stat. Ann. § 40-12-108), and certain states impose additional restrictions on class actions under their CPAs (see e.g., Ind. Code Ann. § 24-5-0.5-4(b) (prohibiting class actions in real property transactions); Idaho Code § 48-608(1) (limiting recovery in class actions to actual damages or \$1,000, whichever is greater)). Other states specifically prohibit class actions under their CPAs. See e.g., Ala. Code § 8-19-10(f) (“A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class”); Ga. Code Ann. § 10-1-399(a); La. Rev. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Mont. Rev. Code Ann. § 30-14-133(1); S.C. Code Ann. § 39-5-140(a). Many state statutes do not expressly address whether a class action is

permitted, which leaves consumers the option to attempt to bring a class action under a state's general class action statutes, court rules, or case law. *Unfairness and Deception: Statutory Regulation*, 1 CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 138 (2014). For example, the court in *Dix* held that plaintiffs could bring a class action for alleged violations of the Michigan Consumer Protection Act against defendants for making misrepresentations to persuade them to purchase annuity policies. *Dix v. Am. Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206, 209 (1987). The court there stated that the "Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices." *Id.* It further explained that "[t]his remedial provision . . . should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons." *Id.*

A recent Ninth Circuit case highlighted the significance of the variations in CPAs from state to state in denying a motion for class certification. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012). The court in *Mazza* held that California consumer protection laws could not be applied to a whole class of plaintiffs in an action alleging that an automobile manufacturer misrepresented characteristics of a braking system. *Id.* Material differences in California consumer protection law and the other forty-three states' laws in which class members resided created a class certification and conflict of law problem. *Id.* The differences cited include whether a plaintiff was required to prove scienter and whether the named class plaintiffs were required to demonstrate reliance. *Id.*

The court in *Mazza* also found a wide variation in remedies provided by each state. *Id.* For example, some states allow for recovery of actual damages, while others only allow for restitution and disgorgement. *Id.* In addition, remedies in certain states may depend on whether the defendant's conduct was willful, which is not considered in other states. *Id.* The elements of unjust enrichment and what constitutes "unjust" also vary significantly by state. *Id.*; Def. American Honda Motor Co., Inc.'s Opp'n to Pls.' Mot. for Class Cert., *Mazza v. Am. Honda Motor Co.*, 2008 WL 4212883 (C.D.Cal.) (No. 207CV07857). For example, Minnesota defines "unjust" to mean illegal or unlawful conduct, *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996), while Illinois "does not require fault or illegality on the part of the defendant." *Firemen's Annuity & Benefit Fund of City of Chi. v. Mun. Emps., Officers, & Officials' Annuity & Benefit Fund of Chi.*, 579 N.E.2d 1003, 1007 (1991). The decision in *Mazza* demonstrates that the many differences in CPAs among states may cause a significant impediment on consumers' ability to recover from manufacturers on a national scale through the use of class actions, even if class actions are specifically provided for in a state's CPA.

Chapter Two

Unfair and Deceptive Trade Practices and Consumer Protection:

Targeted Practices and Kinds of Claims

P. Ryan Beckett
Haley F. Gregory
BUTLER SNOW, LLP

I. Introduction.

The federal Unfair and Deceptive Trade Practices Act prohibits unfair or deceptive acts or practices affecting commerce. See 15 USC 45(a)(1). Knowing that “[u]nfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful” is only part of the equation. *Id.* According to the National Conference of Commissioners on Uniform State Laws, approximately twenty-three states have enacted statutes similar to the Federal Trade Commission Act; while fourteen states have enacted a version of the Uniform Deceptive Trade Practices Act (1964). This inconsistency elevates the relevant law from conceptually simple to effectively complex and heavily reliant on the individual state statutes. Further, in addition to the general consumer protection statutes, consumer protection laws are often not contained within a single statutory scheme but expand into laws specifically aimed at regulating a certain type of business, practice, or industry.

With that in mind, examination of the consumer protection statute in the relevant state, which may refer to other statutes, is often the safest and best place to start. See e.g., Miss. Code Ann. § 75-24-3(c) (referring courts to the Federal Trade Commission Act for assistance in “construing what constitutes unfair or deceptive trade practices”). While many states outline specific prohibited practices, others are reliant on general principals which are interpreted and applied in case law.

II. Targeted Practices under UDAP.

A. Targeted Practices Generally

By way of introduction, it is important to note that an act or practice under the statute may be unfair or deceptive or both, and the act or practice does not have to violate another law to be considered unfair or deceptive. For example, the following practices have been deemed deceptive or unfair in the context of financial services:

General

- marketing practices that did not convey the whole truth or explain requirements to obtain a benefit, or that contained claims that could not be substantiated

- promises that did not materialize
- rates “as low as” or “as high as” which were not available to the majority of customers
- teaser rates that did not explain the duration
- claims that could not be substantiated
- asterisks buried in the text of the agreement
- using the term “free” when fees could result

Credit cards

- security deposits/fees for subprime cards that consumed most of the available credit

Home loans

- hidden terms such as balloon payments

Deposit products

- gift cards without pre-sale disclosures, especially where fees could be imposed on the balance
- ATM balances that included overdraft protection

Predatory lending

- servicing and collections issues due to the lack of consumer choice in servicers
- posting late fees for on-time payments
- collecting unauthorized fees, e.g., for insurance that is already in place
- not quoting payoff amounts or otherwise misrepresenting the amount owed
- fees that are too high for the service received

The strongest protections for consumers and competing businesses are found in statutes which include broad, general prohibitions against both deceptive conduct and unfair conduct, which is the approach taken by the FTC Act upon which many state UDAP statutes rely. The kinds of activities which are unlawful under the law of the relevant jurisdiction may be laid out in the unfair and deceptive practices act of the state. These lists, though helpful, are not generally exhaustive. Rather, they are generally designed to inform and supplement the common law and existing statutes. See Revised Uniform Deceptive Trade Practices Act, Prefatory Note (1966) (“the Uniform Act fills a void in most state legislative schemes by providing a substantive private action for misleading trade identification and false or deceptive advertising. It might be useful to compare the Uniform Act with existing state legislation of various common types to indicate the types which will not be significantly affected by passage of the Uniform Act; namely, fair trade acts, unfair practice acts, price discrimination acts, weights, measures, and labelling acts, food, drug and cosmetic acts, insecticides,

fungicide and rodenticide acts, trademark registration statutes and false advertising acts.”).

B. Trade Practices Specifically: Mississippi Law

For example, in Mississippi, the Mississippi Consumer Protection Act ("MCPA"), codified at Miss. Code Ann. § 75-24-1 *et seq.*, governs unfair and deceptive trade practices. The MCPA establishes that “[u]nfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited.” Miss. Code Ann. § 75-24-5(1). Like its federal analog, 15 USC 45(a)(1), the Mississippi statute does not define “unfair” or “deceptive.” Instead, the Mississippi statute provides the following non-exhaustive list of prohibited unfair methods of competition and unfair or deceptive trade practices or acts:

- (a) Passing off goods or services as those of another;
- (b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;
- (c) Misrepresentation of affiliation, connection, or association with, or certification by another;
- (d) Misrepresentation of designations of geographic origin in connection with goods or services;
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;
- (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
- (i) Advertising goods or services with intent not to sell them as advertised;
- (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions;

- (l) Advertising by or on behalf of any licensed or regulated health care professional which does not specifically describe the license or qualifications of the licensed or regulated health care professional;
- (m) Charging an increased premium for reinstating a motor vehicle insurance policy that was cancelled or suspended by the insured solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage. The provisions of this paragraph (m) shall apply only to such instances when the insured does not drive the vehicle during the period of cancellation or suspension of his policy.

Miss. Code Ann. § 75-24-5(2). Further, the Mississippi statute specifically prohibits “price gouging” during a declared official “state of emergency,” a term of art defined separately under state law. Miss. Code Ann. § 75-24-25(2). It also imposes a duty to comply with security breach notification requirements but restricts the right of action for such a violation to the Attorney General of the State. Miss. Code Ann. § 75-24-29(8). No distinction is made between the prohibited practices for civil and criminal purposes. *Id.*

III. Kinds of Claims Allowed Under UDAP Law in Mississippi.

Some consumer protection laws provide for individual rights of action, while others provide such right only to state enforcement agencies, such as the State Attorney General. Still others provide for both. For states that allow both enforcement by private right of action and by state actors, consumer protection laws often allow very different remedies for the two kinds of claimants.

A. State Enforcement – Civil and Criminal

For example, in Mississippi, the MCPA provides for civil enforcement by the Attorney General to proceed in the name of the State against an alleged violator of the Act. Miss. Code Ann. § 75-24-9. Specifically, the MCPA permits the Mississippi Attorney General to bring an action against any person he believes is violating, has violated, or is about to violate the statute. *Id.* Under those circumstances, the Attorney General may seek a temporary or permanent injunction and, if successful, may forego the bond requirement typically imposed on others seeking injunctive relief. *Id.* Further, the Attorney General has an additional action for civil penalties for violation of the injunction so issued. Miss. Code Ann. § 75-24-19.

The Attorney General is also authorized to seek restitution and civil penalties for any violation of the MCPA. Miss. Code Ann. §§ 75-24-11 (restitution) and 75-24-19 (civil penalties). Specifically, the statutes provide that the court may make such additional orders or judgments, including restitution as necessary to restore the offended party, and may award civil penalties on a “per violation” bases. Many State Attorneys General, including in Mississippi, have used this provision of the statutory scheme to bring *parens patriae* claims on behalf of unnamed individual consumers. The promise of civil penalties imposed on a “per violation” basis has led to widescale and sweeping consumer protection claims against pharmaceutical companies, product manufacturers, banks, software companies and other big target defendants. It has also led to the much-criticized practice of the State Attorneys General partnering with private contingency fee attorneys who are incentivized to seek the maximum amount of civil penalty awards. The constitutional and statutory legality of that practice is under attack in numerous states, including Mississippi.

The Court may also order the “appointment of a receiver or the revocation of a license or certificate authorizing” the person who violated the statute to engage in business in the state, or both. Miss. Code Ann. § 75-24-11. The receiver has broad power to “sue for, collect, receive and take into his possession” a wide variety of property derived by means of any practice prohibited by the MCPA. Miss. Code Ann. § 75-24-13. The Attorney General may bring a claim for knowing and willful use of an “unfair or deceptive trade practice, method or act prohibited under the act.” Miss. Code Ann. § 75-24-19.

The Attorney General may also pursue criminal actions against violators, including escalating penalties for multiple offenders. Miss. Code Ann. § 75-24-20. The Attorney General’s cause of action is for knowing and willful violation of the statute, and the first offense is a misdemeanor punishable by a fine of \$1,000. *Id.* The second offense within five years is also a misdemeanor but is punishable by a fine or up to one year in the county jail. *Id.* The third and subsequent offenses within five years are a felony with penalties of between one and five years in jail and between \$1,000 and \$5,000 in fines, and criminal convictions from other states are counted for the purpose of determining whether a violation is the first, second, third or subsequent offense. *Id.* Also, the Attorney General may bring a criminal action for “price gouging” during an official “state of emergency.” Miss. Code Ann. § 75-24-25.

The Mississippi statute also provides a cause of action for knowingly and willfully failing or refusing to cooperate with the Attorney General in providing statements or filing reports or otherwise refusing to obey a subpoena or investigative demand. Miss. Code Ann. § 75-24-17. The Mississippi statute authorizes all district and county attorneys to assist the Attorney General by empowering them with the authority to bring any action under the MCPA that the Attorney General could bring. Miss. Code Ann. § 75-24-21.

In addition to the kinds of actions authorized under the statute, the Attorney General also has rulemaking authority under the statute. Miss. Code Ann. §75-24-27(f) (“To accomplish the objectives and to carry out the duties prescribed in this chapter, the Attorney General, or his designee, in addition to the power conferred by this chapter,

may: . . . (f) Issue any necessary rules and regulations in order to carry out the provisions of this chapter”). This authority has been interpreted by some commentators to give the Attorney General the right to create additional causes of action based on what he perceives to be necessary in carrying out the provisions of the Act. Consumer advocates have argued that this is the most effective way to combat unfair and deceptive trade practices as it affords state agencies the fluidity to target emerging or persistent unfair and deceptive trade practices and to create state-based solutions. CONSUMER PROTECTION IN THE STATES, National Consumer Law Center, Jan. 10, 2009, *available at* https://www.nclc.org/images/pdf/udap/report_50_states.pdf. However, despite the seemingly-broad authority to adopt substantive regulations given to State Attorneys General, none of the proposed UDAP regulations have ever been adopted. CONSUMER PROTECTION IN THE STATES, A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES, APPENDIX B, National Consumer Law Center, Feb. 2009, *available at* <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>.

B. Private Rights of Action by Consumers – Pleading and Defenses

Private causes of action for unfair or deceptive trade practices include a variety of different claims. The Mississippi statute provides guidance on navigating a private claim through the court, including a series of procedural requirements, which incidentally serve as a great source of defenses against plaintiff's who fail to comply with those requirements.

For example, under Mississippi law, consumers have a private right of action if they qualify as a “person who purchases or leases goods or services primarily for personal, family or household purposes” Miss. Code Ann. § 75-24-15(1). Such action is allowed for the “use or employment by the seller, lessor, manufacturer or producer of a method, act or practice prohibited by Section 75-24-5.” *Id.* This private right of action is constrained in several important ways. First, the consumer must first attempt to resolve the claim through “an informal dispute settlement program approved by the Attorney General.” Miss. Code Ann. § 75-24-15(2). This requirement is important in that it puts the allegedly offending business on notice of the claim against it, which will presumably ensue after the administrative procedure ends. Failure to exhaust this important administrative remedy will generally result in dismissal of the claim. *See, Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. 2007). Second, the consumer may be sanctioned with an award of attorney’s fees in favor of the “prevailing defendant” in private actions which are deemed “frivolous or filed for the purpose of harassment or delay.” Miss. Code Ann. § 75-24-15(3). However, a “prevailing plaintiff” is *not* permitted to obtain attorney’s fees in the event that they are successful. *See, e.g., Wilson v. Nelson Hall Chevrolet*, 871 F. Supp. 279 (S.D. Miss. 1994) (noting statutory amendment in 1994 which removed the provision for an award of attorney’s fees to a prevailing plaintiff); *contra Derr Creek Const.Co., Inc. v. Peterson*, 412 So. 2d 1169 (Miss. 1982). Finally, Mississippi law does not permit class actions, generally, and the MCPA makes it clear that consumer protection is no exception. Miss. Code Ann. § 75-24-15(4). These constraints are a great source of

defenses for entities accused of violating the statute and have prompted the creation of a litany of cautionary case law for parties bringing a consumer protection claim.

Under the MCPA, actions which a plaintiff may bring for ascertainable loss of money or property, real or personal, as a result of violation of the MCPA include those for unfair and deceptive trade practices under Section 75-24-5 of the MCPA as well as “all other statutory and common law rights, remedies and defenses.” Miss. Code Ann. § 75-24-15. That is, the private right of action under the MCPA provides an additional list of claims for plaintiffs who would otherwise have to bring a claim under another statute or under the common law. Thus, Mississippi consumers may bring actions for price gouging, statutory fraud, and any other unfair or deceptive trade practice under MCPA as well as unjust enrichment/constructive trust, common law fraud, breach of contract, breach of good faith and fair dealing, conspiracy to commit statutory and common law fraud. See, e.g., *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655 (S.D. Miss. 2007); *Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1047 (Miss. Ct. App. 2007); *Wilson v. Nelson Hall Chevrolet*, 871 F. Supp. 279 (S.D. Miss. 1994). Consumers may also bring an action for engaging in any prohibited practice under MCPA § 75-24-5(2). In addition to the kinds public and private actions noted in Section II.b, *infra*, Mississippi courts have addressed others. See, e.g., *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So. 2d 564, 571, 2008 Miss. LEXIS 28, 14 (Miss. 2008) (denying defendant summary judgment where plaintiffs pled genuine issues of fact regarding whether defendant car dealer sold them a car it represented as “new” when it was actually “used” or “reconditioned” in violation of Miss. Code Ann. § 75-24-5(2)(f)); *Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007) (affirming dismissal of plaintiff’s claims both because plaintiff did not establish a car insurance policy to be “merchandise” within the meaning of the MCPA and because she did not attempt to resolve the claim through an informal dispute settlement program approved by the Attorney General); *Hernandez v. Vickery Chevrolet-Oldsmobile Co.*, 652 So. 2d 179 (Miss. 1995) (affirming summary judgment in favor of defendant where the trial court found, as a matter of law, that the truck purchase by plaintiff was new); *contra River Region Med. Corp. v. Am. Lifecare, Inc.*, 2008 U.S. Dist. LEXIS 21693, 2008 WL 748359 (S.D. Miss. Mar. 17, 2008) (denying a private right of action to a company because the MCPA requires the allegedly injured party to be an individual consumer). However, because the list of actions under MCPA § 75-24-5(2) is not exhaustive, the kinds of claims which may be brought has the potential for broad common law expansion.

Further, the Mississippi Legislature has enacted a number of statutes that specifically proscribe certain conduct with respect to specific goods and services. For instance, the False and Deceptive Advertising Act prohibits the dissemination to the public of any untrue, deceptive or misleading advertising or promotional material in connection with the sale of any “merchandise, securities or other thing” and provides for certain statutory penalties, both civil and criminal, in addition to all other remedies available at common law, such as personal injury damages and restitution. Miss. Code Ann. § 97-23-1 *et seq.* In further instance, the Small Loan Regulatory Law proscribes any false, misleading or deceptive advertising, printing, displaying or broadcasting of any statement or representation with regard to rates, terms or conditions in the lending

context. See Miss. Code Ann. § 75-67-101 *et seq.* Similar statutory provisions govern representations by sellers or advertisers in connection with the sale of certain goods and services, including: sweepstakes and other promotional devices for interest in real property, Miss. Code Ann. § 75-24-101 *et seq.*; magazine subscriptions, Miss. Code Ann. § 75-24-131 *et seq.*; and rental-purchase or "rent-to-own" transactions, Miss. Code Ann. § 75-24-151 *et seq.*

Still further, there are specific trade practice statutes concerning: trademarks, Miss. Code Ann. § 75-25-1 *et seq.*; trade secrets, Miss. Code Ann. § 79-23-1 *et seq.*; milk and milk products, Miss. Code Ann. § 75-31-1 *et seq.*; meat and poultry products and inspection, Miss. Code Ann. § 75-33-1 *et seq.*; the sale of "baby chicks," Miss. Code Ann. § 75-39-1 *et seq.*; the importation and sale of animals or birds, Miss. Code Ann. § 75-40-1 *et seq.*; commercial feeds and grains, Miss. Code Ann. § 75-45-1 *et seq.*; commercial fertilizers, Miss. Code Ann. § 75-47-1 *et seq.*; movable homes, Miss. Code Ann. § 75-49-1 *et seq.*; water heaters, Miss. Code Ann. § 75-51-1 *et seq.*; paints and varnishes, Miss. Code Ann. § 75-53-1 *et seq.*; gasoline and petroleum products, Miss. Code Ann. § 75-55-1 *et seq.*; antifreeze and summer coolants, Miss. Code Ann. § 75-56-1 *et seq.*; liquefied petroleum gas, Miss. Code Ann. § 75-57-1 *et seq.*; and home solicitation sales, Miss. Code Ann. § 75-66-1 *et seq.*, just to name a few. Each of these schemes has its own pleading requirements in order for consumers to qualify for relief.

IV. Conclusion

Accordingly, the best place to start in formulating a defensive strategy when faced with an unfair and deceptive trade practices claim is with the limitations and constraints built into the state statutory scheme themselves. As noted above, in states following the model Act, some cases can easily be dismissed if the plaintiff is not an individual consumer, is not purchasing a product for personal, family or household purposes, or has failed to exhaust administrative remedies, among other statutory defenses. Further, the restrictions on a plaintiff's private right of action and the unavailability of attorney's fees and costs may limit the available recovery significantly.

Chapter Three

Unfair and Deceptive Trade Practices and Consumer Protection:

Proof Elements of Claims

Charles E. Griffin
Haley F. Gregory
BUTLER SNOW, LLP

I. Introduction

Many states have enacted some form of the Uniform Deceptive Trade Practices Act (“UDTPA”). The UDTPA was promulgated in 1964 and amended in 1966, and although declared obsolete by the Uniform Laws Commission (“ULC”) in 2000, it served as a valuable resource to state lawmakers and still exists in various forms through state uniform deceptive trade practices laws. Specifically, many states have modeled their laws to include what the ULC termed “objectionable practices.” See Revised Uniform Deceptive Trade Practices Act, Prefatory Note (1966) declared obsolete and removed from the rolls of current acts in 2000 (“The Uniform Act is designed to bring state law up to date by removing undue restrictions on the common law action for deceptive trade practices. Certain objectionable practices are singled out, but the courts are left free to fix the proper ambit of the act in case by case adjudication.”).

Generally, an act or practice is considered deceptive if (1) the representation, omission or practice is likely to mislead consumers (2) who are acting reasonably under the circumstances presented, and (3) the representation, omission or practice is material. Notably absent is the requirement that the consumer actually be misled; rather, an action may exist when the conduct is only likely to mislead. An act or practice may be unfair when it causes or is likely to cause substantial consumer injury; such injury cannot reasonably be avoided; and the injury is not outweighed by the benefit to consumers or competition.

To better illustrate the proof elements of UDAP claims under state schemes that have adopted the uniform act, we will focus on how the courts have treated such claims under a particular state scheme which closely tracks the uniform act, in this instance, that adopted by the State of Mississippi.

II. Proof Elements of Claims Allowed Under UDAP Law in Mississippi

A. Targeted Practices – Private Action

Mississippi unfair and deceptive trade practice law, like the laws of many other states, has integrated the UDTPA’s list of objectionable practices into its statutory

scheme. This list is lengthy but not exhaustive. Because the statute specifically recognizes these causes of action, the case law is naturally apt to develop these claims more thoroughly as plaintiffs bring causes of action under the statute. There are currently thirteen prohibited practices under Mississippi law, which are established in Miss. Code Ann. § 75-24-5(2). These practices are as follows:

- (a) Passing off goods or services as those of another;
- (b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;
- (c) Misrepresentation of affiliation, connection, or association with, or certification by another;
- (d) Misrepresentation of designations of geographic origin in connection with goods or services;
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;
- (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
- (i) Advertising goods or services with intent not to sell them as advertised;
- (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions;
- (l) Advertising by or on behalf of any licensed or regulated health care professional which does not specifically describe the license or qualifications of the licensed or regulated health care professional;
- (m) Charging an increased premium for reinstating a motor vehicle insurance policy that was cancelled or suspended by the insured solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the

National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage. The provisions of this paragraph (m) shall apply only to such instances when the insured does not drive the vehicle during the period of cancellation or suspension of his policy.

Miss. Code Ann. § 75-24-5(2). The UDTPA contains twelve objectionable practices; Mississippi law contains thirteen, and other states that have used UDTPA as a guide may have fifteen or more.

Each of these prohibited practices operates as an independent cause of action with its own proof requirement. However, there are several mandates built into the statutory scheme which serve as hurdles that a private plaintiff must clear in order to pursue a claim in court. For example, in order to recover under MCPA, plaintiff must first pursue an informal dispute resolution program which has been approved by the Attorney General. Miss. Code Ann. § 75-24-15(2). This requirement converts into an element of every claim because failure to complete this prerequisite will cause plaintiff's action to be dismissed. *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 667 (S.D. Miss. 2007) (“defendants['] strongest argument for the dismissal of Count I is that in addition to its “purchase” requirement, the CPA section authorizing private rights of action contains a prerequisite that the plaintiffs attempt to resolve their CPA claims through the auspices of the Attorney General's office prior to filing suit”); *Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007) (concluding that dismissal of plaintiff's claims was appropriate because she did not attempt to resolve the claim through an informal dispute settlement program approved by the Attorney General). Likewise, plaintiffs must establish a “purchase or lease” of goods or services “primarily for personal, family or household purposes.” *Cole*, 554 F. Supp. 2d at 666.

Each claim for relief under a specific provision of Miss. Code Ann. § 75-24-5(2) requires that plaintiff plead the appropriate set of facts. For example, in order to avoid summary judgment on his claim that defendant represented that goods are original or new when they are reconditioned, reclaimed, used, or secondhand under Miss. Code Ann. § 75-24-5(2)(f), plaintiff must allege that he selected a “new” vehicle which the seller represented as new, and that, when the seller represented the vehicle as new, that representation carried with it the connotation that the vehicle had never been damaged. *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So. 2d 564 (Miss. 2008). Plaintiff must also plead that, based on this and similar representations, he decided to and did purchase the vehicle. *Id.*

In order to recover under Miss. Code Ann. § 75-24-5(2)(g) for misrepresenting the quality or grade of goods or services, plaintiff must plead that the thing purchased qualifies as a “good” or “service.” *Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844 (S.D. Miss. 1990). In *Burley*, the court held that a construction defect insurance policy was not a good or services under the MCPA and therefore, plaintiff could not establish a cause of action under Miss. Code Ann. § 75-24-5(2)(g). *Id.* at 863. In order to recover for a defendant’s advertising goods and services with the intent not to sell them under Miss. Code Ann. § 75-24-5(2)(i), the plaintiff must establish that the advertising was an advertisement and offer to the general public. *Deer Creek Constr. Co. v. Peterson*, 412 So. 2d 1169, 1173-1174 (Miss. 1982). Advertising does not include statements made during negotiation. *Id.*

Making matters even more amorphous, an MCPA claim may rely so heavily on the establishment of other claims that it succeeds or fails based on the successful pleading and proof of the elements of those other claims. See, e.g., *Hardy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.*, 848 F. Supp. 1276, 1289 (S.D. Miss. 1994) (“Inasmuch as the plaintiffs’ claims of unfair trade practices rest heavily upon the assertions of disparagement, libel, slander, and misrepresentation, this court finds no violations of Miss. Code Ann. § 75-24-5 (b), (c), (e) and (h) for many of the reasons above stated with regard to the slander and defamation issue. This court is unpersuaded by the evidence presented that State Farm made misrepresentations concerning certification of any automobile repair services . . .”).

B. Targeted Practices – State Action

The Attorney General may also bring a claim for knowing and willful use of any unfair or deceptive trade practice, method or act prohibited by Section 75-24-5. Miss. Code Ann. § 75-24-19. In order for the State to recover the civil penalties under the statute, the court must find, by clear and convincing evidence, that a person knowingly and willfully used any unfair or deceptive trade practice, method or act prohibited by Section 75-24-5. *Id.*; see also *Hood ex rel. Miss. v. Bristol-Myers Squibb Co.*, 2013 U.S. Dist. LEXIS 90540, at *15, 2013 WL 3280267 (N.D. Miss. June 27, 2013); *Pickering v. Hood*, 95 So. 3d 611, 616 (Miss. 2012). For the purpose of the burden of proof, a knowing and willful violation occurs when the court finds from clear and convincing evidence “that the party committing the violation knew or should have known that his conduct was a violation of Section 75-24-5.” Miss. Code Ann. § 75-24-19.

The Mississippi Supreme Court affirmed an award in favor of the Attorney General in *Southwest Starving Artist Group v. State*, 364 So. 2d 1128 (Miss. 1978). In *Southwest*, the Attorney General brought an action to enjoin defendants from advertising or conducting the sale of any painting under the name “Southwest Starving Artist Art Sale” and assessed civil penalties of \$1,500 against the group. *Id.* The county court found that the advertising violated Miss. Code Ann. §§ 75-24-5(b), (c), (d), and (e). *Id.* The chancellor’s reasoning in affirming the lower court, which the Supreme Court found to be justified, sounds strikingly similar to the elements of an action for negligent misrepresentation. *Id.* (“It was entirely possible for a reasonable person to believe after seeing and hearing the advertising complained of to believe that this sale was being put on by a group of artists who were desperate or hurting and wanted to part

with their paintings at an extremely reasonable or below reasonable price; that they were either local as in Southwest Jackson or regional as in Southwest United States or the Texas area, when in truth the Defendant is owned by one person and ninety percent of the art he sells is from Hong Kong. It is also true that the paintings carried names which indicated a different origin than from what was otherwise portrayed by the publicity.”). The court discussed the relevant facts, specifically, that the representation was false, that people relied on that representation, and that such reliance was reasonable. *Id.* at 1130-1131.

C. Elements of Other Causes of Action

The MCPA creates a private right of action for “price gouging.” Miss. Code Ann. § 75-24-25(2). A cause of action for price gouging requires proof that the “‘value received’ for a good or services ‘sold within [a] designated emergency impact area’ exceeds ‘the prices ordinarily charged for comparable goods or services in the same market area.’” *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 666 (S.D. Miss. 2007) (noting, however, an ambiguity in the plain language of the Miss. Code Ann. § 75-24-25 prohibition against price gouging and the legislative history with respect to the availability of a private right of action). Built into the rules is a requirement that the plaintiff plead the requisite facts under the statute. *Id.* For example, a plaintiff must allege that he is a consumer and that he made a “purchase” as required by Miss. Code Ann. §§ 75-24-15 and 75-24-25. *Id.*

Of course, actions that were available under common law or by statute are still available if the allegedly offending conduct fits the proof requirements for those claims. For example, in order to prove common law fraud under Mississippi law, a consumer must allege (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) reliance upon its truth, (8) a right to rely on the representation, and (9) an injury proximately caused by the reliance on the representation. *Taylor v. Southern Farm Bureau Casualty Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007). If a plaintiff has an opportunity to investigate statements upon which she allegedly relied, the plaintiff cannot be said to have reasonably relied on those statements. *Martin v. Winfield*, 455 So.2d 762, 765-66 (Miss. 1984); see also *Taylor*, 954 So. 2d at 1049 (where plaintiff accepted insurance payment for her damaged vehicle without investigating the value of the vehicle, she could not prove reasonable reliance on the insurer's estimate of the vehicle's value). Also, as noted above, a plaintiff that has a claim under the MCPA will often meet the elements for negligent misrepresentation. The MCPA does not in any way restrict a claimant's ability to seek actions under the common law or by another statute.

III. Conclusion

Private action under the uniform deceptive trade practices acts is dynamic and growing. An MCPA action is seemingly limited only by the creativity of private plaintiffs and rulemaking authorities, including State legislatures and Attorneys General. Thus, guiding a corporation through the risks associated with unfair and deceptive trade

practices actions requires attention and vigilance. The passage of statutes like the Dodd-Frank Act can easily change the law or expand the rulemaking authority of entities like the Consumer Financial Protection Bureau and open up companies to liability by making an action unlawful based on the sophistication of the prospective plaintiff. As unfair and deceptive trade practices law in certain areas takes shape, defense counsel has no stronger ally than the well-defined law in his jurisdiction which makes concrete an area of the law that might otherwise be nebulous.

Chapter Four

Unfair and Deceptive Trade Practices and Consumer Protection:

Damages in UDAP Claims

Michael C. Bruck
Williams Montgomery & John, LTD
Chicago, Illinois

I. Introduction

Over the years, the principles guiding the calculation and proof of damages have become increasingly complex and are infused with concepts from economics, accounting, and finance of other fields. The Unfair and Deceptive Trade Practice Acts (“UDTPA”) passed by state lawmakers in various states, however, has sought to change the complexity in calculating damages by codifying such relief in the statute itself. Unlike the Federal Trade Commission Act (15 U.S.C. § 45(a)(1) (2006)), state unfair trade practices acts typically provide consumers with a private right of action for unfair trade practices. These states also have distinguishing requirements for obtaining treble damages. Like consumers, businesses have discovered enhanced rights under the UDTPAs that has created a battleground of business litigation in states that have them.

Although many of the states adopting UDTPAs seek to regulate similar conduct, the remedies afforded can vary. For instance, some states provide injunctive relief, while others allow recovery of monetary damages. Approximately half of the states with UDTPA laws allow plaintiffs to recover treble damages for violating state statutes. Some states impose “automatic” treble damages, requiring a showing of intent or willfulness on the defendant’s part. Other states, however, have a mechanism for treble damages but give the court discretion in the amount of trebling and the award itself.

This section briefly identifies the different types of damages available to private plaintiffs in UDTPA litigation. We will focus on how the states treat damages generally, while explaining, in greater detail, the type of recoverable damages in Illinois.

II. The Type of Damages Available under UDTPA

A. Targeted Practices Generally

A strong consumer movement in the 1960s helped raise awareness of the weakness in remedies available to consumers who brought claims against businesses. UDPTAs offer lower standards of proof while enhancing a plaintiff’s selection of remedies. See *Hangman Ridge Training Stables v. Safeco Title Ins.*, 105 Wash.2d 778 (1986). Awards of attorneys’ fees are one component of recoverable damages in many states. Under the American Rule, a successful consumer plaintiff generally had no right

to an award of his or her attorneys' fees. Such fees imposed a high barrier of entry upon consumers interested in filing lawsuits seeking redress for fraud, misrepresentation, or breach of contract. Likewise, at common law, punitive damages awards were discretionary and the standards regulating such awards were vague. As discussed below, plaintiffs suing under the UDTPA may be able to recover punitive or treble damages. Consumers previously did not have much, if any, leverage to encourage settlement or deter fraudulent conduct. The enactment of state UDTPAs, however, has changed the way both plaintiffs and defendants approach consumer fraud litigation.

1. *The Bellwether States*

In 1967, Massachusetts was the first state to enact a UDTPA. See Chapter 93A of the Massachusetts General Laws. Similar to the FTC, Chapter 93A prohibited "unfair methods of competition and unfair or deceptive acts or practices." Massachusetts also allowed the prevailing plaintiff to recover actual damages and attorneys' fees. Furthermore, upon a showing of willful or knowing conduct, a plaintiff could receive a mandatory award of at least double and up to treble the amount of actual damages. When the law first went into effect, however, it only allowed consumers or the state attorney general to have private rights of action. Gilleran, *supra*.

Massachusetts amended its law in 1972, adding a section conferring a private right of action to "any person who engages in the conduct of any trade or commerce..." This language was likely added to deter fraud, deception, and overreaching in the commercial markets while also redistributing the balance of power between small and large businesses. A business plaintiff could now sue under the Massachusetts UDTPA and, like a consumer plaintiff, was entitled to a lower standard of proof for liability and enhanced remedies. *Id.*

Texas lawmakers were also one of the first states to allow businesses to bring suit. In 1975, the legislature passed legislation redefining the term "consumer" to include "an individual, partnership, corporation, or governmental entity..." So a corporation could sue under its UDTPA, however, certain limitations were placed upon Texas corporations. For instance, the business needed to have \$25 million in assets or less to have standing to sue under the statute.

2. *Actual Damages*

Nearly all state UDTPAs allow a plaintiff to recover actual damages. However, most state UDTPAs do not provide a formula by which actual damages are to be calculated and the types of recoverable actual damages vary from state to state.

Causal Link

Most states only allow a plaintiff to recover those damages that were "caused" by the defendant's conduct. For instance, in Texas, a plaintiff cannot recover damages if the plaintiff cannot prove actual reliance on the defendant's alleged deceptive or unfair practice. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 822-24 (Tex. 2012). In a Washington case, a plaintiff was not permitted to recover damages where he could not

prove that he actually relied on a broker's misrepresentation concerning the boundary of the property he recently purchased. *Nuttal v. Dowell*, 639 P.2d 832, 840 (Div. 2 1982). Likewise, a plaintiff-listener who sued a radio station under the Florida Deceptive and Unfair Trade Practices Act for prematurely terminating a promotional contest could not recover because the loss of opportunity to enter the contest did not amount to actual damages. *Macias v. HBC of Florida, Inc.*, 694 So. 2d 88 (Fla. Dist. Ct. App. 3d Dist. 1997).

Some states require a plaintiff to demonstrate that the plaintiff's losses were a "reasonably foreseeable" consequence of the defendant's conduct. For example, in a Connecticut case, a court determined that a public official who was incorrectly implicated in a bribery scheme could not recover under Connecticut's Uniform Trade Practices Act because the plaintiff's injury resulted from the fallout after the scheme was exposed and not from the scheme itself. *Abrahams v. Young and Rubicam, Inc.*, 692 A.2d 709 (Conn. 1997). More specifically, the court found that damage to the plaintiff's reputation was not a reasonably foreseeable consequence of the scheme. *Id.* In contrast, in an Oregon case, plaintiffs claimed they had been misled into enrolling into a vocational school by false representations about the institution's placement rates. *Beckett v. Computer Career Institute, Inc.*, 852 P.2d 840 (Or. 1993). Those plaintiffs were permitted to recover as damages the income lost when the plaintiffs terminated their employment to take courses at the institution because the damages were reasonable and foreseeable. *Id.*

Benefit of the Bargain

Most states permit a plaintiff to recover an amount sufficient to give the plaintiff the benefit of the bargain. Benefit of the bargain damages are attractive and powerful because they often provide greater recovery than actual damages. For example, in Missouri, a plaintiff-purchaser of a defective hot tub was not entitled to a refund of the purchase price, but instead, was entitled to benefit of the bargain damages -- the difference between the actual value of the hot tub and the value it would have had if it had been represented properly. *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S. W.2d 883 (Mo. Ct. App. E.D. 1994). In an Indiana case, a plaintiff's damages were determined to be the amount by which the reconstruction exceeded insurance proceeds where a contractor fraudulently misrepresented that he could reconstruct a home destroyed by fire for an amount not to exceed the insurance proceeds. *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88 (Ind. Ct. App. 1987).

Mental Anguish

Generally, states will not allow a plaintiff to recover for emotional distress alone. See, e.g., *Morse v. Mutual Federal Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271 (D. Mass. 1982); *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433 (2010); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350 (N.J. 1997). In some states, emotional distress damages may be recovered absent physical injury if there is proof of fraud or other culpable mental state. For instance, in Texas, a plaintiff may recover for emotional distress in a deceptive trade practices case if the plaintiff can prove that the defendant's conduct was committed in a grossly negligent manner, or with intent, recklessness, or

actual awareness of the falsity of the conduct. See *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561 (Tex. 2002). In other states, a plaintiff is permitted to recover emotional distress damages. For example, a plaintiff can recover actual damages for mental anguish and humiliation under Louisiana's Unfair Trade Law. *Vercher v. Ford Motor Co.*, 527 So. 2d 995, 100 (La. Ct. App. 3d Cir. 1988). Likewise, damages for emotional distress are recoverable as actual damages under Virginia's Consumer Protection Act. *Barnette v. Brook Road, Inc.*, 429 F. Supp. 2d 741 (E.D. Va. 2006).

Physical Pain and Suffering

Damages for physical pain and suffering are sometimes recoverable if caused by a deceptive or unfair trade practice. For example, in New Jersey, a plaintiff was permitted to recover the cost of medical expenses incurred to correct the physical injuries that resulted from the plaintiff's use of an intrauterine birth control device where the manufacturer deceptively failed to disclose the risks associated with its use. *Jones v. Sportelli*, 399 A.2d 1047, 1051 (Law. Div. 1979).

3. Consequential Damages

Damages under UDTPAs are not always limited to direct economic loss. Most states allow a plaintiff to recover consequential damages in addition to actual damages. For instance, in a Texas case, a plaintiff was permitted to recover the cost of a rental car where a mechanic would not release the plaintiff's car after the plaintiff refused to pay for excess repairs that were not authorized. *Hyder-Ingram Chevrolet, Inc. v. Kutach*, 612 S.W.2d 687 (Tex. Civ. App. 14th Dist. 1981). In a Delaware case, a plaintiff-buyer of real property was permitted to recover lost profits from the nursing home the plaintiff planned to operate on the property after the seller failed to mention that the property was subject to imminent foreclosure. *Nash v. Hoopes*, 332 A.2d 411, 414 (Del. Super. Ct. 1975). In Ohio, a potential purchaser of a customized yacht was permitted to recover towing costs, gas costs, costs associated with a damage survey, and dock rental costs when the yacht caught fire while the potential purchaser was taking it on a test run. *Brenner Marine, Inc. v. George Goudreau, Jr. Trust*, 1995 WL 12118 (Ohio Ct. App. 6th Dist. 1995).

4. Rescission and Restitution

Rescission and restitution is generally available to plaintiffs in unfair and deceptive trade practices cases. In Illinois, consumers who joined a "buyers club" as a result of various misrepresentations were permitted to rescind their contracts and recover the money they paid to join the club. *American Buyers Club of Mt. Vernon, Ill., Inc. v. Honecker*, 46 Ill. App. 3d 252 (5th Dist. 1977). In Montana, a car buyer was entitled to rescind the purchase contract and recover the purchase price where the buyer had been misled by a misrepresentation that the used car was in good condition when in reality the car's frame was severely cracked. *T & W Chevrolet v. Darvial*, 641 P.2d 1368 (Mont. 1982). In North Carolina, a consumer was able to recover full restitution for a worthless product without even returning the product. *State ex rel. Edmisten v. Zim Chemical Co., Inc.*, 263 S.E.2d 849 (N.C. 1980).

Other courts take a more restrictive approach. For instance, in one Georgia case, the court determined that although a spa membership contract violated the Fair Business Practices Act, the contract was not thereby void. *Sacks v. McCrory*, 274 S.E.2d 158 (Ga. App. 1980). In Ohio, the court determined in a case involving a home improvement contract that rescission and restitution was not available under Ohio's Consumer Sales Practices Act because there had been substantial change in the subject of the consumer transaction. *Reichert v. Ingersoll*, 480 N.E.2d 802 (Ohio. 1985). In a Connecticut case involving misrepresentations in a sale of a convenience store franchise, a court held that restitution was not proper because the franchise buyers, at that point, had received five years of intangible or difficult to quantify benefits. *Aurigemma v. Arco Petroleum Products Co.*, 734 F. Supp. 1025 (D. Conn. 1990). The plaintiffs were only entitled to recover the diminution in the value of the franchise as a result of the misrepresentations.

5. Injunctive Relief

Every state attorney general has the authority to seek injunctive relief, and a majority of states also authorize individuals to seek not only damages for their own injuries but also to act as a private attorney general to seek to enjoin any future violations of state consumer protection laws. Like most injunction cases, consumer protection act plaintiffs must establish an irreparable injury to obtain injunctive relief. Single plaintiffs may not be able to meet this burden because that plaintiff may not be able to convince a court that he or she will fall for the same deceptive or unfair practice again. As a result, class actions are usually more appropriate for injunctions that seek to deter future violations. However, of note is a Washington state plaintiff was able to enjoin a business from future violations, however, despite the fact that he would no longer be personally affected. To do otherwise, said the court, would permit a "multiplicity of suits" to develop while the deceptive practices continued. *Hockley v. Hargitt*, 82 Wash. 2d 337, 510 P.2d 1123, 1132, 1133 (1973)

Whether injunctive relief is available to an individual plaintiff may also depend on whether the plaintiff has suffered injury. For instance, a private plaintiff seeking injunctive relief in New Jersey must show that he has suffered an ascertainable loss from the challenged practice. *Weinberg v. Sprint Corp.*, 173 N.J. 233, (2002). Likewise, in California "private attorneys general" must show that they have "suffered injury in fact and lost money or property as a result of ... unfair competition." Cal. Bus. & Prof. Code § 17204. On the other hand, actual damages are not required for a private plaintiff to seek injunctive relief on behalf of the public in states such as Alaska and New York. *Smallwood v. Central Peninsula General Hosp.*, 151 P.3d 319 (Alaska 2006); *McDonald v. North Shore Yacht Sales, Inc.*, 513 N.Y.S.2d 590 (Sup 1987).

6. Attorneys' Fees

Over the years, states have passed their own version of the UDTPA, offering plaintiffs enhanced remedies. The mandatory or discretionary award of attorneys' fees to prevailing plaintiffs has redistributed power in this type of litigation. In California, for example, a consumer is awarded reasonable attorneys' fees when the benefit is conferred upon the public, the financial burden of private enforcement makes an award

appropriate, and the fees should not be paid out of the recovery. See Cal. Civ. Proc. Code § 1021.5; In addition, there is a provision for consumers for claims under the Cal. Consumers Legal Remedies Act, Cal Civil Code § 1780(d). Under Florida's UDTPA, however, attorneys' fees may be awarded to the prevailing party. The court, however, has discretion to award fees to either side. See *Mandel v. Decorator's Mart, Inc.*, 965 So.2d 311 (Fla. Dist. Ct. App. 2007). Some states even go so far as to allow the amount of attorney fees awarded to be determined by the jury. See *Thorsen v. Durkin Development, LLC*, 129 Conn.App. 68 (2011). Attorneys' fees are also recoverable by a party successfully seeking injunctive relief for a UDTPA violation. See *Airflo A/C & Heating v. Pagan*, 929 So. 2d 739 (Fla.App. 2006).

The potential of an attorneys' fee award aids plaintiffs in bringing these claims as the net recovery of a successful plaintiff under a UDTPA would at least be equal to its actual damages.

7. Punitive Damages

Finally, UDPTAs provide for awards of multiple or punitive damages. In most states, consumers cannot recover damages for the same conduct under multiple legal theories. For example, a plaintiff usually is not entitled to punitive damages under common-law breach of contract and treble damages for violation of the state unfair trade practices act, when the conduct giving rise to the causes of action is the same. In Tennessee, among other states with similar laws, consumer plaintiffs suing under Tennessee's Consumer Protection Act ("TCPA") may elect their punitive damages remedy. See *Concrete Spaces v. Sender*, 2 S.W.3d 901, 909 (Tenn. 1999) (holding that a successful plaintiff could elect to recover either punitive damages under a common-law theory or treble damages under the TCPA).

Some states take actual damages and use a multiplier, while other states offer unlimited punitive damages to prevailing plaintiffs. Take, for example, South Carolina's Unfair Trade Practices Act ("SCUTPA"), which imposes mandatory treble damages for a willful and knowing violation. A violation of SCUTPA is willful when the defendant "should have known" that his actions would violate SCUTPA. See *GTR Rental, LLC v. Dalcanton*, 547 F. Supp. 2d 510, 518, 521 (D.S.C. 2008) (upholding both the punitive and treble damages awards, observing that the evidence supported findings of separate and distinct wrongs for fraud and violation of the SCUTPA). Likewise, in Delaware, monetary damages are automatically trebled. Delaware's Uniform Deceptive Trade Practices Act expressly states, "if damages are awarded to the aggrieved party under the common law or other statutes of this State, such damages awarded shall be treble the amount of actual damages proved." See Del. Code Ann. tit. 6, § 2533(c) (1998).

Most courts agree that proof of a defendant's unfair or deceptive conduct was willful or knowing is a necessary prerequisite for any award of multiple damages. The purpose of awards of multiple or punitive damages is to promote settlement in particular cases, encourage injured parties to file suit, and deter business fraud. See *Kenai Chrysler Center v. Denison*, 167 P. 3d 1240, 1260 (Alaska 2007).

B. Illinois Consumer Fraud and Deceptive Trade Practices Act

In Illinois, private individuals may bring actions under §10a of the Consumer Fraud and Deceptive Business Practices Act (“ICFDBPA”). See 815 ILCS 505/1, *et seq.* The court may award actual damages, injunctive relief, attorneys’ fees, and costs to the prevailing party. A plaintiff who is not a consumer can only maintain a claim by alleging a consumer nexus, which involves trade practices directed to the market generally or that otherwise implicate consumer protection concerns. See *Harris v. JAT Trucking of Illinois, Inc.*, No. 07-CV-2210, 2009 WL 2222740 at *9 (C.D.Ill. July 24, 2009).

1. *Actual Damages*

Section 10a(a) of the ICFDBPA states that “[a]ny person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper...”

Illinois courts have held that a private right of action does not arise without both a violation and damages. See *Duran v. Leslie Oldsmobile, Inc.*, 229 Ill.App.3d 1032 (2d Dist. 1992). A plaintiff must plead proximate causation and that he or she was deceived. See *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 776 N.E.2d 151 (2002). A plaintiff’s allegations of aggravation, inconvenience, mental anguish, and emotional distress suffered as a result of Defendant’s conduct are sufficient to plead damages. See *Fleming-Dudley v. Legal Investigations, Inc.*, No. 05 C 4648, 2007 WL 952026 at *10 (N.D.Ill. Mar. 22, 2007). In *Demitro v. General Motors Acceptance Corp.*, the court held that the plaintiff suffered substantial injury because his vehicle was wrongfully repossessed and his credit rating was damaged. 388 Ill.App.3d 15 (1st Dist. 2009). However, a consumer is not injured by an inaccurate credit report unless false information in the plaintiff’s credit report is communicated to and used by a third party. *Reeder v. HSBC USA, Inc.*, No. 09-cv-2043, 2009 WL 4788488 at *13 (N.D.Ill. Dec. 8, 2009).

2. *Injunctive Relief*

In 1990, the Illinois legislature amended the ICFDBPA to allow injunctive relief when appropriate. See 815 ILCS 505/10a(c). The courts have found that a consumer must allege facts that would indicate that he or she is likely to be damaged in the future. See *Howard v. Chicago Transit Authority*, 402 Ill.App.3d 455 (1st Dist. 2010) (denying the injunction because consumer had ceased using Chicago Transit Authority transit cards that were subject of complaint and therefore was not likely to suffer same harm complained of in the future). Illinois does not require proof of monetary damages, loss of profits, or intent to deceive to obtain injunctive relief in cases of ongoing conduct. See *Chicago’s Pizza, Inc. v. Chicago’s Pizza Franchise Limited USA*, 384 Ill.App.3d 849 (1st Dist. 2008). A plaintiff must seek injunctive relief within the three-year statute of limitations. *McCready v. Illinois Secretary of State*, 382 Ill.App.3d 789 (3d Dist. 2008).

3. Punitive Damages

The ICFDBPA does not specifically allow the courts to award punitive damages. The courts, however, have interpreted the statute to include the awarding of punitive damages. See 815 ILCS 505/10a states “the court, in its discretion may award actual economic damages or any other relief which the court deems proper”; See also *Black v. Iovino*, 219 Ill.App.3d 378, 580 N.E.2d 139, 162 Ill.Dec. 513 (1st Dist. 1991). Punitive damages must be proportionate to the nature and enormity of the wrong. These damages must be limited to an amount that would deter a person who was without pecuniary resources. One Illinois court recently held it undisputed that punitive damages are available for a violation under the Act. See *Dubey v. Public Storage, Inc.*, 395 Ill.App.3d 342 (1st Dist. 2009).

Punitive damages are properly assessed when one acts willfully, fraudulently, or with such gross negligence as to indicate a wanton disregard for the rights of others. See *Gent v. Collinsville Volkswagen, Inc.*, 116 Ill.App.3d 496 (5th Dist. 1983). The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant and to deter similar offenses in the future. See *Johnston v. Anchor Organization for Health Maintenance*, 250 Ill.App.3d 393 (1st Dist. 1993). Illinois appellate courts have adopted a three-step approach to review the trial court’s award of punitive damages: (a) whether punitive damages are available as a matter of law for the particular cause of action; (b) whether the defendant acted fraudulently, maliciously, or in some other outrageous manner such as to warrant punitive damages; and (c) that the trial court’s ultimate decision to impose punitive damages is reviewed for an abuse of discretion. See *Caparos v. Morton*, 364 Ill.App.3d 159 (1st Dist. 2006).

Illinois has also awarded punitive damages only upon a showing of nominal damages. In one such case, the plaintiff only proved nominal damages, and the trial court acted within its discretion for awarding \$300,000 in punitive damages. See *Kirkpatrick v. Strosberg*, 385 Ill.App.3d 119 (2d Dist. 2008). On the other hand, the courts have placed limitation on punitive damages, finding that a jury award of \$20 million in punitive damages and no compensatory damages was excessive. See *United States ex rel. Pileco, Inc. v. Slurry Systems, Inc.*, No. 09 C 7459, 2013 WL 3774001 at *2 (July 18, 2013).

4. Attorneys’ Fees and Costs

Section 10a(c) of the ICFDBPA provides that “in any action brought by a person under this Section, the court may grant...reasonable attorney’s fees and costs to the prevailing party.” The award of attorneys’ fees and costs is also appropriate for appellate work.

In *Krautsack v. Anderson*, the court held that when a prevailing defendant petitions a court for reasonable attorneys’ fees under Section 10a(c), the court must first make a threshold finding that the plaintiff acted in bad faith. The court considers the following factors before approving attorneys’ fees: (1) the ability of the opposing party to satisfy an award of fees; (2) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (3) whether the party requesting

fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the Act; and (4) the relative merits of the parties' positions. 223 Ill.2d 541 (2006). However, the court also held that when deciding whether to award a prevailing plaintiff attorney's fees, a threshold finding of bad faith on the part of the defendant is not required. *Id.*

C. Illinois Uniform Deceptive Trade Practices Act

Illinois also has a Uniform Deceptive Trade Practices ("IUDTP") Act similar to other states' uniform acts. While the ICFDBPA is focused on the consumer, the IUDTP allows businesses to recover for deceptive trade practices. See 815 ILCS 510/1(5). The IUDTP allows for the same damages as are available for consumers under the ICFDBPA. A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable. See 815 ILCS 510/3. However, costs or attorneys' fees or both may be assessed against a defendant only if the court finds that he has willfully engaged in a deceptive trade practice. *Id.* Courts have defined "willful" as "voluntary and intentional, but not necessarily malicious." See *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill.App.3d 849 (1st Dist. 2008).

III. Conclusion

The states have demonstrated a significant interest in protecting consumers from unfair and deceptive trade practices. Likewise, business claims under UDTAs offer great opportunities but also create risks. The lower standards of liability and much more powerful remedies are more intriguing than standard tort or breach of contract claims. But they also have many complex exceptions and limitations, requiring sophisticated defensive strategies. Damages vary from state to state. The differences in the statutory schemes can drastically affect the available remedies, particularly as they relate to treble damages. A careful review of the applicable state statutes and corresponding case law will offer guidance to parties on both sides of this type of litigation.

25647243v1

ButlerSnow 25647243v1