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

CHAPTER ONE

Unfair and Deceptive Trade Practices and Consumer Protection: A History and State Law Distinctions

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

A. Federal protection

Prior to the implementation of consumer protection acts in the United States, 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*, AM. TORT REFORM ASS'N, http://atra.org/sites/default/files/documents/Shepherd-Bailey%20White%20Paper%20-%20FINAL_0.pdf (last visited Oct. 10, 2015). 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, at 3. 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. *Id.*

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



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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. *Id.* at 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.” About CPSC, U.S. Consumer Product Safety

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.

Comm’n, <http://www.cpsc.gov/en/about-CPSC/> (last visited Oct. 29, 2015). 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.” What We Do, U.S. Food and Drug Admin., <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited Oct. 29, 2015). In addition, the National Highway Traffic Safety Administration (“NHTSA”) is tasked with ensuring consumer protection for automobiles, trucks, and motorcycles. Who We Are and What We Do, Nat’l Highway Traffic Safety Admin., <http://www.nhtsa.gov/About+NHTSA/Who+We+Are+and+What+We+Do> (last visited Oct. 29, 2015). The Federal Communications Commission (“FCC”) is responsible for broadcast communications and communication common carriers. What We Do, Fed. Comm’n Comm’n, <http://www.fcc.gov/what-we-do> (last visited Oct. 29, 2015). 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. About Us, Consumer Fin. Prot. Bureau, <http://www.consumerfinance.gov/the-bureau/> (last visited Oct. 29, 2015).

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, at 12. In addition, several model laws were developed to address consumer-merchant issues at the state level. Sheldon & Gardner, 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”). *Id.* 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. *Id.* at 381. The USTPA 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. *Id.* The UDTPA did not require consumers to prove actual confusion, reliance, damage, or intent to deceive. *Id.* 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”). *Id.* 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. *Id.*

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, at 13. The UTPCPL greatly expanded private remedies by allowing for both injunctive relief and civil penalties. *Id.* at 14. It authorized consumer class actions, individual rights of action if the damages exceed two-hundred dollars, and provided for attorneys’ fees against any violator. *Id.* 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., at 19. 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. *Id.* Such causes of action allow consumers to recover actual or punitive damages, rescission of the transaction, or benefit-of-the-bargain damages. *Id.* at 20.

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. *Id.* at 21. Every state, except for Louisiana, has adopted the frame-

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.

work of Article 2 of the Uniform Commercial Code, which provides consumer protection through express and implied warranties. U.C.C. § 2313 (2002). 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." *Id.* § 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. Tennessee Consumer Protection Act of 1977. §§ 47-18-101—47-18-130 (2015); *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 (2010); Kan. Stat. Ann. § 50-626 (1994); S.D. Codified Laws Ann. § 37-24-6 (2015)), while others are more expansive in prohibiting "unfair" and "unconscionable" behavior (*see, e.g.*, Ala. Code § 819-5 (2002); Alaska Stat. § 45.50.471 (2007); Fla. Stat. Ann. § 501.201 (2011); 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.*, N.J. Stat. Ann. § 56:8-2.12 (2015); Or. Rev. Stat. § 646.150 (2015). 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 (2015); Ind. Code Ann. § 24-5-0.5-4(b) (2015); Kan. Stat. Ann. § 50-634(c), (d) (2015); Mass. Gen. Laws Ann. ch. 93A, § 9 (2015); Mo. Ann. Stat. § 407.025 (2015); N.M. Stat. Ann. § 57-12-10 (2015); Ohio Rev. Code Ann. § 1345.09 (2015); R.I. Gen. Laws § 613.1-5.1 (2015); Utah Code Ann. § 13-11-20 (2015); Wyo. Stat. Ann. § 40-12-108 (2015)), and certain states impose additional restrictions on class actions under their CPAs (*see e.g.*, Ind. Code Ann. § 24-5-0.5-4(b) (2015) (prohibiting class actions in real property transactions); Idaho Code § 48-608(1) (2015) (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 § 819-10(f) (2015) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class"). Ga. Code Ann. § 101399(a) (2015); La. Rev. Stat. Ann. § 51:1409(A) (2015); Miss. Code Ann. § 75-24-15(4) (2015); Mont. Rev. Code Ann. § 30-14-133(1) (2015); S.C. Code Ann. § 39-5-140(a) (2015). 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. HOWARD J. ALPERIN & ROLAND F. CHASE, *CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION* § 138 (2015), available at Westlaw CLSPCR. 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 (Mich.

1987). The court 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. Am. Honda Motor Co., Inc.’s Opp’n to Pls.’ Mot. for Class Cert. at 6-10, *Mazza v. Am. Honda Motor Co.*, 2008 WL 4212883 (C.D.Cal. 2008) (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 (Ill. App. Ct. 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

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I. Introduction.

The federal Unfair and Deceptive Trade Practices Act prohibits unfair or deceptive acts or practices affecting commerce. See 15 U.S.C. § 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



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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) (2015) (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.

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.

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
- 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—75-24-29 (2015), 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.” *Id.* § 75-24-5(1). Like its federal analog, 15 U.S.C. § 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;

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.

- (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) (2015). Further, the Mississippi statute specifically prohibits “price gouging” during a declared official “state of emergency,” a term of art defined separately under state law. *Id.* § 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. *Id.* § 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. *Id.* § 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. *Id.* § 75-24-19.

The Attorney General is also authorized to seek restitution and civil penalties for any violation of the MCPA. *Id.* §§ 75-24-11 (providing for restitution); 75-24-19 (providing for 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” basis. 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

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.

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. *Id.* § 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. *Id.* § 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.” *Id.* § 75-24-19.

The Attorney General may also pursue criminal actions against violators, including escalating penalties for multiple offenders. *Id.* § 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 felonies with penalties of between one and five years in jail and between \$1,000 and \$5,000 in fines. 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.” *Id.* § 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. *Id.* § 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. *Id.* § 75-24-21.

In addition to the kinds of actions authorized under the statute, the Attorney General also has rulemaking authority under the statute. *Id.* § 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. CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES 11, (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. *Id.* app. B (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) (2015). 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.” *Id.* § 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. State Farm Bureau Cas. Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 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) (2015). However, a "prevailing plaintiff" is *not* permit-

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."

ted to obtain attorney's fees in the event that he is successful. *See, e.g., Wilson v. Nelson Hall Chevrolet*, 871 F. Supp. 279, n. 3 (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, 1173 (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) (2015). 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 (2015). 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 the MCPA as well as unjust enrichment/constructive trust, common law fraud, breach of contract, breach of good faith and fair dealing and 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. State Farm Bureau Cas. 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 of 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. State Farm Bureau Cas. 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—97-23-109 (2015) 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 Id.* §§ 75-67-101—75-67-139 (2015). 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, *Id.* § 75-24-101 (2015); magazine subscriptions, *Id.* § 75-24-131 (2015); and rental-purchase or "rent-to-own" transactions, *Id.* §§ 75-24-151—75-24-175 (2015). Still further, there are specific trade practice statutes concerning trademarks, *Id.* §§ 75-25-1—75-25-37 (2015); trade secrets, *Id.* § 79-23-1 (2015); milk and milk products, *Id.* § 75-31-1 *et seq.*; meat and poultry products and inspection, *Id.* §§ 75-33-1—75-33-111 (2015); the sale of "baby chicks," *Id.* §§ 75-39-1—75-39-13 (2015); the importation and sale of animals

or birds, *Id.* §§ 75-40-1—75-40-117 (2015); commercial feeds and grains, *Id.* §§ 75-45-1—75-45-115 (2015); commercial fertilizers, *Id.* §§ 75-47-1—75-47-39 (2015); movable homes, *Id.* §§ 75-49-1—75-49-21 (2015); water heaters, *Id.* §§ 75-51-1—75-51-11 (2015); paints and varnishes, *Id.* §§ 75-53-1—75-53-17 (2015); gasoline and petroleum products, *Id.* §§ 75-55-1—75-55-41 (2015); antifreeze and summer coolants, *Id.* §§ 75-56-1—75-56-27 (2015); liquefied petroleum gas, *Id.* §§ 75-57-1—119; and home solicitation sales, *Id.* §§ 75-66-1—75-66-11 (2015), 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 schemes 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. 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: Damages in UDAP Claims

MICHAEL C. BRUCK

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.*, 719 P.2d 531 (Wash. 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



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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

The enactment of state UDTPAs, however, has changed the way both plaintiffs and defendants approach consumer fraud litigation.

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.

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.

Texas was also one of the first states to allow businesses to bring suit. In 1975, the Texas 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 that the plaintiff had recently purchased. *Nuttall v. Dowell*, 639 P.2d 832, 840 (Wash. Ct. App. 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. 3d DCA 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 public official’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. 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 (1982); *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433 (Nev. 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

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.

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 (N.J. Sup. Ct. 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. Ct. App. 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. 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*, 361 N.E. 2d 1370 (Ill. App. 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. Ct. App. 1980).

Other courts take a more restrictive approach. For instance, 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. 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 who was able to enjoin a business from future violations. 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, 1132-33 (Wash. 1973)

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.

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.*, 801 A.2d 281 (N.J. 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 versions 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 California Consumers Legal Remedies Act; Cal. Civil Code § 1780(d). Under Florida’s UDTPA, 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. 4th DCA 2007). Some states even go so far as to allow the amount of attorneys’ fees awarded to be determined by the jury. See *Thorsen v. Durkin Development, LLC*, 20 A.3d 7007 (Conn.

App. Ct. 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. 2d DCA 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 Section 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

Illinois does not require proof of monetary damages, loss of profits, or intent to deceive to obtain injunctive relief in cases of ongoing conduct.

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.*, 594 N.E. 2d 1355 (Ill. App. Ct. 1992). A plaintiff must plead proximate causation and that he or she was deceived. See *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151 (Ill. 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.*, 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. 902 N.E. 2d 1163 (Ill. App. Ct. 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.*, 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*, 931 N.E.2d 292 (Ill. App. Ct. 2010) (denying the injunction

because consumer had ceased using Chicago Transit Authority transit cards that were the 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*, 893 N.E.2d 981 (Ill. App. Ct. 2008). A plaintiff must seek injunctive relief within the three-year statute of limitations. *McCready v. Illinois Secretary of State*, 888 N.E. 2d 702 (Ill. App. Ct. 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 and permit the awarding of punitive damages. See 815 ILCS 505/10a which 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*, 580 N.E.2d 139, (Ill. App. Ct. 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.*, 918 N.E. 2d 265 (Ill. App. Ct. 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.*, 451 N.E. 2d 1385 (Ill. App. Ct. 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*, 621 N.E. 2d 137 (Ill. App. Ct. 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*, 845 N.E. 2d 773, 790 (Ill. App. Ct. 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*, 894 N.E. 2d 781 (Ill. App. Ct. 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., 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

The differences in the statutory schemes can drastically affect the available remedies, particularly as they relate to treble damages. Damages vary from state to state.

businesses or to resolve a significant legal question regarding the Act; and (4) the relative merits of the parties’ positions. 861 N.E. 2d 633 (Ill. 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, supra.*

III. Conclusion

The states have demonstrated a significant interest in protecting consumers from unfair and deceptive trade practices. Likewise, business claims under UDTPAs 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.