

1980


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Recommended Citation

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Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence

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Introduction

Between the 1960's and the present, most states enacted consumer protection legislation designed to parallel and supplement the Federal Trade Commission Act (the Act).¹ These state statutes, which we will refer to as UDAP statutes for "unfair or deceptive acts or practices," had their genesis in various forms suggested to the states by the Federal Trade Commission (FTC or Commission)² and the

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1. 15 U.S.C. §§ 41-77 (1976) [hereinafter cited as the FTC Act]. Although there are variations in the utility and scope of these state provisions, *see* notes 64-79 *infra* and accompanying text, every state but one — Alabama — has enacted such a law. J. SHELTON & G. ZWEIBEL, SURVEY OF CONSUMER FRAUD LAW 13 (1978).

2. *See generally* Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 275 (1971) [hereinafter Lovett I]. In 1970, the FTC offered three alternative drafts of an Unfair Trade Practices and Consumer Protection Law: Alternate Form No. 1 contains the broad language of § 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition and unfair or deceptive acts or practices" in trade or commerce; Alternate Form No. 2 outlaws all forms of fraudulent, deceptive and sometimes unfair acts or practices in trade or commerce; and Alternate Form No. 3 itemizes

Commissioners on Uniform State Laws.³ The Commission strongly encouraged these state-level activities, recognizing that enforcement of the Act's broad section 5 proscription against "unfair or deceptive acts or practices" could not possibly be accomplished without extra-agency assistance.⁴

In contrast to the Federal Trade Commission Act and most interpretations of it,⁵ a large number of state UDAP statutes contain provisions that give consumers the right to bring civil actions for damages and other forms of relief against those who violate the broad legal proscriptions contained in these laws.⁶ These private remedy provisions, however, have been used only sporadically by consumers since the enactment of the statutes.

We believe that the value of UDAP statutes in private consumer protection litigation has been severely underestimated. More specifically, we view the consumer protection jurisprudence developed by the FTC under section 5 as having great importance to consumers in need of redress, and we are convinced that the state courts will make use of it in construing UDAP provisions. Our thesis, accordingly, is that consumers can and should use state UDAP provisions more frequently⁷ and effectively to enforce this federal jurisprudence in private actions brought in state court.

Part I of this article focuses on the federal courts' treatment of private claims asserted under section 5, and on the FTC's historical and current role in consumer protection. Part II continues with a detailed description of the UDAP statutes, a discussion of the manner in which many state courts have read them in light of the FTC's jurisprudence, and an examination of some practical aspects of UDAP consumer litigation, namely, remedies, class actions, and awards of attorneys' fees. We conclude in Part III with a proffered justification

the deceptive practices proscribed, and usually contains a "catch-all" clause reaching all other forms of deception. See COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C4-C5 (1970). See generally Lovett, *Deceptive Trade Practices*, 46 TULANE L. REV. 724, 730-31 (1972) [hereinafter Lovett II].

3. Two of the Commissioners' "uniform" statutes have been adopted in a variety of forms by the states: The Uniform Deceptive Trade Practices Act, 7A U.L.A. 35 (1978); and the Uniform Consumer Sales Practices Act, 7A U.L.A. 1 (1978). Because the former allows private consumer actions only for injunctive relief, its usefulness to consumers is questionable. See Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101, 1110-113. The latter statute, however, contains broad damages and other remedy provisions providing the aggrieved consumer with more incentive to take action and ability to obtain redress. See generally Rice, *Uniform Consumer Sales Practices Act — Damages Remedies: The NCCUSL Giveth and Taketh Away*, 67 NW. U.L. REV. 369 (1972).

4. See Lovett II, *supra* note 2, at 727 n.1, 729 n.10, 730 nn.14 & 15 (1972); L. RICHIE & H.I. SAFERSTEIN, *Private Actions for Consumer Injury Under State Law — The Role of the Federal Trade Commission*, in FTC TRADE REGULATION — ADVERTISING, RULEMAKING AND NEW CONSUMER PROTECTION 415 (1979).

5. See notes 8-17 *infra* and accompanying text.

6. All of the state statutes referred to in this article are cited and classified by type, available remedies and procedural features in the Appendix, *infra*. See also J. SHELDON & G. ZWIBEL, *supra* note 1, at 103, indicating that all of the state UDAP statutes which allow private actions by consumers provide for the recovery of money damages.

7. As we will discuss, there are substantial differences in the utility to consumers of the various UDAP statutes and, under some statutes, the private remedy may be illusory. See note 3 *supra*.

for these private actions and some speculation on future prospects under the statutes.

Part I: The Scope and Limitations of FTC Consumer Protection

Private Actions Under Section 5

Injured consumers have no private cause of action under section 5 of the Federal Trade Commission Act.⁸ Because of the nature of the FTC's jurisdictional authority, the extent to which consumers are protected under the federal law depends upon the FTC's willingness to act.⁹ In the leading case of *Holloway v. Bristol-Meyers Corp.*,¹⁰ the United States Court of Appeals for the District of Columbia Circuit reconfirmed the federal courts' traditional reluctance to construe section 5 to encompass private actions.¹¹ The court based its decision upon the legislative history of the Act and the underlying policy favoring a purely public enforcement mechanism.¹² It noted that the FTC is an expert body consisting of lawyers, economists, and other professionals who develop public policy in a reasoned and orderly fashion rather than by piecemeal private suits.¹³ Although private enforcement would deter deceptive and misleading practices, the court concluded that Congress, in amending section 5 in 1938, intended the Commission to use prospective remedies, such as cease and desist orders and assurances of voluntary compliance, to eliminate these practices.¹⁴ A private remedy, the court reasoned, would constitute a gross departure from this general reliance on prospective remedies and would overly penalize companies that had committed practices not considered unfair, deceptive, or misleading prior to their commission.¹⁵

8. See cases cited in *Carlson v. Coca Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).

9. Whether and whom to prosecute is within the agency's sound discretion. A private party may not bring an enforcement action before the FTC or a court. Nor does the enabling legislation require the Commission to enforce the FTC Act in any particular way. The FTC is not required to proceed by issuing a formal complaint and by giving the respondent an opportunity to explain his conduct in a formal trial type hearing. Rather, the FTC may regulate by informal or formal means; it may seek to regulate all businesses, one industry or only one firm. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 581 (2d ed. 1980). Although the courts have consistently rejected a private right of action under § 5 of the FTC Act, their rulings have not been as restrictive for other federal statutes. See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) (Bank Service Corporation Act); *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (Voting Rights Act of 1965); *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964) (Securities Exchange Act of 1934).

10. 485 F.2d 986 (D.C. Cir. 1973).

11. *Id.* at 998-1000.

12. *Id.* at 991.

13. *Id.* at 992-97.

14. *Id.* at 999-1000. See generally Note, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibility*, 69 Nw. U.L. REV. 462 (1974).

15. *Holloway v. Bristol-Meyers Corp.*, 485 F.2d at 998; see note 9 *supra*. But see

Although the attempt to extend section 5 to permit private actions did not die with *Holloway*, the case law and legislative history give little hope to those who favor such a construction of the statute.¹⁶ Amendments that would create a private right of action have been offered in Congress, but they have failed to win approval.¹⁷

Any hope consumers may have of enforcing section 5's proscriptions in private actions must be found in state UDAP statutes. The result sought by the plaintiffs in *Holloway* and other cases can be achieved in state court actions in which the courts employ ever-developing FTC jurisprudence. As background for our discussion of these statutes and the treatment they have been accorded by state courts, we will briefly review the Commission's history as a consumer protection institution, and the content of its jurisprudence.

A Short Course in FTC History and Jurisprudence

The broad sweep of FTC history reveals a continuous expansion of its power to protect consumer interests. Ironically, the purpose of the FTC, on its creation in 1914, was not to protect the consumer, but rather to strengthen the enforcement of the antitrust laws — an articulation of Congress's displeasure with the judicially-created "rule of reason."¹⁸ Section 5 of the Federal Trade Commission Act, originally declaring unfair methods of competition unlawful, was designed to fulfill the need for a broad statutory regime that would enable the agency to act against new varieties of anticompetitive practices in their incipiency.¹⁹

The fear was, however, that a statute of such breadth would become a source of vexatious litigation and over-zealous and burdensome enforcement.²⁰ To temper this fear, the FTC was not given the power to impose criminal penalties. Rather, it was to enforce the statute by an equity-like proceeding culminating in a cease and desist order.²¹ In addition, the Act contemplated purely public enforcement by an expert body defending the "public interest," rather than en-

Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 Nw. U.L. Rev. 274, 278-82 (1975).

16. See *Bott v. Holiday Universal Inc.*, [1976-2] Trade Cas. (CCH) ¶ 60,973 at 617, 22 F.R. Serv. 2d 615, (D.D.C. 1976). But see *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 587 (N.D. Ind. 1976), the only case allowing a private right of action under § 5 in certain limited circumstances. In *Guernsey*, a private right of action under § 5 was recognized where the FTC had declared the defendants' acts unlawful thirteen years before in another proceeding, and had issued a cease and desist order against them. *Id.* at 587-589. The court distinguished *Holloway*, in which the private litigants were attempting to establish a private right, on the basis that the defendants' actions had already been declared unlawful by the FTC in a separate proceeding. *Id.* at 587. *Guernsey*, however, appears to be an anomaly, and is not followed in other jurisdictions.

17. See H.R. 3816, 95th Cong., 1st Sess. (1977); H.R. REP. NO. 95-339, 95th Cong., 1st Sess. 15-17 (1977); S. 1288, 94th Cong., 2d Sess. (1976); S. 642, 94th Cong., 1st Sess. (1975). Both the Senate and House rejected legislation which would have authorized individual and class actions for those injured by the violation of a trade regulation rule or of a final cease and desist order. Prospects for passage of such legislation appear dim, particularly now that the activities of the FTC have become so controversial. See notes 56-62 *infra* and accompanying text.

18. See G. HENDERSON, THE FEDERAL TRADE COMMISSION 16-17 (1924).

19. *Id.* at 46.

20. See *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 990 (D.C. Cir. 1973).

21. See *FTC v. Gratz*, 253 U.S. 421, 436 (1920) (Brandeis, J., dissenting); Kintner &

forcement by private parties pursuing their own selfish interests.²² Section 5(b) thus limits the Commission's jurisdiction to cases in which it shall appear that a proceeding would be in the interest of the public.²³

Soon after the passage of the Act, the Commission sought to expand its authority over unfair methods of competition into the field of false and misleading advertising.²⁴ With the passage of the Wheeler-Lea Amendment in 1938,²⁵ adding the phrase "and unfair or deceptive acts or practices in commerce" to section 5's prohibition of unfair methods of competition, the FTC was expressly given the authority to proscribe practices that were unfair or misleading to the public, but not injurious to competitors.²⁶ The Commission's powers to encourage truth in advertising and fair merchandising practices have been used often since then in efforts to ensure that consumers receive both the information necessary to make intelligent choices in the marketplace and the opportunity to use that information effectively.²⁷

During most of the first several decades following passage of the Wheeler-Lea Amendment, the law-making and enforcement activi-

Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L.R. 651, 654-55 (1975).

22. See P. AREEDA, *ANTITRUST ANALYSIS* 656 (2d ed. 1974).

23. See 15 U.S.C. § 45b (1976). This provision was interpreted narrowly by Justice Brandeis in *FTC v. Klesner*, 280 U.S. 19 (1929), which involved a passing off claim between two competitors. The Court required the FTC, before issuing a cease and desist order against a deceptive practice, to show a specific and substantial public interest as opposed to a private right. *Id.* at 27. The Court concluded that the alleged unfair competition arose out of a controversy essentially private in nature. *Id.* at 30.

Since *Klesner*, however, the courts have deferred to the FTC's determination of the public interest. For example, in *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962), the majority stated, "once we say that the courts should exercise their judgment as to whether an alleged deception is of sufficient importance to warrant Commission action, we get into matters which are not entrusted to us and as to which we have little qualification and even less necessary information." *Id.* at 873. Thus, although there may be a limited review of the Commission's finding that a proceeding is in the public interest, the statutory limitation may have a practical effect on the Commission, encouraging restraint in case selection. See R. CALLMANN, *UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 94.3(c) (3d ed. 1967); French, *The Federal Trade Commission and the Public Interest*, 49 MINN. L. REV. 539, 550 (1965).

24. See *FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 491 (1922); *FTC v. Yangle*, 1 F.T.C. 13, 15-16 (1916); *FTC v. A. Theo. Abbott & Co.*, 1 F.T.C. 16, 19-20 (1916).

25. Wheeler-Lea Amendment, Pub. L. No. 447, §§ 1-5, 52 Stat. 111 (amending 15 U.S.C. §§ 41, 44, 45, 52-58).

26. The Commission's authority to prohibit false advertising without showing injury to competitors had suffered a setback in *FTC v. Raladam Co.*, 283 U.S. 643, 646 (1931). The Commission found that petitioner's obesity cure advertised as safe and usable without discomfort was actually dangerous and harmful. *Id.* at 645-46. Although the Commission found deception, it made no finding of competitive harm. Justice Sutherland, writing for the majority, found the Commission's authority limited to practices which injured competitors. *Id.* at 649. The *Raladam* holding was expressly repudiated by the Wheeler-Lea Amendment of 1938.

27. The Commission's authority to act against deceptive practices without having to show anticompetitive effect was confirmed in *Pep Boys — Manny, Moe and Jack, Inc. v. FTC*, 122 F.2d 158, 160 (3d Cir. 1941).

ties of the FTC in the consumer protection area were concentrated on the problem of deceptive practices.²⁸ Consistent with its self-limited role, the Commission expended most of its energies on preventing deception, for example, by promulgating "trade practice rules" or "industry guides,"²⁹ or on ensuring its cessation by adjudicating "cease and desist" cases, obtaining consent orders, or acquiring assurances of voluntary compliance.³⁰ The agency appears to have given little attention to the effect of deceptive practices on the consumer, to other practices that injured consumers more, to measuring the injury caused by such practices, or to the need to allocate resources to remedial or compensatory activities on behalf of the consumer. As a result, the impact of FTC jurisprudence on consumers was limited, at best.³¹

Major changes in the Commission's focus came with the "consumer movement."³² The Commission's involvement in areas beyond

28. For an exhaustive list of deceptive practices see [1971] TRADE REG. REP. (CCH) ¶¶ 7575-77; E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 443, Appendix I (1971). Some of the practices may be categorized as: characteristics of products, *see, e.g.*, FTC v. Algoma Lumber Co., 291 U.S. 67, 70 (1934) (yellow pine sold as white pine); testimonials and endorsements, *see, e.g.*, Mattel, Inc., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,735 (F.T.C. 1971) (order prohibits endorsements by famous personalities unless they have the expertise to substantiate their opinions); pricing claims, *see, e.g.*, FTC v. Mary Carter Paint, 382 U.S. 46, 47 (1965) (deceptive advertising of "free" goods); Spiegel, Inc. v. FTC, 411 F.2d 481, 483 (7th Cir. 1969) (false claims of price reductions); guarantees, *see, e.g.*, Sibert v. FTC, 367 F.2d 364, 365 (2d Cir. 1966) (failure to disclose service charges attached to guarantees is deceptive); demonstrations on television, *see, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 376 (1965) (deceptive use of mockups on television); deceptive sales, *see, e.g.*, Arthur Murray Studio of Washington, Inc. v. FTC, 458 F.2d 622, 623 (5th Cir. 1972) (inducing unwary persons into entering dance lesson contracts at exorbitant prices is prohibited); cooling-off period for door-to-door sales, *see, e.g.*, 16 C.F.R. § 429 (1980); business torts, *see, e.g.*, Waltham Watch Co. v. FTC, 318 F.2d 28, 29 (7th Cir. 1963) (passing off as a violation of § 5), *cert. denied*, 375 U.S. 944 (1963); business status, *see, e.g.*, FTC v. Royal Milling Co., 288 U.S. 212, 215-16 (1933) ("milling company" designation is unfair where company does no milling).

29. *See, e.g.*, Trade Practice Rule, Handkerchief Industry, 16 C.F.R. § 181 (Supp. 1958) Trade Practice Rule, Jewelry Industry, 16 C.F.R. § 23 (1960); Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. § 239 (1977); Guides Against Deceptive Pricing, 16 C.F.R. § 233 (1977); Guides Against Debt Collection Deception, 16 C.F.R. § 237 (1977).

30. *See* cases cited note 28 *supra*.

31. To explore this notion fully would be beyond the scope of this article. The failure of the Commission to attend to the problem of consumer injury is, in part, attributable to the manner in which it developed the jurisprudence of deception. The Commission's "business" has been largely confined to obtaining a cessation of unlawful conduct in the future. Because of this focus, the Commission need not show actual consumer injury in order to prevail. *Charles of the Ritz Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944).

Given the conceptual difficulties retrospective relief under § 5 was thought to raise, *see, e.g.*, Sebort, *Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission*, 57 MINN. L. REV. 225, 237 (1972), the absence of useful rules of trade regulation law relating to compensation for consumers is not surprising. One can look in vain for pre-1960's cases in which the FTC, in dictum or otherwise, provided the theoretical premise for a private consumer's action to obtain damages after having purchased Product X, rather than less expensive Product Y, as the result of deceptive representation.

32. Many of these structural and policy changes were precipitated by the publication of three studies highly critical of the Commission. *See, e.g.*, E. COX, R. FELLMETH, & T. SCHULTZ, NADER REPORT ON THE FEDERAL TRADE COMMISSION (1960) [hereinafter cited as Nader Report]; AMERICAN BAR ASSOCIATION, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter cited as ABA Report]; J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, SUBCOMMITTEE

mere deception and the impact of other practices on consumers were manifested in a variety of ways. In several "cease and desist" proceedings, for example, the Commission took action against a number of "business opportunity" schemes.³³ In each of these cases, the respondent's practices were alleged or found to be "fraudulent," and to have caused actual monetary loss to the consumer-victims.³⁴ Although the FTC proceedings did not achieve redress for those victims, the agency's aggressive activity undoubtedly deterred like-minded schemers and encouraged similar local enforcement efforts.³⁵ The Commission also began to show a serious interest in the consumer sales industry by challenging the validity of contractual transactions between buyers and sellers that were induced by high pressure tactics. The result of these efforts is illustrated by numerous litigated and consent orders in which sellers of goods or services were required to allow buyers a so-called "cooling-off" period in which to cancel purchases without penalty.³⁶ Finally, following its victory in the *Sperry & Hutchinson* case,³⁷ the Commission commenced a program designed, in part, to address the problems of low-income consumers by giving content to the "unfairness" proscription of section 5.³⁸ In particular, the Commission intensified its efforts

ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS. 4-5, 48-52 (Comm. Print 1960).

33. See, e.g., *Fuqua Indus., Inc.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,755 (F.T.C. 1975) (vocational school); *Holiday Magic, Inc.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,757 (F.T.C. 1974) (pyramid sales); *Postage Stamp Service Bur., Inc.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,371 (F.T.C. 1973) (stamp machines); *Universal Credit Card Acceptance Corp.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,240 (F.T.C. 1973) (credit card program); *Curtis Publishing Co.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,719 (F.T.C. 1971) (magazine subscriptions); *Universal Electronics Corp.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,930 (F.T.C. 1971) (tube testing machines).

34. See, e.g., *Universal Credit Card Acceptance Corp.* [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,938 (F.T.C. 1972).

35. See cases collected in NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ANALYSIS AND DIGEST OF CONSUMER PROTECTION CASE LAW 58 (1974).

36. See, e.g., *American Tractor Trailer Training, Inc.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,014 (F.T.C. 1975) (vocational school); *Arthur Murray Dance Studios, Inc.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,529 (F.T.C. 1971) (dance instruction); *Household Sewing Machine Co.*, [1967-70 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,882 (F.T.C. 1969) (sewing machines). Such cases preceded, of course, the Commission's promulgation of a Trade Regulation Rule covering "cooling off" periods in door-to-door sales transactions. 16 C.F.R. § 429 (1980).

37. *FTC v. Sperry & Hutchinson*, 405 U.S. 233 (1972).

38. See generally D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION REPORTING SERVICE § 3.05, at 75, § 3.16, at 91-102 (1979); Thain, *Consumer Protection: Advertising — The FTC Response*, 26 FOOD DRUG & COSM. L.J. 609, 616 (1971).

The Commission has found unfairness in the following areas: (1) affirmative disclosure: e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 891 (6th Cir. 1967) (advertiser must affirmatively disclose that symptoms of fatigue are not usually caused by factors the advertiser's product was designed to remedy); *Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps*, 16 C.F.R. § 422 (1973); *Care Labeling of Textile Wearing Apparel*, 16 C.F.R. § 423 (1973); (2) advertising substantiation: e.g., *Firestone Tire & Rubber Co.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,112 (F.T.C. 1972), (advertiser must have a reasonable basis for a tire safety claim), *aff'd*, 481 F.2d 246 (6th

against unfair credit and debt collection practices, and devoted more of its resources toward practices it characterized as "metropolitan fraud."³⁹

The Commission also used its "unfairness" powers to reach practices that exploited consumers' "psychological needs," but which were not deceptive in the traditional sense.⁴⁰ In addition, the agency began to act more vigorously and with greater imagination to eliminate or limit various practices having a more direct impact on consumers' pocketbooks — "bait and switch" selling techniques,⁴¹ inflated pricing coupled with "easy credit" claims,⁴² transactions involving financiers, whose arrangements with sellers of shoddy merchandise deprived consumers of effective remedies,⁴³ and the sending of unsolicited mail-order merchandise followed by demands for payment.⁴⁴

A new sensitivity to consumer problems among the members of Congress paralleled FTC "activism" during this period. In the late 1960's and through much of the 1970's, Congress moved to provide consumers with federal protection in a variety of areas by conferring on the FTC and other agencies new and broader substantive enforcement responsibilities, and by giving consumers new federal claims. In 1968 the Consumer Credit Protection Act (or "Truth-in-Lending" Act)⁴⁵ was enacted to afford consumers uniform and truthful information with which to make comparative decisions about the "purchase" of credit.⁴⁶ Other federal laws soon followed, protecting consumers against racial and sex discrimination in credit granting,⁴⁷

Cir. 1973); (3) unconscionability and exploitation of consumer weaknesses: *see* Rule Relating to the Use of Negative Option Plans, 16 C.F.R. § 425 (1980) (consumers' tendency to procrastinate protected by requiring adequate lead time and return privileges for such endeavors as book and record clubs); Cooling Off Period for Door-to-Door Sales, 16 C.F.R. § 429 (1980) (a three day cooling-off period is provided to protect consumers against an inherent lack of sales resistance).

39. For example, the Commission embarked upon an ambitious program in 1972 to develop "unfairness" cases which would impact upon "ghetto fraud," specifically focusing upon adhesive contract provisions and creditors' remedies widely used in ghetto selling and in the collection of low-income consumer debts. Memorandum from Morton Needelman, Assistant Director for Evaluation, Bureau of Consumer Protection to the Federal Trade Commission, (regarding the Metropolitan Retail Program) (Sept. 9, 1972). Later, this program evolved into a Trade Regulation Rule proceeding entitled "Credit Practices." *See* 40 Fed. Reg. 16,347-50 (Apr. 11, 1975).

40. *See, e.g.*, J.B. Williams Co., 81 F.T.C. 238, 244 (1972) (advertising for an over-the-counter stimulant (Vivarin) which was claimed to "make one more exciting and attractive, improve one's personality, marriage, and sex life, and solve marital and personal problems"); Pfizer Inc., 81 F.T.C. 23, 58-59 (1972).

41. *See, e.g.*, Carpets "R" Us, Inc., 87 F.T.C. 303, 320-21 (1976); James Neece, 86 F.T.C. 845, 853 (1975); Dowd's Inc., 77 F.T.C. 270, 274 (1970).

42. *See, e.g.*, *In re* Leon A. Tashof, 74 F.T.C. 1361, 1406 (1968), *aff'd*, 437 F.2d 707 (D.C. Cir. 1970).

43. *See* All State Indus., Inc. v. FTC, 423 F.2d 423, 425 (4th Cir. 1970) (disclosure that installment contracts might be assigned with consequent loss of defenses against assignee), *cert. denied*, 400 U.S. 828 (1970). *See also* Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (1980).

44. *See* Portwood v. FTC, 418 F.2d 419, 421 (10th Cir. 1969) (disclosures that mailees are under no duty to return or preserve unsolicited merchandise, and no duty to pay unless decision is made to purchase it).

45. 15 U.S.C. §§ 1601-1691 (1976).

46. *See* Mourning v. Family Publication Serv., 411 U.S. 356, 377 (1972).

47. Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691 (as amended, 90 Stat. 251 (1976)); "Regulation B", 12 C.F.R. §§ 201-202.1104 (1976).

abusive practices by credit reporting agencies,⁴⁸ unfair periodic billing practices,⁴⁹ unreasonable and harmful debt collection practices,⁵⁰ and inadequate consumer product warranty remedies.⁵¹ In each of these areas, Congress gave the FTC significant enforcement and regulatory authority which it could and did exercise under section 5.⁵²

The foregoing developments highlight an important point: during the past decade, the FTC's activities under the general proscriptions in section 5 and this new body of federal statutory consumer protection law have created a wealth of jurisprudence that is enormously valuable to consumers. The question posed, however, is how will this jurisprudence actually benefit consumers? Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975,⁵³ the Commission was authorized to bring civil actions to redress consumer injury.⁵⁴ This new statutory provision was expected by some to provide the Commission, finally, with the tools it required to protect consumers' monetary interests effectively.⁵⁵

48. Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 (1976).

49. Fair Credit Billing Act of 1974, 15 U.S.C. § 1666 (1976).

50. Fair Debt Collection Practices Act of 1977, 15 U.S.C. § 1692 (Supp. I 1977).

51. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§ 2301-2312 (1976).

52. See, e.g., 15 U.S.C. §§ 1601-1691 (1976) (Truth in Lending enforcement); 15 U.S.C. § 1681 (1976) (Fair Credit Reporting Act enforcement and interpretations); 15 U.S.C. § 1692 (1977) (Fair Debt Collection Practices enforcement); 15 U.S.C. §§ 2301-2312 (1976) (warranty act rulemaking).

53. Pub. L. No. 93-637, 88 Stat. 2183, 15 U.S.C. §§ 2301-2312 (1976).

54. The Commission may sue in a district court or a state court of competent jurisdiction for relief including, but not limited to, the following: rescission or reformation of contracts, refund of money or return of property, and payment of damages. 15 U.S.C. § 57b(a)-(b) (1976). The court is not empowered, however, to award any exemplary or punitive damages. *Id.* § 57b(b) (1976). The authority of the Commission to obtain redress by such proceedings is limited. It may do so only where consumers have been injured: (1) by violations of Commission trade regulation rules which constitute unfair or deceptive acts or practices, *id.* § 57b(a)(1) (1976), or (2) by violations of the broad § 5 proscription, but only where such a violation led to the issuance of a cease and desist order "and" where a reasonable man would have known under the circumstances that the act or practice was dishonest or fraudulent. *Id.* § 57b(a)(2) (1976).

It is beyond the scope of this article to examine the many questions the foregoing amendments raise. Illuminating discussions of many of these questions may be found, however, in the following: C. SMITH & C. WHITE, *FTC TRADE REGULATION — ADVERTISING, RULEMAKING AND NEW CONSUMER PROTECTION 337-67* (1979); B. MEZINES & J.T. ROSCH, *THE FEDERAL TRADE COMMISSION IN 1975 — WARRANTIES, CONSUMER REDRESS, RULEMAKING 163* (1975); Kinter & Smith, *supra* note 21, at 669; D. ROTHSCHILD & D. CARROL, *supra* note 38, §§ 3.03, 3.16.

55. See Kintner & Westermeier, *Obtaining Refunds for Consumers Under Section 19 of the Federal Trade Commission Act*, 29 SYRACUSE L. REV. 1025, 1038-43 (1978). The General Accounting Office has recently cast doubt upon the FTC's ability to obtain consumer redress under Magnuson Moss. See U.S. COMP. GEN., *GAO REPORT TO THE CONGRESS: VICTIMS OF UNFAIR BUSINESS PRACTICES GET LIMITED HELP FROM THE FEDERAL TRADE COMMISSION* (1978). The GAO studied 24 consumer redress cases brought by the FTC during a one year period (June 1977 to August 1978); the Commission obtained no redress in 12 cases. *Id.* at 8-10. In most of the others the recovery was small. *Id.* at 8. The GAO attributed the FTC's failure to obtain adequate redress on behalf of consumers to the FTC's time-consuming procedures, *id.* at 12-16, internal management problems, *id.* at 19-23, and the weak financial position of many of the businesses it investigates. *Id.* at 1-11.

What seemed to be limitless possibilities for the FTC's consumer protection activities, however, are now in doubt. In the few years following passage of the Magnuson-Moss Act, the FTC lost its charmed position by attempting to exercise its authority in innovative areas like children's advertising.⁵⁶ Moreover, both the business community and the press have scorned the agency for wasting its resources by promoting excessive regulation through rulemaking.⁵⁷ The result of this political groundswell was the FTC Improvements Act of 1980,⁵⁸ which reduced the Commission's power to issue rules applying to certain industries,⁵⁹ and subjected its remaining rulemaking authority to a two-house legislative veto, which cannot in turn be vetoed by the President.⁶⁰

Despite the 1980 amendments, the Commission's broad jurisdictional authority to protect consumer interests remains basically intact.⁶¹ Nevertheless, its recent experiences may force the FTC to keep its eye constantly on the political currents of the day. In addition, budgetary curtailments in an "era of limits" may well further reduce the Commission's practical ability to use its enforcement authority fully.⁶² On the other hand, the Commission undoubtedly will continue to build a body of consumer protection law by rule and adjudication, adding to the already substantial body of jurisprudence developed through the years.⁶³ When considered in conjunction with the private remedy provisions contained in state UDAP statutes, the construction of those statutes by the state courts, and the expansion in the availability of legal services to the populace as a whole, this

56. See 43 Fed. Reg. 17,967 (1978).

57. See Wash. Post, Aug. 13, 1979, at A20, col. 1; N.Y. Times, Nov. 5, 1979, at D5, col. 4; Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REGULATION 33, 38 (Jan./Feb. 1980).

58. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (to be codified at 15 U.S.C. § 58).

59. Restrictions have been placed on Commission activities in private standard setting and certification, Pub. L. No. 96-252, § 7, 15 U.S.C. § 57a(a)(1)(B); insurance, *id.* § 5, 15 U.S.C. § 46; children's advertising, *id.* § 11, 15 U.S.C. § 57a; generic trademarks, *id.* § 18, 15 U.S.C. § 41; agricultural cooperatives, *id.* § 20, 15 U.S.C. § 41; the funeral industry, *id.* § 19, 15 U.S.C. § 41. See CONF. REP. NO. 96-917 ON H.R. 2313, 96th Cong., 2d Sess. (1980) (as approved by conferees), reprinted in [1980] ANTITRUST & TRADE REG. REP. (BNA) No. 963 (May 8, 1980).

60. Federal Trade Commission Improvements Act of 1980, § 21(a) (to be codified in 15 U.S.C. § 57a); see CONF. REP., *supra* note 59, § 21. There is considerable doubt about the constitutionality of such a legislative veto provision. See generally Dixon, *The Congressional Veto and Separation of Powers*, 56 N.C. L. REV. 423 (1978). Perhaps because of these doubts, the amendments provide that any interested person may institute a declaratory judgment action in a United States District Court for a determination of the constitutionality of any of these provisions. *Id.* § 21(f).

61. It is too soon to predict what the next phase of the FTC will be — whether the agency will be dismantled completely or whether it will further increase its efforts in fields over which it has authority and interest.

62. See generally 126 CONG. REC. S6111 (daily ed. June 3, 1980).

63. See generally Givens, *FTC Amendments of 1980*, 183 N.Y.L.J. 1, col. 1 (June 16, 1980). Givens, a former New York Regional Director of the FTC, predicts: "In choosing how to employ its resources and seeking to avoid repetition of the legislative results of 1980, the Commission might take into account the areas of greatest concern to the general public, the support of which is essential to its activities and indeed in the end, its continued existence. Where public concern is at a lower level, an agency may, of course, also proceed by seeking to find common ground among those concerned with a problem, in which event investment of political energy on both sides may be minimal." *Id.* at 4.

jurisprudence will bring on a new era in which consumers, seeking direct, private redress for injuries to their interests, will play an increasingly important role in comparison to the FTC.

To demonstrate the manner in which we believe this development will transpire, we turn in Part II of this article to an examination of the UDAP statutes and practice under them.

Part II: Practice and Prospects Under UDAP Statutes

The Statutory Variations

Legislation more or less paralleling the proscription against "unfair or deceptive acts or practices" contained in section 5 of the Federal Trade Commission Act is now in effect in forty-nine states, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.⁶⁴ The UDAP statutes, however, vary in the legal prohibitions they employ as well as in the types of relief they make available to consumers.

Presently, the largest number of UDAP statutes contain language either identical to section 5 — including unfair methods of competition — or a proscription against "unfair or deceptive acts or practices" alone.⁶⁵ A substantial number of the statutes itemize certain deceptive practices that are *per se* unlawful, with or without a "catch-all" phrase designed to reach any others.⁶⁶ Provisions in other statutes also outlaw fraudulent and/or unconscionable practices.⁶⁷

Unlike section 5, forty-two state statutes expressly provide that consumers may sue those engaged in prohibited practices to recover damages or to obtain other relief.⁶⁸ The statutes commonly permit rescission of transactions that violate statutory proscriptions.⁶⁹ Recovery of actual damages is allowed under all of the private action provisions, and under most provisions the prevailing consumer may be granted an award of attorney's fees.⁷⁰ The fee award provisions are intended to permit consumers to attract competent counsel to represent them in connection with the claims created by the statutes, and to provide an incentive for consumers to engage in litigation to

64. FEDERAL TRADE COMMISSION, FACT SHEET, STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES 1 (rev. Nov. 1979) [hereinafter FTC FACT SHEET].

65. See Appendix cols. 1 & 2, *infra*; FTC FACT SHEET, *supra* note 64, at 1.

66. See Appendix col. 3, *infra*.

67. *Id.* col. 4.

68. *Id.* col. 6. In addition, the courts of two other states, Arizona and Delaware, have construed UDAP statutes to provide an implied right of action. See Selinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974); Young v. Joyce, 351 A.2d 857, 859 (Del. 1975).

69. See Appendix col. 10, *infra*; see, e.g., CONN. GEN. STAT. ANN. §§ 42-110g(a), (d) (West 1980); ILL. REV. STAT. ch. 121 1/2, § 270a(a) (1972); OHIO REV. CODE ANN. § 1345.09(A) (Anderson 1979).

70. See Appendix col. 12, *infra*.

protect their rights so that the statutes will be fully enforced.⁷¹

Many UDAP statutes give additional incentives to those contemplating private actions by providing for the recovery of more than actual damages. Seventeen states provide for the doubling or trebling of actual damages in such actions.⁷² Multiple damages may be mandatory,⁷³ may depend upon whether the violation was knowing or intentional,⁷⁴ or may be available only in the discretion of the court.⁷⁵ In sixteen states, consumer-litigants may obtain minimum statutory damages (commonly \$100 to \$300) or their actual damages, whichever are higher.⁷⁶ Twelve states also provide for the imposition of punitive damages in consumer actions,⁷⁷ though such damage awards ordinarily are reserved for instances in which the violator's acts constituted a grievous violation of societal interests.⁷⁸

Although generalizations about the meaning and utility of statutes that vary in many of their particulars must be made cautiously, the manner in which the proscriptions of UDAP statutes have been construed by the state courts indicates that the state courts do not regard the differences among these statutes as extensive. To the contrary, state court decisions under "unfair or deceptive acts or practices" statutes demonstrate a clear trend toward permitting consumers to premise private actions on past and present FTC initiatives against such activities. More specifically, state courts applying these statutes increasingly have adopted the standards of "unfairness" and "deception" that have been developed and used by the FTC, and approved by the federal courts.⁷⁹

71. See, e.g., *Bartner v. Carter*, 405 A.2d 194, 201 (Me. 1970). See also *Lovett I*, *supra* note 2, at 281-82; Schulman, *Little F.T.C. Act: The Neglected Alternative*, 9 J. MAR. J. PRAC. & PROC. 351, 369 (1976).

72. See Appendix col. 8, *infra*. Treble damage provisions are designed to encourage UDAP enforcement by private individuals injured by unfair trade practices. See *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, 5 (1979). As Lovett notes, the potential of double or treble damage liability also can be expected to lead to more pre-litigation settlements, because it enhances consumers' bargaining power at that stage of the proceedings. See *Lovett I*, *supra* note 2, at 285.

73. See, e.g., *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 271, 390 A.2d 566, 571 (1978) (Pashman, J., concurring); *Neveroski v. Blair*, 141 N.J. Super. 365, 377-78, 358 A.2d 473, 479 (1976); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 105-106, 245 S.E.2d 801, 807 (1978); *Woods v. Littleton*, 554 S.W.2d 662, 671 (Tex. 1977).

74. See, e.g., *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 815, 242 S.E.2d 740, 742 (1978).

75. One example of such a provision is the Vermont statute, under which the court may grant recovery of "exemplary damages not exceeding three times the value of the consideration given." 9 VT. STAT. ANN. § 2461(b) (1980).

76. See Appendix col. 7, *infra*. A recent Oregon case involving a minimum damages remedy is a good example. See *Crooks v. Pay Less Drug Stores Northwest*, 285 Or. 481, 490, 592 P.2d 196, 200 (1979). In *Crooks*, the consumer's actual damages amounted, arguably, to only \$2.00, but he recovered \$200.

77. See Appendix col. 9, *infra*.

78. See, e.g., *Crooks v. Pay Less Drug Stores Northwest*, 285 Or. 481, 488, 592 P.2d 196, 199 (1979); *Allen v. Morgan Drive Away, Inc.*, 273 Or. 614, 542 P.2d 896, 898 (1975). Cf. *Hoffman v. Ryan*, 422 N.Y.S.2d 288, 291-92 (Civ. Ct. 1979) (punitive damages "may be assessed to deter consumer fraud '[I]f punitive damages are to be awarded to protect the public from continuation of a fraudulent consumer scheme, they must be taxed in an amount which will accomplish that purpose.'").

79. Although our focus is on the interrelationship between UDAP statutes and the jurisprudence of the FTC, it is worth noting that the scope of the state statutes often enables consumers to initiate action in subject areas over which the Commission has no jurisdiction, or as to which it has shown little interest. For example, a New Jersey

Adoption of FTC Standards

Although the vast body of federal trade practices law interpreting the unfairness and deception proscriptions of section 5 was developed by an agency that cannot act on behalf of individual consumers,⁸⁰ and that, until recently, was empowered to employ only prospective remedies, the state courts have used this jurisprudence, almost without hesitation, to afford consumers retrospective redress in private UDAP actions.⁸¹ The explanation for this state-level adoption of federal standards lies largely in the statutes themselves.

More than twenty UDAP statutes specifically direct the state courts to employ the jurisprudence of the FTC, the federal courts, or both in construing the enumerated statutory proscriptions.⁸² Even

court trebled damages in a medical malpractice action, in which the consumer relied on that state's UDAP statute in asserting that the defendant had failed to disclose material risks involved in the use of an intra-uterine device. *Jones v. Sportelli*, 166 N.J. Super. 383, 390, 399 A.2d 1047, 1051 (1979). Litigation under the statutes has also involved such topics as utility rate charges, *see Lowell Gas Co. v. Attorney General*, 79 Mass. Adv. Sh. 49, 49-50, 385 N.E.2d 240, 242-43 (1979); insurance company claims practices, *see Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 566 S.W.2d 724, 725 (Tex. Civ. App. 1978); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash. 2d 355, 357, 581 P.2d 1349, 1350 (1978); *Dodd v. Commercial Union Ins. Co.*, 365 N.E.2d 802, 803 (1977); household goods movers' practices, *see American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 287 (Tex. Civ. App. 1979); and landlord-tenant relationships, *see Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 572, 574 (1977); *York v. Sullivan*, 369 Mass. 157, 159, 338 N.E.2d 341, 344 (1975). On the other hand, some state courts have read legislative instructions to construe the statutes by reference to § 5 of the FTC Act, *see notes 80-83 infra* and accompanying text, to limit the scope of such statutes to subjects over which the Commission has jurisdiction. *See, e.g., Idaho First Nat'l Bank v. Wells*, 596 P.2d 429, 432 (Idaho 1979) (since the FTC Act exempts banks, so does the Idaho UDAP statute).

80. This limitation is imposed by the "public interest" standard by which FTC jurisdiction is constrained. *See* 15 U.S.C. § 45(b) (1976); *FTC v. Klesner*, 280 U.S. 19, 27-28 (1929); notes 21-23 *supra* and accompanying text.

81. There has been some scholarly debate about the propriety of using legal standards developed in the context of governmental enforcement activities to afford private relief to consumers. *Compare Lynn, Anatomy of a Deceptive Trade Practices Case*, 31 S.W.L.J. 867, 869-71 (1977) (arguing against the use of the "capacity to deceive" test) with Note, *Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions*, 10 GONZ. L. REV. 457, 473-74 (1975) (adoption of the capacity to deceive test would provide consumers with more incentive to proceed under state consumer fraud laws). Most state courts, however, have not undertaken this sort of analysis; rather, they have chosen to use the federal standards to fulfill the legislatures' intentions that UDAP statutes be employed to the utmost degree in the battle to eradicate all forms of unfair or deceptive business practices. *See American Buyers Club, Inc. v. Hayes*, 46 Ill. App. 3d 270, 271, 361 N.E.2d 1383, 1384 (1977). To the extent that these statutes were enacted to foster private assistance to the FTC in accomplishing its mandate under § 5, *see Gross-Haentjens v. Leckenby*, 38 Or. App. 313, 589 P.2d 1209, 1210 (1979), it is clear that this objective could not be achieved except by applying the same standards in consumers' actions.

82. *See* Appendix col. 5, *infra*. The legislative directions are stated in various ways. For example, the Ohio Consumer Sales Practices Act calls for "great weight" to be given to Federal Trade Commission and federal court rulings. OHIO REV. CODE ANN. § 1345.02(C) (Page Supp. 1979). *See also* ALASKA STAT. § 45.50.545 (Supp. 1979). In Illinois, "consideration shall be given to interpretations of the Federal Trade Commission and the federal courts relating to § 5(a) of the Federal Trade Commission Act." ILL. REV. STAT. ch. 121 1/2, § 262 (1972). By far the largest number of the statutes contain a provision calling for federal trade practices law to be used as a guide in construing the state enactments. *See, e.g.,* CONN. GEN. STAT. ANN. § 42-110(b) (West Supp. 1980);

when a UDAP statute does not speak in such terms, however, state courts frequently will look to that body of federal law because of the similarity between the state statutory language and that of section 5, and because federal law is a readily available and rational source of authority on the meaning of the broad prohibitions adopted by the state legislatures.⁸³

The significance of state court adoption of FTC standards in determining what is "unfair" or "deceptive" in consumer actions is two-fold. First, the use of the federal tests substantially reduces the requirements of proof consumers must meet to achieve redress for "consumer fraud," and thus enhances the probability of success in UDAP litigation.⁸⁴ Second, consumers have available a wealth of "good law" interpreting UDAP prohibitions, which they may in reasonable confidence present to the state courts, and with which they can reasonably be assured of persuading those courts to rule for them.⁸⁵ In the following sections we will review the state courts'

MASS. ANN. LAWS ch. 93A, § 2(b) (Michie/Law Co-op Supp. 1980); 9 VT. STAT. ANN. § 2453(b) (1970).

A legislature's direction that the courts are to be "guided" by federal trade practices law is, of course, inherently ambiguous. It may indicate an intent to limit the courts' determinations that acts are unfair or deceptive to instances in which the Commission or federal courts have said so. *Cf.* Department of Legal Affairs v. Rogers, 329 So. 2d 257, 265 (Fla. 1976) (Florida UDAP statute interpreted to require the enforcing and rulemaking authority to comply with the federal trade law standards in effect on or before the effective date of the law). On the other hand, the courts which have given broad construction to UDAP statutes have expressed the view that they are free to go beyond what the FTC has done. *See, e.g.,* Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170, 174 n.4 (Super. Ct. 1979). This viewpoint appears to represent the trend in the cases and allows the state courts to deal effectively with the great variety of alleged unfair or deceptive acts brought to their attention. *See* note 79 *supra*.

83. *See, e.g.,* Guste v. Demars, 330 So. 2d 123, 125 (La. App. 1976); note 82 *supra*; Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 461-62, 329 A.2d 812, 817-18 (1974). Indeed, the state courts have consistently rejected due process challenges to these statutes due to the existence of over thirty years of federal precedents, which cure any "vagueness" problem. *See, e.g.,* State v. O'Neill Investigations, Inc., 609 P.2d 520, 530-34 (Alaska 1980); Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 187, 380 N.E. 2d 790, 793-94 (1978); State v. Reader's Digest Assoc., 81 Wash. 2d 259, 274-75, 501 P.2d 290, 299-302 (1972).

84. As many courts have recognized, UDAP statutes were intended to relegate the elements of common-law fraud to the realm of historical curiosity. *See, e.g.,* Heller v. Silverbranch Constr. Corp., 78 Mass. Adv. Sh. 2839, 382 N.E. 2d 1065, 1069-70 (1978); Hardy v. Toler, 288 N.C. 303, 307, 218 S.E.2d 342, 346 (1975).

85. Because it is the federal courts which review FTC actions, *see generally* 5 U.S.C. §§ 701-706 (1976), it is safe to assume that state court judges are unfamiliar, or at least less familiar, with this body of federal trade practices law. The cases demonstrate, however, that despite their unfamiliarity, state court judges who are required to construe UDAP statutes are willing to look to a wide variety of sources in doing so.

Federal appeals and Supreme Court decisions are commonly cited. *See, e.g.,* Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170, 175 (Super. Ct. 1979); Commonwealth v. DeCotis, 366 Mass. 234, 240, 316 N.E.2d 748, 754 (1974); Spradling v. Williams, 566 S.W.2d 561, 563 (Tex. 1978); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 47, 554 P.2d 349, 357-58 (1979). Adjudicated orders of the Commission will be considered. *See, e.g.,* Guste v. Demars, 330 So. 2d 123, 126 (La. App. 1976); Reiter Oldsmobile v. General Motors Corp., 79 Mass. Adv. Sh. 2091, 2096-97, 393 N.E.2d 376, 378 (1976); Schubach v. Household Fin. Corp., 376 N.E.2d 140, 141-42 (Mass. 1978); PMP Assoc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915, 918-19 (1975); Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812, 819 (1974); Vargas v. Allied Fin. Co., 545 S.W.2d 231, 233 (Tex. Civ. App. 1976). While some state courts have stated that FTC consent orders do not constitute "authoritative interpretations" of federal law, *see* Whittinsville Plaza, Inc. v. Kotseas, 79 Mass. Adv. Sh. 1262, 1283, 390 N.E.2d 243, 252 (1979), other courts have relied upon them in construing UDAP proscriptions, viewing the Commission's injunction of the practices covered in consent orders as indicative of its position that § 5 renders

treatment of FTC jurisprudence and discuss exemplary cases that have employed it.

Deception

Like the FTC and many federal courts, state courts have ruled that the purpose of UDAP provisions is to protect "[t]he ignorant, the unthinking, and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."⁸⁶ Thus, in keeping with the federal interpretations of deception under section 5, the state courts have said that to prevail in a UDAP action based upon alleged deception, the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception.⁸⁷

those, or similar, practices unlawful. *See, e.g.*, *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980); *Gour v. Daray Motor Co.*, 373 So. 2d 571, 577 (La. App. 1979); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 291-92 (Tex. Civ. App. 1978). *Cf.* *Invention Marketing, Inc. v. Spannaus*, 279 N.W.2d 74, 78 (Minn. 1979) (citing evidence that defendant's Pennsylvania affiliate entered into FTC consent order to provide information to customers as evidence that defendant could comply with similar requirements of Minnesota law). Other courts have considered FTC Rules, *see, e.g.*, *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 199, 380 N.E.2d 1040, 1047 (1978); *cf.* *Donnelly v. Mustang Pools, Inc.*, 84 Misc. 2d 28, 33, 374 N.Y.S.2d 967, 972-73 (Sup. Ct. 1975) (contract cancelled because in violation of FTC door-to-door rules), and *Guides, see, e.g.*, *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 n.8 (Alaska 1980); *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 222-23, 379 N.E.2d 52, 54-55 (1978). Finally, a few state courts have turned to FTC advisory opinions, *see* *PMP Assoc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915, 919 (1975), and even Commission complaints, *see* *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978); *Department of Legal Affairs v. Rogers*, 329 So. 2d 257, 267 (Fla. 1976).

As the foregoing discussion should suggest, private counsel who engage in UDAP litigation should become familiar with the many judicial and administrative rulings concerning the lawfulness of practice under § 5. The extent to which counsel search the federal precedents and carefully lay out the rules they wish the state courts to employ may well determine who succeeds. Indeed, one court lamented that the parties had not brought to its attention any FTC or federal court interpretations of unfairness which related to the acts it was being asked to evaluate under a UDAP statute. *Mechanics Nat'l Bank v. Killeen*, 79 Mass. Adv. Sh. 129, 139, 384 N.E.2d 1231, 1237 (1979). The absence of such authority may prove fatal to a plaintiff's action. *See* *Reiter Oldsmobile v. General Motors Corp.*, 79 Mass. Adv. Sh. 2091, 2096-97, 393 N.E.2d 376, 378 (1979). The persuasive authority of federal trade practices law may also be employed, of course, in the defense of a UDAP claim. *See, e.g.*, *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 199, 380 N.E.2d 1040, 1047 (1978); *Gour v. Daray Motor Co.*, 373 So. 2d 571, 576 (La. App. 1979); *PMP Assoc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915, 918-19 (1975).

86. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273, 401 N.Y.S.2d 182, 184, 372 N.E.2d 17, 19 (1977). *See also* *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 222, 379 N.E.2d 52, 54 (1978); *People v. Volkswagen, Inc.*, 47 A.D.2d 868, 868, 366 N.Y.S.2d 157, 158 (1975).

87. *See, e.g.*, *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 222, 379 N.E.2d 52, 54 (1978); *Heller v. Silverbranch Constr. Corp.*, 78 Mass. Adv. Sh. 2839, 382 N.E.2d 1065, 1069-70 (1978); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768, 779 (1975); *State v. Hudson Furniture Co.*, 165 N.J. Super. 516, 520, 398 A.2d 900, 901-902 (1979); *Fenwick v. Kay American Jeep*, 72 N.J. 372, 378, 371 A.2d 13, 16 (1977); *Spradling v. Williams*, 566 S.W.2d 561, 562-63 (Tex. 1978); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 51, 554 P.2d 349, 358 (1976); *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wash. App. 742, 747-48, 551 P.2d 1398, 1403 (1976). *But see*

While proof of common law fraud or deceit necessarily establishes a violation of the deception prohibition,⁸⁸ the converse is not true, *i.e.*, defenses based upon such common law torts ordinarily have no relevance to the issues in a UDAP action.⁸⁹ In determining whether an act is "deceptive," the emphasis is on the effect of the actor's conduct on the consumer rather than on his intent, which is generally unimportant.⁹⁰ The good faith of the alleged violator is consequently not a defense to a UDAP claim.⁹¹ Moreover, the consumer's reliance on the deception is immaterial: reliance need not be pleaded or proved to establish a UDAP violation for deceptive practices.⁹²

Unfairness

FTC consumer protection activity under the "unfairness" power is a comparatively recent development, dating approximately from the early 1970's and the decision of the United States Supreme Court in *FTC v. Sperry & Hutchinson*.⁹³ For that reason, and because the "unfairness doctrine" can be used to challenge practices that are otherwise permissible under state law,⁹⁴ one would not necessarily expect the state courts to be receptive to its adoption in the construction of UDAP provisions. Nevertheless, the decided trend is toward employment of the "unfairness doctrine" in private actions.

State courts have recognized, for example, that the meaning of "unfairness" must be developed by the gradual process of inclusion and exclusion, through which they may "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."⁹⁵ The circumstances of

Bartner v. Carter, 405 A.2d 194, 200 (Me. 1979) (where "loss of money or property" is an element of the claim, mere proof of capacity to deceive is insufficient).

88. See, e.g., *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

89. See e.g., *Heller v. Silverbranch Constr. Corp.*, 78 Mass. Adv. Sh. 2839, 382 N.E.2d 1065, 1069-70 (1978); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768, 799 (1975); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

90. See *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980); *Grimes v. Adlesperger*, 67 Ill. App. 3d 582, 585, 384 N.E.2d 537, 539 (1978); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 51, 554 P.2d 349, 357-58 (1976).

91. See *American Buyer's Club, Inc. v. Honecker*, 46 Ill. App. 3d 252, 259, 361 N.E.2d 1370, 1374 (1977).

92. See *Perry v. Hansen*, 120 Ariz. App. 266, 270, 585 P.2d 574, 578 (1978); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768, 779 (1975). The importation of a reliance requirement under the statutes would lead the courts into the rules of common-law deceit, undermining the intent of the legislatures to facilitate consumer redress. To the extent that some requirement akin to reliance is deemed appropriate, it has been suggested that the consumer simply should be obligated to show that his purchase occurred at the time of the commission of the deceptive practice. See *Wade & Kamenshine, Restitution For Defrauded Consumers: Making The Remedy Effective Through Suit By Governmental Agency*, 37 GEO. WASH. L. REV. 1031, 1061 (1968).

93. 405 U.S. 233 (1972). See generally *Thain, Consumer Protection: Advertising — The FTC Response*, 26 FOOD DRUG & COS. L.J. 609, 616-20 (1971). A good deal of the recent criticism of the Commission, which culminated in the FTC Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (to be codified in 15 U.S.C. § 58), arose as the result of the agency's employment of its "unfairness" jurisdiction in several subject areas, most notably children's advertising. See Pub. L. No. 96-252, § 11 (to be codified in 15 U.S.C. § 57a). Despite some calls to do so, however, Congress did not eliminate or substantially limit the unfairness proscription.

94. *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 239 n.4 (1972).

95. *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748, 754 (1974) (quoting *L. Hand, J.*, in *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936)). This rule

each case will be considered, and unfairness measured not simply by determining whether particular conduct is lawful apart from the statutory proscription, but also by analyzing the effect of that conduct on the public.⁹⁶ Thus, even lawful acts may be scrutinized in consumers' actions under the statutes.⁹⁷

To the extent that they have sought to define the elusive unfairness proscription, many state courts have explicitly employed the tests that the FTC originally set forth in the "Cigarette Trade Regulation Rule,"⁹⁸ as subsequently approved in the *Sperry & Hutchinson* case.⁹⁹ As a result, the analysis of an assertion of unfairness in a private UDAP action will proceed, in those courts, much as it would in a Commission proceeding under section 5. The court must determine whether a challenged act (1) "without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."¹⁰⁰

The state courts, of course, are not bound to adhere to the FTC's view of what is "unfair."¹⁰¹ Nevertheless, though some state courts appear to have given the federal standards little more than "lip-serv-

evolved because "[w]hat is unfair is a definitional problem of long standing, which statutory draftsmen have prudently avoided. It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." *Levings v. Forbes & Wallace, Inc.*, 1979 Mass. App. Ct. 2419, 396 N.E.2d 149, 153 (1979) (quoting H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914)). *See also* *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170, 175 (Super. Ct. 1979); *Perrin v. Pioneer Nat'l Title Ins. Co.*, 83 Ill. App. 3d 664, 671-72, 404 N.E.2d 508, 514 (1980); *Lowell Gas Co. v. Attorney General*, 79 Mass. Adv. Sh. 49, 65, 385 N.E.2d 240, 249 (1979).

96. *See, e.g.*, *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 142 (Mass. 1978); *Lorenz, Inc. v. Northhampton Nat'l Bank*, 1978 Mass. App. Ct. 995, 381 N.E.2d 1108, 1109.

97. *See* *Perrin v. Pioneer Nat'l Title Ins. Co.*, 83 Ill. App. 3d 664, 671, 404 N.E.2d 508, 513-14 (1980); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 142 (Mass. 1978); *Mechanics Nat'l Bank v. Killeen*, 79 Mass. Adv. Sh. 129, 139, 384 N.E.2d 1231, 1237 (1979).

98. 29 Fed. Reg. 8325, 8355 (1964).

99. FTC v. *Sperry & Hutchinson*, 405 U.S. 233, 244 n.5 (1972).

100. *Id. See, e.g.*, *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980); *Covenant Radio Corp. v. Ten Eighty Corp.*, 35 Conn. Supp. 1, 390 A.2d 949, 955 (1977); *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170, 175 (Super. Ct. 1979); *Perrin v. Pioneer Nat'l Title Ins. Co.*, 83 Ill. App. 3d 664, 670, 404 N.E.2d 508, 513 (1980); *Levings v. Forbes & Wallace, Inc.*, 1979 Mass. App. Ct. 2419, 396 N.E.2d 149, 153 (1979); *Gendron Lumber Co. v. Great Northern Homes, Inc.*, 1979 Mass. App. Ct. 1927, 395 N.E.2d 457, 462-63 (1979); *Lorenz v. Northhampton Nat'l Bank*, 1978 Mass. App. Ct. 995, 381 N.E.2d 1108, 1109 (1978); *Frank J. Linhares Co. v. Reliance Ins. Co.*, 4 Mass. App. Ct. 617, 357 N.E.2d 313, 316 n.4 (1976); *State v. J.C. Penney Co.*, 292 N.C. 311, 327, 233 S.E.2d 895, 905 (1977) (*Huskins, J.*, dissenting); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812, 818-19 (1974); *Christie v. Dalmig, Inc.*, 136 Vt. 597, 601, 396 A.2d 1385, 1388 (1979).

101. *See* *Vargas v. Allied Fin. Co.*, 545 S.W.2d 231, 233 (Tex. Civ. App. 1976); *State v. Reader's Digest Assoc.*, 81 Wash. 2d 259, 501 P.2d 290, 301 (1972).

ice,"¹⁰² others have indicated a willingness to use the tests to develop imaginative rules and remedies in consumer protection litigation under the UDAP statutes.¹⁰³

Exemplary State Decisions

As we have just shown, state courts frequently have turned to federal trade practices law to determine the meaning of the prohibitions contained in UDAP statutes. As the following discussion of certain of the decided cases illustrates, the impact of the state courts' adoption of these standards may well be to make virtually all of the FTC's consumer protection jurisprudence privately actionable.

In *Staney v. Westwood Auto, Inc.*,¹⁰⁴ for example, the plaintiff alleged that the merchant seller of a used automobile knew or should have known that the car's engine was defective at the time of sale, but had failed to disclose that fact.¹⁰⁵ Specifically relying upon FTC deception cases, the Massachusetts Supreme Judicial Court ruled that this allegation was actionable under the state's UDAP statute, holding that the defendant's failure to disclose had the "capacity or tendency to deceive the buyer."¹⁰⁶ The court emphasized the sharp distinctions between actions under the Massachusetts statute and those for deceit, stating:

As numerous FTC cases have made clear, the definition of an actionable "unfair or deceptive" act or practice goes far beyond the scope of the common law action for fraud and deceit . . . [among the distinctions are that] in the statutory action, proof of actual reliance is not required . . . and it is not necessary to establish that the defendant knew that the representation was false.¹⁰⁷

Gour v. Daray Motor Co.,¹⁰⁸ another deception case, involved a recent, highly-publicized consumer issue. The plaintiff-consumer, an "Oldsmobile man," had purchased a so-called "Chevymobile" — a 1977 Oldsmobile Delta 88, later found to have a Chevrolet engine.¹⁰⁹ After all the furor over the hybrid vehicles began, and Gour discovered the engine substitution in his car, he brought an action against General Motors and his Oldsmobile dealer seeking to rescind the sale and to recover damages and attorney's fees.¹¹⁰ He alleged, in part, that the defendants had violated the Louisiana UDAP statute by failing to disclose facts concerning the product which, if known to a prospective buyer, would have influenced the decision to purchase.¹¹¹

102. See, e.g., *Christie v. Dalmig, Inc.*, 136 Vt. 597, 601, 396 A.2d 1385, 1388 (1979).

103. See, e.g., *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170, 174 (Super. Ct. 1979); notes 137-47 *infra* and accompanying text; *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141-42 (Mass. 1978); notes 129-36 *infra* and accompanying text. Cf. *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 485-86 (Ky. 1978) (truck warranty which failed to recognize rights of buyers under U.C.C. "unfair" under state UDAP statute); notes 150-59 *infra* and accompanying text.

104. 366 Mass. 688, 322 N.E.2d 768 (1975).

105. *Id.* at 696, 322 N.E.2d at 771.

106. *Id.* at 702-703, 322 N.E.2d at 778.

107. *Id.* at 703, 322 N.E.2d at 779.

108. 373 So. 2d 571 (La. App. 1979).

109. *Id.* at 573.

110. *Id.* at 574.

111. *Id.* at 573.

Following a trial court judgment for the plaintiff, General Motors appealed on the ground that the engine substitution complied with section 5. For support, it cited the FTC's dismissal of a 1957 complaint involving the advertising of "genuine Chevrolet [replacement] parts" that were allegedly manufactured by outside vendors, rather than by any General Motors division.¹¹² The *Gour* court, however, saw considerable differences between that case and one involving a major, original component of a new automobile.¹¹³ Furthermore, it noted that the Commission had issued a complaint against General Motors in 1978 for the very engine substitutions at issue, and that the FTC proceeding had been terminated by a consent order.¹¹⁴ In view of this disposition of the FTC's more recent charges, and the federal authorities defining deception under section 5, the *Gour* court concluded that the engine substitution was capable of deceiving the buying public and, therefore, violated the Louisiana UDAP statute.¹¹⁵ Rescission was permitted, and the plaintiff recovered the full purchase price (\$8,100) less a minor deduction for use, and an award of statutory attorney's fees.¹¹⁶

Two additional deception cases even more clearly illustrate the propensity of state courts to rely upon FTC determinations. In *Thomas v. Sun Furniture & Appliance Co.*,¹¹⁷ a creditor engaging in debt collection in Ohio employed forms captioned, "Notices of Court Action to Collect Debt," which threatened debtors with wage garnishment within fifteen days unless payment was made.¹¹⁸ The notices were sent to debtors before any judgment against them had been obtained. Under Ohio law, however, the personal earnings of a debtor

112. *Id.* at 576.

113. *Id.* at 576-77.

114. *Id.* at 577.

115. *Id.* at 578.

116. *Id.* The failure or omission to disclose has been used as the basis for a deception claim in numerous other UDAP cases. *See, e.g.,* *Smith v. Piedmont Aviation, Inc.*, 412 F. Supp. 641, 642 (N.D. Tex. 1976) (plaintiff alleged failure to disclose airline's deliberate overbooking policy; court found, however, no violation of state statute or common law fraud); *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 269-70, 361 N.E.2d 815, 817 (1977) (advertising a warranty offering a "free" replacement muffler, without disclosing that purchasers would be charged for replacement of associated installation parts); *York v. Sullivan*, 369 Mass. 157, 161-62, 338 N.E.2d 341, 345-46 (1975) (failure to disclose that leases in publicly-subsidized housing would not prevent rental increases by landlord during term); *Fenwick v. Kay American Jeep, Inc.*, 72 N.J. 372, 378, 371 A.2d 13, 16 (1977) (omission of automobile odometer readings in advertisements); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 105-106, 245 S.E.2d 801, 807 (1978) (failure to disclose that home was constructed on land filled with "vegetable matter"); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 483-84, 329 A.2d 812, 829 (1974) (landlords' failure, in leases, to inform tenants of the existence of statutory tenant remedies, some of which were unwaivable); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 51-52, 554 P.2d 349, 358 (1976) (failure to disclose that a "muscle car", sold as a passenger vehicle, had been modified and previously used in racing).

117. 61 Ohio App. 2d 78, 399 N.E.2d 567 (1978).

118. *Id.* at 79-80, 399 N.E.2d at 568.

clearly could not be attached before judgment.¹¹⁹ Recognizing that the likelihood of deception is the appropriate criterion by which to judge whether an act is deceptive,¹²⁰ and relying expressly upon FTC and federal court precedents involving similar debt collection practices,¹²¹ the court held that because the notice would falsely create the impression in the average person's mind that a judgment had been rendered against him and that his wages could be attached, possibly causing him to lose his job, the notices were deceptive as a matter of law.¹²²

Williams v. Bruno Appliance & Furniture Mart, Inc.,¹²³ the last deception case we will discuss, was a class action for injunctive relief and damages in a typical "bait and switch" case.¹²⁴ The plaintiff alleged that she had responded to an advertisement depicting a three-piece furniture set priced at \$298; when she inquired about the set at the store, however, she was told that the "sofa alone" was \$298. She was then persuaded to buy different, more expensive furniture.¹²⁵ On appeal from the trial court's dismissal of the action, the Illinois appellate court first observed that on the basis of settled *federal* principles, an advertisement could be held deceptive *on its face* if it created the likelihood of deception and, further, that advertising should be evaluated not on the basis of the technical meaning of the phrases used, but rather by the net impression it is likely to make on the general public.¹²⁶ More significantly, the court tested the allegations of "bait and switch" tactics against the FTC's "Guides Against Bait Advertising,"¹²⁷ and held that under those FTC interpretations of section 5, the consumer's allegations clearly stated a claim.¹²⁸

119. *Id.* at 82-83, 399 N.E.2d at 570.

120. *Id.*

121. *Id.* The Ohio court cited several of the classic FTC cases involving the practice colloquially known as "bluebacking" (using legal simulations): *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968). Other FTC cases on debt collection practices include *Slough v. FTC*, 396 F.2d 870 (5th Cir. 1968), *cert. denied*, 393 U.S. 980 (1968); *In the Matter of Neighborhood Periodical Club, Inc.*, 81 F.T.C. 93 (1972). The Commission has acted many times against the use of debt collection practices as in *Slough* and *Neighborhood Periodical*, and has promulgated rules concerning them in *Guides Against Debt Collection Deception*, 16 C.F.R. § 237 (1980).

122. *Thomas v. Sun Furniture & Appliance Co.*, 61 Ohio App. 2d 78, 82, 399 N.E.2d 567, 570 (1978). *See also* *Fukuhara v. Huff Agency, Ltd.*, 607 P.2d 1304, 1307-1308, 1312-14 (Hawaii 1980) (deceptive representation that attorneys' fees may be added to debt being collected); *Liggins v. May Co.*, 44 Ohio Misc. 81, 373 N.E.2d 404, 405-406 (C.P. 1977) (deceptive collection notices containing false statements and simulated official documents); *State v. Credit Bureau of Laredo*, 530 S.W.2d 288, 289 (Tex. 1975) (sending of notices which simulated legal process or action by public officials).

123. 62 Ill. App. 3d 219, 379 N.E.2d 52 (1978).

124. A "bait and switch" is a deceptive sales practice which usually involves the advertising of a low-priced product to lure customers to a store, and then inducing them to buy higher-priced models by failing to stock sufficient quantities of the lower priced item to satisfy demand, or by disparaging the less-expensive product. *See Tashof v. FTC*, 437 F.2d 707, 709 (D.C. Cir. 1970).

125. 62 Ill. App. 3d at 221, 379 N.E.2d at 53.

126. *Id.* at 222; 379 N.E.2d at 54.

127. 16 C.F.R. § 238 (1980).

128. *Williams v. Bruno Appliance & Furniture Mart*, 62 Ill. App. 3d at 223, 379 N.E.2d at 55. Many other UDAP decisions have involved consumer complaints about pricing, quality and similar deceptive representations; many of the decisions in those cases also implicate the FTC's jurisprudence. On price representations, *see, e.g.*, *State v.*

Although fewer of the state court decisions have dealt with "unfairness," several cases are notable. The leading case is *Schubach v. Household Finance Corp.*,¹²⁹ in which consumers challenged alleged "distant forum abuse."¹³⁰ The plaintiffs asserted that the filing of collection actions in locations inconvenient to debtors for the purpose of precipitating default judgments, making defense of the actions more difficult, and securing more favorable judgments than would other-

Crossroads Gallery, Inc., 357 So. 2d 1381, 1382-83 (La. App. 1978) (advertising a 50% savings on oil paintings, where they were sold at substantially lower prices at another location 90% of the time); *Crooks v. Pay Less Drug Stores Northwest, Inc.*, 285 Or. 481, 487-91, 592 P.2d 196, 199-201 (1979) (erroneous advertisement for a \$3.29 razor at a price of \$.89, coupled with failure to redistribute correction, warrants consumer's recovery of \$200 minimum statutory damages); *Sanders v. Francis*, 277 Or. 593, 595-99, 561 P.2d 1003, 1004-1006 (1977) (advertisement of automobile before and after its sale for \$3,098, when seller actually charged purchaser \$3,898); *State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 82 Wash. 265, 268-69, 510 P.2d 233, 236-37 (1973) (deceptive price comparisons, advertising of discounts and representation of prices on auto stickers).

As to representations of product or service qualities or features, *see, e.g.*, *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 813, 242 S.E.2d 740, 741 (1978) (representation that automobile was in "perfect running order" and that the seller would "take care of any problem," where sales contract contained broad warranty disclaimer); *American Buyers Club, Inc. v. Honecker*, 46 Ill. App. 3d 252, 361 N.E.2d 1370, 1371-75 (1977) (representations that club membership would entitle consumer to obtain merchandise at substantial savings, and that certain "name brand" goods would be available); *Heller v. Silverbranch Constr. Corp.*, 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065, 1068-69 (1978) (representation that land had good drainage); *Scott v. Western Int'l Surplus Sales, Inc.*, 267 Or. 512, 514-17, 517 P.2d 661, 662-63 (1973) (pictorial and written representation on package that tent had a rear window with a zippered flap); *Spradling v. Williams*, 566 S.W.2d 561, 564 (Tex. 1978) (representation of model year of pleasure boat); *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App. 1978) (representations concerning franchise/distributorship opportunities in motivational products marketing operation — award of treble damages of \$18,555 plus \$3,000 attorney's fees); *Mallory v. Custer*, 537 S.W.2d 141, 144 (Tex. Civ. App. 1976) (representation that repairer of "R.V.'s" was a "Coleman authorized dealer").

Other deceptive practices cases, which we have characterized here as "miscellaneous," include: *Clayton v. McCrary*, 426 F. Supp. 248, 260 (N.D. Ohio 1976) (failure to include material oral representation into written contract of sale for motor vehicle); *Lowell Gas Co. v. Attorney General*, 79 Mass. Adv. Sh. 49, 51-53, 385 N.E.2d 240, 243-44 (1979) (overcharging for natural gas supplied to consumers by employing deceptive accounting procedures to allocate debt expense to inventory); *cf.*, *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. Super. 267, 268-73, 390 A.2d 566, 567-70 (1978) (company overstated actual price and quantity of gas purchased and reflected this overstatement in its monthly bills to customers); *State v. Ledwith*, 204 Neb. 6, 8-11, 281 N.W.2d 729, 732-34 (1979) (representations in connection with "professional modeling school" enrollments, *e.g.*, that students would be able to earn back all or most of tuition charged on modeling assignments); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380, 385-86 (C.P. 1974) (failing to refund moneys received where goods are not delivered; acceptance of money for goods or services and allowing unreasonable periods of time to pass without delivering, offering and making refunds, or offering alternatives; failure to honor warranty of merchantability); *Our Fair Lady Health Resort v. Miller*, 564 S.W.2d 410, 413 (Tex. Civ. App. 1978) (representation that health spa contract would be voided if consumer changed her mind after signing it); *MacDonald v. Mobley*, 555 S.W.2d 916, 918-19 (Tex. Civ. App. 1977) (representations concerning home repairs under warranty); *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 665 (Tex. Civ. App. 1975) (representation that salesman had authority to negotiate sales price of auto and coercing agreement to pay higher price); *State v. Hudson Furniture Co.*, 165 N.J. Super. 516, 518-21, 398 A.2d 900, 901-902 (1979) (failure to afford furniture customers with options in writing when promised delivery dates are not met).

129. 78 Mass. Adv. Sh. 1153, 376 N.E.2d 140 (1978).

130. 376 N.E.2d at 141.

wise be possible, was unfair under the Massachusetts UDAP statute.¹³¹ The Massachusetts Supreme Judicial Court, following FTC precedent, held these allegations actionable as "unfair practices" even though the pertinent state venue provisions permitted Household Finance to file its collection actions in the forums about which the plaintiffs had complained.¹³² The court relied in large part upon the Seventh Circuit's enforcement of an FTC cease and desist order in *Spiegel, Inc. v. FTC*,¹³³ which dealt with similar venue practices in the context of interstate collection actions. *Spiegel* held that the Commission has the power to enjoin a company from bringing collection actions in locations inconvenient to debtors even if the practice is lawful under state law.¹³⁴ Although the order in *Spiegel* was enforced only insofar as it related to out-of-state consumers,¹³⁵ the Massachusetts court agreed with the plaintiffs in *Schubach* that this distinction made "no absolute difference in deciding whether the practice of a creditor is unfair."¹³⁶

Murphy v. McNamara,¹³⁷ a Connecticut trial court decision, represents another recent example of a state court's creative use of the FTC's unfairness tests. In *Murphy*, the consumer, a welfare recipient, "leased" a television set under an agreement that provided that she could become the owner of it, "without establishing credit." The defendant never advised the plaintiff that a total payment of \$1,268 would be required in order to own the set under the agreement.¹³⁸ A reasonable retail sale price for the T.V. set would have been \$499.¹³⁹ After approximately six months, the plaintiff read a newspaper article criticizing the T.V. "lease" plan, consulted counsel, and stopped

131. *Id.* at 140.

132. *Id.* at 142-43. *But see* *Vargas v. Allied Fin. Co.*, 545 S.W.2d 231, 233-34 (Tex. Civ. App. 1976), in which the court declined to follow FTC cases and rejected an attack on distant forum practices under the Texas UDAP. That statute, however, covered deceptive acts, not unfair practices. Moreover, the Texas legislature subsequently amended the UDAP statute to provide that the filing of a collection suit in a distant forum is a deceptive act. TEX. BUS. & COM. CODE ANN. tit. 2, § 17.46(b)(22) (1979).

133. 540 F.2d 287 (7th Cir. 1976). The Massachusetts court in *Schubach* also cited with approval two Commission consent orders which were not appealed. 376 N.E.2d 140, 141 n.4 (Mass. 1978) (citing *In re Commercial Serv. Co.*, 86 F.T.C. 467 (1975); *In re Montgomery Ward & Co.*, 84 F.T.C. 1337 (1974)).

134. 540 F.2d 287, 292 (7th Cir. 1976) (relying on *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972)).

135. 540 F.2d at 296.

136. *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 142 (Mass. 1978). The court noted that the Commission's position in the Seventh Circuit had been that certain *in-trastate* "distant forum" practices could be unfair under § 5. *Id.*; *see* *Spiegel, Inc. v. FTC*, 540 F.2d 287, 296 n.12 (7th Cir. 1976).

Following the remand in *Schubach*, which was filed as a class suit, *see* 376 N.E.2d at 141 n.2, the parties entered into settlement negotiations. At the time of this writing, they were on the verge of entering into an agreement on the following terms: (1) any class member inconvenienced by H.F.C.'s venue practices will receive \$25; (2) any pending action in which a class member asserts a defense or counterclaim will be transferred to a court in the locale of the consumer's residence; and (3) plaintiff's counsel will receive attorneys' fees of \$4000. Telephone Interview by authors with Richard Alpert, Esq., Attorney for Plaintiffs, National Consumer Law Center, Boston, Massachusetts (May 1, 1980).

137. 36 Conn. Supp. 183, 416 A.2d 170 (Super. Ct. 1979).

138. 416 A.2d at 173.

139. *Id.*

making payments.¹⁴⁰ Soon afterwards, she was subjected to numerous telephone calls and written communications from the lessor threatening to repossess the T.V., to commence civil suit against her, and to have her criminally prosecuted.¹⁴¹ The plaintiff commenced an action against the lessor seeking injunctive relief and damages under the Connecticut UDAP statute. She contended that the purported lease was in fact a conditional sale, that the price charged for the T.V. set (which was over two and one-half times the retail price) was unconscionable under the Uniform Commercial Code and, therefore, that the defendant had committed unfair trade practices by entering into such an agreement with her and by using harassing collection practices against her.¹⁴²

In a lengthy opinion, the *Murphy* court granted the consumer a preliminary injunction against repossession of the T.V. and any further creditor harassment.¹⁴³ After reviewing the FTC's unfairness standards, the court discussed the refusal of courts to enforce "oppressive" contract terms in general, and those relating to price in particular, under the unconscionability doctrine of the Uniform Commercial Code.¹⁴⁴ It found this unconscionability rule to constitute the public policy of the state, to which the defendant's selling techniques were clearly offensive.¹⁴⁵ The court noted, moreover, that the FTC had indicated, in dicta, that "the use of unconscionable selling prices can, by itself, constitute an 'unfair' . . . practice . . . in violation of section 5"¹⁴⁶ Accordingly, the court held that "an agreement for the sale of consumer goods entered into with a consumer having unequal bargaining power and which agreement calls for an unconscionable purchase price, constitutes an unfair trade practice under [the Connecticut UDAP statute]."¹⁴⁷

140. *Id.*

141. *Id.*

142. *Id.* at 173-76.

143. *Id.* at 180.

144. U.C.C. § 2-302.

145. 416 A.2d at 176.

146. *Id.* (quoting *In re Leon A. Tashof*, 74 F.T.C. 1361, 1406 (1968), *aff'd*, *Tashof v. FTC*, 437 F.2d 707, 712-713 (D.C. Cir. 1970)). The court found substantial similarities between Ms. Murphy's case and the situation in *Tashof*, most notably, that there had been representations of "easy credit" to a consumer whose bargaining power clearly was unequal, combined with the charging of unconscionable prices. *Id.*

147. 416 A.2d at 177. A number of other courts have encountered UDAP claims involving allegedly unfair price, credit or contract terms, collection practices or the use of creditors' remedies. On price, credit or contract terms, *see, e.g.* *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 591 P.2d 51, 55-56 (1979) (calculating "per annum" interest rates on loans on the basis of a 360-day year may be an unfair trade practice); *Bondanza v. Peninsula Hosp. & Med. Ctr.*, 23 Cal. 3d 260, 262-63, 590 P.2d 22, 23 (1979) (assessment of a one-third collection commission on patients' bills turned over to a collection agency was an unlawful unfair business practice); *Perrin v. Pioneer Nat'l Title Ins. Co.*, 83 Ill. App. 3d 556, 404 N.E.2d 508, 509-10 (1980) (title insurance company's practice of granting builders, developers, contractors and others engaged in real estate development substantial discounts, which were disproportionate and unrelated to any purported economy or saving inuring to the company by reason of obtaining their busi-

Ford Motor Co. v. Mayes,¹⁴⁸ applying a *state* unfairness provision, calls into question the sanctity of the "limited warranty" given by most automobile and other consumer product manufacturers, and suggests that protections afforded by the Magnuson-Moss Warranty Act,¹⁴⁹ which is enforced by the FTC through section 5,¹⁵⁰ may be

ness, is alleged by plaintiff to be an unfair trade practice resulting in real estate purchasers being required to pay higher prices for title work); *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748, 754 (1974) (inclusion of unconscionable lease terms, under which mobile home park owners imposed fees upon lot tenants as a condition of allowing sale of their mobile homes, is an unfair practice); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 814, 828 (1974) (inclusion of illegal, unconscionable and/or unconstitutional provisions in residential leases, e.g., waiver of exemptions, right to distraint tenant's property); *Safeguard Investment Corp. v. Commonwealth*, 44 Pa. Commw. Ct. 417, 404 A.2d 720, 721 (1979) (usury statutes do not comprehensively cover all activities that are related to the cost of borrowing money but which are not charged or reflected as interest rates *per se* — usurious lending covered by UDAP); *Bennett v. Bailey*, 597 S.W.2d 532, 533 (Tex. Civ. App. 1980) (defendants engaged in an "unconscionable act or course of action" by inducing plaintiff widow to pay \$29,669.45 within two months for dance lessons, and by attempting to coerce her into entering into another dance contract costing \$49,000 — treble damages of \$78,000 plus attorneys' fees awarded); *Laviana v. The Howard Bank, No. C400-75 Cnc* (Vt. Super. Ct. Jan. 9, 1976), slip. op. at 2 (charging consumers who would not receive cards or numbers bank credit card rates on "cash advances" may be usurious and an unfair practice).

On collection practices or creditors' remedies, *see, e.g.*, *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 524-25 (Alaska 1980) (threats that debtors would be immediately arrested or placed in jail, telephone calls to relatives or employers about debtors, and representations that credit ratings would be impaired); *Mechanics Nat'l Bank v. Killeen*, 79 Mass. Adv. Sh. 129, 130-40, 384 N.E.2d 1231, 1233-37 (1979) (unfairness challenge to repossession and sale of secured property, prior to acceleration of maturity dates on notes and default by debtor, in "erroneous" belief that creditor had right to do so); *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 337 N.E.2d 701, 703-704 (1975) (numerous harassing telephone calls at early or late hours, totalling 180 calls in nine weeks; use of false identities; threats of legal action not taken; use of offensive, embarrassing and abusive language; in-person harassment at debtors' residence; employer contacts, and a litany of other "aggressive" tactics over a period of thirteen months); *Frank J. Linhares, Co. v. Reliance Ins. Co.*, 4 Mass. App. Ct. 617, 357 N.E.2d 313, 316 (1976) (refusal to deliver possession of truck to owner unless owner agreed in writing to release repairer from warranties on the repairs); *State v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895, 896 (1977) (repeated, harassing, abusive, demeaning and threatening collection calls by telephone; phone calls at place of employment and to employers); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574, 583 (1974) (landlord's seizure of tenant's property and refusal to return it, *i.e.*, distraint, where landlord had not evicted tenant by judicial process — treble damages awarded).

148. 575 S.W.2d 480 (Ky. 1978).

149. The Magnuson-Moss Warranty Act, 15 U.S.C. §§2301-2312 (1976), enacted in 1975, regulates the terms and conditions, and disclosure thereof, of written warranties given on consumer products. All written warranties must be designated either "full" or "limited" under its provisions. *See id.* § 2303(a). Because a written warranty designated "full" must meet (or will be deemed to incorporate) certain stringent minimum federal standards, *see id.* §§ 2303(a)(1), 2304(e), most product manufacturers presently give "limited" warranties seeking to diminish their liability in the event of product defect or failure.

150. 15 U.S.C. § 2310(b) (1976). Warranty problems have been a constant and frequent source of difficulty for consumers. *See H.R. REP. NO. 93-1107*, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7705-16, which provided the basis, in part, for enactment of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1976).

As an alternative to actions under the Uniform Commercial Code's warranty provisions, consumers have often turned to UDAP statutes to obtain redress. For the most part, however, actions involving warranty problems rely upon the prohibition against deceptive acts in the statutes. *See, e.g.*, *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740, 741-42 (1978) (complaint alleging misrepresentations in the sale of an automobile stated a separate claim under state statute apart from breach of warranty contract claim); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768, 778 (1975) (failure to disclose a defective engine was a cognizable claim under state stat-

available to consumers in state UDAP actions.

In *Mayer*, Ford gave the buyers of a new truck a twelve month or 12,000 miles "limited" warranty covering repair or replacement of defective parts.¹⁵¹ The truck quickly developed severe rear end problems. Some six months after the sale, the parties discovered that the truck had a bent or twisted frame.¹⁵² The buyers then brought it back to the dealer and gave written notice of revocation of acceptance.¹⁵³ Subsequently, Ford told the dealer that it would only repair or replace defective parts and that it would not repurchase the truck, give the buyers a new one, or extend the original warranty on it, due to longstanding company policy.¹⁵⁴ As a result, the dealer refused the buyers' demand for a full refund or replacement, precipitating their lawsuit.¹⁵⁵

The Mayes alleged, in part, that Ford had committed an "unfair" practice in violation of the Kentucky UDAP statute by adopting the unconscionable policy of refusing to recognize consumers' legitimate UCC remedies.¹⁵⁶ Ford's position was that its "limited" warranty provision and the stance that it adopted were lawful trade practices, *authorized* by the state's UCC.¹⁵⁷ Disagreeing with Ford, the Kentucky Court of Appeals affirmed the trial court's judgment for the buyers.¹⁵⁸ It reasoned that when Ford failed to correct the truck's defects within a reasonable time, the repair or replacement remedy it had given failed of its essential purpose under the UCC provision governing limitation of remedies.¹⁵⁹ At that point in time, the court ruled, the buyer was entitled to invoke other UCC remedies for warranty breach, including revocation of acceptance, notwithstanding the "limited warranty."¹⁶⁰ In the court's view, Ford's insistence that it should be allowed indefinitely to try to correct the defect was an unconscionable refusal to recognize the legitimate rights of buyers under the

ute); *Woods v. Littleton*, 554 S.W.2d 662, 666 (Tex. 1977) (statement by builder that repairs to sewer system placed it in good working order created an express or implied warranty and was a "deceptive" practice); *Valley Datsun v. Martinez*, 578 S.W.2d 485, 489 (Tex. Civ. App. 1979) (defendant's oral representation purporting to give a warranty was untrue).

151. 575 S.W.2d at 483.

152. *Id.* at 484.

153. *See* U.C.C. §§ 2-607, 2-608.

154. 575 S.W.2d at 482.

155. *Id.*

156. *Id.* at 482-83.

157. *Id.* at 482.

158. *Id.* at 488.

159. 575 S.W.2d at 484. *See* U.C.C. § 2-719(2). This is not by any means an unusual holding in consumer warranty actions. *See, e.g.,* *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 99, 397 N.Y.S.2d 677, 682, 684 (Civ. Ct. 1977). The court's further, unique rulings concerning the effect of Ford's actions under the UDAP statute, however, merit close attention.

160. 575 S.W.2d at 484.

UCC and, therefore, an unfair practice.¹⁶¹ The court might have reached the same conclusion more directly by finding liability under Magnuson-Moss — therefore a violation of section 5 — which might constitute a *per se* violation of the state UDAP statute.

Some Practical Aspects of UDAP Litigation

In the foregoing sections of this article we have described the existing case law under UDAP statutes, pointing out how it potentially integrates all of the FTC's consumer protection jurisprudence. Our discussion has suggested that private enforcement of this important jurisprudence is now possible in the state courts. We wish to make it clear, however, that such enforcement is not merely theoretically possible, but that it is now feasible and should be attractive to advocates. Accordingly, we will discuss three practical topics below — remedies, class actions, and attorneys' fee awards — which provide further incentives for continued expansion of the role of private litigants in the enforcement of FTC jurisprudence in state court actions.

Remedies

As we have already described in general, UDAP statutes offer a panoply of consumer remedies and afford considerable incentive to sue by holding out the prospect, in many instances, of recovery of more than actual damages.¹⁶² In addition to damages, many of the statutes provide the remedy of rescission which, when coupled with court awards of costs and counsel fees, will undoubtedly serve in many instances to make consumers whole and to encourage legal representation.¹⁶³

The proper measure of actual damages in UDAP actions is unclear. In a number of instances, the courts have utilized either the "out-of-pocket" damages rule¹⁶⁴ or one that allows the recovery of the reasonable cost of remedying defects in a product.¹⁶⁵ In making these determinations, when actual damages are not ascertainable with precision, the courts will employ the customary rule requiring reason-

161. *Id.* at 485. The court approved the buyers' recovery of damages and a substantial attorney's fee. *Id.* at 488.

162. See notes 68-78 *supra* and accompanying text.

163. See generally *Gour v. Daray Motor Co.*, 373 So. 2d 571 (La. App. 1979), discussed in the text at notes 108-16 *supra*. The rescission remedy ordered by the court in that case enabled the consumer to obtain \$6,762.65 of the \$8,122.65 he had originally paid for his 1977 "Chevy-mobile." See 373 So. 2d at 578-79. This entitlement was computed on the basis of a deduction for the use of the vehicle (during a period of roughly fourteen and one-half months) at \$.08 per mile, for 17,000 miles. In addition, Gour's attorney received a court-awarded fee of \$2,000. *Id.* at 574. The practicality of Gour's individual UDAP action is highlighted by comparing the relief he obtained with the proposed subclass settlement in *In re G.M.C. Engine Interchange Litigation*, 594 F.2d 1106, 1116 (7th Cir. 1979), which provides for the payment of \$200 per affected vehicle owner in exchange for a release of all claims.

164. See, e.g., *Jack Criswell Lincoln Mercury v. Haith*, 590 S.W.2d 616, 619 (Tex. Ct. App. 1979); cf. *Potter v. Dangler Mobile Homes*, 61 Ohio Misc. 14, 401 N.E.2d 956, 962 (C.P. 1977) (court allowed plaintiff the sum he spent repairing his defective mobile home, in suit brought under Uniform Commercial Code).

165. See, e.g., *Young v. DeGuerin*, 591 S.W.2d 296, 299 (Tex. Ct. App. 1979); *Harrison v. Dallas Court Reporting College, Inc.*, 589 S.W.2d 813, 816-17 (Tex. Ct. App. 1979) (dictum).

able certainty rather than mathematical exactness.¹⁶⁶ As an additional incentive to plaintiffs, some courts appear to allow recovery of damages for mental distress in UDAP actions;¹⁶⁷ others, however, have declined to do so in the absence of physical injury.¹⁶⁸

In cases in which injury to consumers is not quantifiable, or when damages would be inadequate under the "out-of-pocket" rule, the courts may allow recovery under the "benefit of the bargain" rule, which entitles a consumer to the difference between what she actually received in the transaction and what she would have received had the deceptive representation actually been true.¹⁶⁹ Employment of a "benefit of the bargain" measure of damages would enable consumers to take more effective action against various practices traditionally proscribed by the FTC.¹⁷⁰ Assume, for example, a deceptive pricing case in which a consumer purchases a power lawnmower for a "sale price" of \$200 in response to an advertisement that represents the "regular price" to be \$259. In reality, the "regular price" of the lawnmower has been \$209. If the "value" of the lawnmower is \$200 or more, the consumer is arguably not out-of-pocket any money.¹⁷¹ If he is entitled to the benefit of the bargain, however, the measure of damages in a UDAP action would be \$50 (doubled or trebled along with attorneys' fees, under an appropriate statute).

In other cases in which proof of the extent of a consumer's loss is difficult, the courts' use of reasonable inferences in connection with minimum damages provisions will make consumer actions feasible. The court's analysis in *Scott v. Western International Surplus Sales*,

166. See, e.g., *Young v. DeGuerin*, 591 S.W.2d 296, 300 (Tex. Ct. App. 1979).

167. See, e.g., *Woods v. Littleton*, 554 S.W.2d 662, 671-72 (Tex. 1977); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash. 2d 355, 358, 581 P.2d 1349, 1352 (1978); *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170, 178 (Super. Ct. 1979).

168. See, e.g., *Young v. DeGuerin*, 591 S.W.2d 296, 300 (Tex. Ct. App. 1979); *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 297 (Tex. Ct. App. 1979).

169. See *York v. Sullivan*, 369 Mass. 157, 165, 338 N.E.2d 341, 341 (1975) (where landlord's deceptive practices lead a tenant to believe that the rent will be stable during the one year term of a lease, tenant is entitled to the benefit of the bargain the landlord induced him to think he was making); cf. *Johnson v. Willis*, 596 S.W.2d 256, 262 (Tex. Ct. App. 1980) (damages for violating state UDAP in real estate transaction measured either by "out of pocket" damages or "loss of bargain," whichever is greater). The application of the "benefit of the bargain" rule in deceit cases is generally set forth in RESTATEMENT (SECOND) OF TORTS § 549 (1977).

170. Entitling the consumer who seeks redress for injury caused by such practices to recover the greatest amount of actual damages established by the proofs serves the dual purpose of UDAP statutes to encourage consumer litigation of grievances and to deter unlawful conduct. See *Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Ct. App. 1978).

171. In the context of a bait and switch case, one commentator has suggested, for example, that no recovery should be allowed the consumer "absent proof that the item the customer was switched to was overpriced in comparison to products of like grade or quality in the seller's trade area." See Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559, 602 n.282 (1974). The commentator recognized, however, that imposition of this burden would surely result in no consumer recovery and would undermine the deterrent purposes of the law. *Id.*

Inc.,¹⁷² is instructive in this regard. In *Scott*, the consumer paid \$38.86 for a tent that had been represented, pictorially and in writing, to possess a feature it did not have.¹⁷³ After discovering that the tent did not have the represented feature, the consumer demanded a refund, which the seller refused.¹⁷⁴ The consumer consequently brought suit under the Oregon UDAP statute seeking the \$200 minimum damages recovery and attorneys' fees.¹⁷⁵ The seller argued that the proof warranted no recovery because the consumer could not show any ascertainable loss, as required by the statute.¹⁷⁶ Disagreeing, the Oregon Supreme Court held that "ascertainable" meant, simply, capable of being discovered or established.¹⁷⁷ Because the inference from the proof was that the tent, as represented, had a value equal to its sale price, the fact that the tent did not have the represented feature justified the inference that its value was less than that price.¹⁷⁸ This difference in value was an ascertainable loss, despite the lack of proof of its amount, and supported the consumer's recovery of minimum damages of \$200 and reasonable attorneys' fees.¹⁷⁹

Finally, there is the question of when multiple damage awards are proper.¹⁸⁰ When damage awards are not automatically multiplied under UDAP statutes, the consumer may be required to show a knowing violation.¹⁸¹ This requirement, however, ought not to deter consumers from seeking multiple damage recoveries. Under some of the statutes, knowledge that practices were proscribed will be imputed whenever the state attorney general has published a rule defining unfair or deceptive acts or practices, or has publicly indexed a court decision that held an act or practice to be unfair or deceptive.¹⁸² Moreover, recent FTC activities hold great promise for easing burdens of proof on the question whether the violation was knowing. Under a provision of the FTC Improvements Act of 1975,¹⁸³ the Commission has collected its key decisions involving a wide range of consumer problems, has prepared synopses of their holdings, and is in the process of sending these synopses to industry members (other than the respondents in those FTC proceedings) who may also be

172. 267 Or. 512, 517 P.2d 661 (1973).

173. 517 P.2d at 663.

174. *Id.* at 662.

175. *Id.*

176. *Id.*

177. *Id.* at 663.

178. *Id.*

179. *Id.* See also *Riviera Motors, Inc. v. Higbee*, 48 Or. App. 545, 609 P.2d 369, 373 (1980).

180. See notes 72-78 *supra* and accompanying text.

181. *Id.*

182. See, e.g., OHIO REV. CODE ANN. §§ 1345.05(A)(3)-(4), .09(B) (1979). In other cases knowledge may be inferred from the objective circumstances of the case. Thus, in *B & B Motors, Inc. v. Broman*, Unrep. Consent Judgment, No. 79 CV 37194 (Ohio Mun. Ct., Hamilton Cty., Mar. 1, 1980), the court noted that even if there had been no intent to deceive or misrepresent, the plaintiff's use of printed forms of cognovit notes or warrants of attorney to confess judgment in consumer transactions constituted knowing violations of Ohio's UDAP statute, "in that the documents used were printed form documents and were knowingly used in the transaction between the parties." *Id.*, slip. op. at 3.

183. 15 U.S.C. § 45(m)(1)(b) (Supp. III 1979).

engaging in the prohibited practices.¹⁸⁴ The records showing which companies have been sent the synopses may be available to consumer-litigants under the Freedom of Information Act.¹⁸⁵ If it can be shown that the defendant in a UDAP action was served with a Commission synopsis in the relevant area, a court may reasonably infer that the defendant knew or had reason to know that his conduct violated a UDAP statute, providing justification for a multiple damage award.

Class Actions

Despite the availability of state-level private enforcement of FTC jurisprudence, consumer litigation specifically tracking Commission initiatives has been limited. The reluctance of counsel to provide representation in small UDAP cases may explain this neglect. One procedural option, however, may increase the bar's interest in such actions. When the nature of the acts challenged and available procedures warrant and permit class actions, the greater monetary stakes will make UDAP actions more attractive to advocates.¹⁸⁶ Because the class action device was designed to ensure that a forum would be available for the small claimant and the uninformed,¹⁸⁷ and to assist in the deterrence of mass frauds and other wrongs,¹⁸⁸ it is ideally suited to consumers' UDAP claims.

In recognition of the importance of class suits to the effective enforcement of UDAP proscriptions, sixteen state statutes explicitly allow class actions to be used.¹⁸⁹ Although the case law under these provisions is sparse, the courts appear to have adopted a decidedly pro-consumer attitude toward these class suits. As the Massachusetts Supreme Judicial Court remarked, in noting that the class action provision of the Massachusetts UDAP statute reduced the discretion ordinarily possessed by courts to deny class status on the basis of the "predominance" and "superiority" requirements contained in class action rules patterned on Federal Rule of Civil Procedure 23(b)(3): "[t]he statute has a more mandatory tone [It]

184. The purpose of this so-called FTC "non-respondents program" is to establish recipients' knowledge of acts determined by the FTC to be unfair or deceptive, which are covered by prior cease and desist orders. In the event of a violation, such knowledge would subject the recipients to high civil penalties. See 15 U.S.C. §§ 45(m)(1)(A)-45(m)(1)(C) (Supp. III 1979).

185. 5 U.S.C. § 552 (1976).

186. See *Dole*, *supra* note 3, at 1111. As Chief Justice Burger recently remarked in *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. 1166 (1980), "For better or worse, the financial incentive that class actions offer the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' [and] . . . an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Id.* at 1174.

187. *Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968).

188. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807-808, 484 P.2d 964, 968-69, 94 Cal. Rptr. 796, 800-801 (1971).

189. See Appendix col. 11, *infra*.

was designed to meet a pressing need for an effective private remedy, and . . . traditional technicalities are not to be read into [it] in such a way as to impede the accomplishment of substantial justice."¹⁹⁰

A recent example of the flexible treatment courts have given to UDAP class actions is *Hogya v. Superior Court*.¹⁹¹ In *Hogya*, a class of 350,000 consumers sought damages from meat packers who were alleged to have sold falsely upgraded beef to Navy commissaries.¹⁹² The defendants had successfully opposed class certification in the trial court, arguing that in deciding a class action motion, the court had discretion to consider certain criteria aside from those enumerated in the UDAP statute's class action provision. The two additional criteria the defendants convinced the trial court to consider — and upon which the court based its decision to deny class status — were whether a class suit would provide a substantial benefit to the public, and the probability that each member of the class ultimately would come forward, identify himself, and prove his separate claim to a portion of the total recovery.¹⁹³ The court of appeals, however, rejected all of the defendants' contentions on appeal, and concluded that the UDAP statute mandates class certification when its four exclusive criteria are met; no additional criteria may be considered in making the class certification decision.¹⁹⁴ As the court observed, evaluation of the "public benefit" of the suit was improper, because the legislature already had determined that in satisfying the statutory criteria, class suits promote the public interest by compelling violators to disgorge wrongfully obtained profits and deterring deceptive practices.¹⁹⁵ In addition, to give consideration to the probability that each class member would come forward to make a claim, the court reasoned, would nullify a statutory procedure designed to allow action against those who bilk individual consumers of only petty amounts.¹⁹⁶

In other jurisdictions, the availability of class actions in UDAP cases will depend upon the existence of a provision comparable to Federal Rule of Civil Procedure 23, and upon how the courts construe their UDAP statutes and any such rule. Among the primary problems that have motivated the federal courts to deny class suits under Rule 23 have been those of predominance of common questions and manageability.¹⁹⁷ Predominance should not present a difficult hurdle in consumers' UDAP class actions. Given the adoption of the federal deception and unfairness standards by many state courts, a number of questions upon which defense counsel traditionally have made suc-

190. *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 40-41, 337 N.E.2d 701, 706 (1975).

191. 75 Cal. App. 3d 122, 142 Cal. Rptr. 325 (1977).

192. *Id.* at 127, 142 Cal. Rptr. at 327.

193. *Id.* at 129, 142 Cal. Rptr. at 329.

194. *Id.* at 140, 142 Cal. Rptr. at 337.

195. *Id.* at 136, 142 Cal. Rptr. at 335.

196. *Id.* at 133-40, 142 Cal. Rptr. at 333-37.

197. *Compare Green v. Wolf Corp.*, 406 F.2d 291, 299-301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) *with Seligson v. Plum Tree, Inc.*, 61 F.R.D. 343, 345-47 (E.D. Pa. 1973); *compare In re Hotel Telephone Charges*, 500 F.2d 86, 88-92 (9th Cir. 1974) *with Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545, 547 (N.D. Ill. 1972).

cessful arguments on the predominance issue, for example, intent, reliance and knowledge, simply will be irrelevant.¹⁹⁸

On the other hand, many state courts tread upon relatively unfamiliar territory when they deal with class suits; state court judges may well believe that they do not possess the resources to deal with them. In those instances, counsel for consumers must emphasize that a court has great flexibility to deal with problems occurring during the course of a class action, and an obligation to use its imagination and energies to structure the course of the action so that it may proceed to benefit the alleged victims.¹⁹⁹ To overcome judicial reluctance to become entwined in class actions, plaintiffs' counsel must present clear, simple, and inexpensive plans of management to the state courts.²⁰⁰ Still, the indication is that state courts are willing to address and handle such cases and the added complexity they may entail.²⁰¹

Attorneys' Fees

Self-interest has motivated counsel to provide their services in litigating private antitrust and securities actions, in which substantial court-awarded fees are commonplace.²⁰² Although the magnitude of statutory fee awards available in UDAP actions is not nearly as great as in the antitrust and securities areas, state court decisions do provide a basis for believing that consumer advocacy is becoming more economically feasible to practitioners.

Again, the UDAP fee provisions vary, with some calling for

198. See e.g., *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 449-54, 591 P.2d 51, 55-59, 153 Cal. Rptr. 28, 31-36 (1979) (proof of each borrower's lack of knowledge unnecessary); *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 272-73, 361 N.E.2d 815, 819-20 (1977). Cf. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814, 484 P.2d 964, 972, 94 Cal. Rptr. 796, 804 (1971) (reliance *must* be proved, but not necessarily by direct evidence; reliance may be inferred from extrinsic evidence). See also notes 80-103 *supra* and accompanying text.

199. See FED. R. Crv. P. 23(c)(4), 23(d); *Dolgow v. Anderson* 43 F.R.D. 472, 492 (E.D.N.Y. 1968).

200. See *State v. Blue Bird Body Co.*, 71 F.R.D. 606, 616 (M.D. Ala. 1976).

201. See, e.g., *Hernandez v. United Fire Ins. Co.*, 79 F.R.D. 419, 432-33 (N.D. Ill. 1978); *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 449-55, 591 P.2d 51, 55-59, 153 Cal. Rptr. 28, 32-36 (1979); *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 219-23, 379 N.E.2d 52, 52-55 (1978); *Barliant v. Follett Corp.*, 74 Ill. 2d 226, 230-40, 384 N.E.2d 316, 318-23 (1978); *Browder v. Harley-Dawson Cadillac Co.*, 62 Ill. App. 3d 623, 625-33, 379 N.E.2d 1206, 1208-13 (1978); *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 39-46, 337 N.E.2d 701, 705-709 (1975); *McGillvrey v. Budget Fin., Inc.*, [1972-73] 6 CLEAR. REV. 555, 556 (Or. Cir. Ct. 1972); *Miles v. N.J. Motors, Inc.*, 32 Ohio App. 2d 350, 291 N.E.2d 758, 763-66 (1972); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807-21, 484 P.2d 964, 968-78, 94 Cal. Rptr. 796, 800-10 (1971); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704-17, 433 P.2d 732, 739-48, 63 Cal. Rptr. 724, 731-40 (1967).

202. See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 164-70 (3d Cir. 1973) (antitrust); *Farmington Dowel Prods. Co. v. Foster Mfg. Co.*, 421 F.2d 61, 86-92 (1st Cir. 1969) (antitrust); *Annot.*, 23 A.L.R. FED. 983, 985-90 (1975) (securities). See generally *Attorney Fee Awards In Antitrust and Securities Class Actions*, 6 CLASS ACTION REP. 82 (1980).

mandatory awards²⁰³ and some appearing to accord complete discretion to the courts.²⁰⁴ The state courts have recognized, however, that absent attorneys' fee awards, the private remedy provisions of UDAP statutes frequently would not provide adequate encouragement for consumers to sue.²⁰⁵ Accordingly, they have been relatively generous in making fee awards, and do not necessarily consider themselves constrained to limit the size of awards by reference to the amount of damages awarded in the underlying consumer actions.²⁰⁶

The decisions under UDAP statutes nevertheless provide little guidance concerning the standards governing the courts' exercise of discretion in favor of a fee award, or the factors that courts will take into account in arriving at the amount of a fee. Strong arguments can be made in favor of using the rules developed by federal courts on these issues. On the discretion question, for example, many of the state statutes make fee awards available to a "prevailing" plaintiff or party. Federal courts considering fee awards in the civil rights area have consistently interpreted this language to mean that a prevailing plaintiff "should ordinarily recover an attorney fee unless special circumstances would render such an award unjust."²⁰⁷ Because the intent underlying the fee provisions in UDAP statutes is virtually identical to that of their civil rights counterparts — to provide an incentive for private litigation seeking the vindication of important public policies²⁰⁸ — state courts have ample reason to adopt the same approach in consumer actions.

The same holds true for the federal standards used to determine the amount of the fee that will be awarded. At least one state court has indicated an inclination to employ criteria similar to those set forth in the leading federal case, *Johnson v. Georgia Highway Express, Inc.*,²⁰⁹ in arriving at an attorney fee award in a UDAP action. In *Linthicum v. Archambault*,²¹⁰ the Massachusetts Supreme Judicial Court said:

203. See Appendix col. 12, *infra*; see, e.g., MASS. GEN. LAW ANN. ch. 93A, § 9(4) (West 1975).

204. See Appendix col. 12, *infra*; see, e.g., KY. REV. STAT. § 367.220(3) (1970).

205. See note 71 *supra* and accompanying text. See also *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 488 (Ky. 1978).

206. See, e.g., *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 488 (Ky. 1978) (fee of \$5,000 on damage award of approximately \$4,000); *Riviera Motors, Inc. v. Higbee*, 45 Or. App. 545, 609 P.2d 369, 371 n.4 (1980) (costs and fees of \$1,121.70 on minimum damage award of \$200 plus \$10,000 punitives); *Tate v. Wiggins*, 583 S.W.2d 640, 644-45 (Tex. Civ. App. 1979) (fee of \$4,300 on actual damages award of \$1,900); *Williams v. Loftice*, 576 S.W.2d 455, 456 (Tex. Civ. App. 1978) (fee of \$14,500 on damage award of \$6,200); *Riverside Nat'l Bank v. Lewis*, 572 S.W.2d 553, 562 (Tex. Civ. App. 1978) (fee of \$6,700 on actual damages award of \$3,000). Cf. *Lazar v. Towne House Restaur. Corp.*, 142 N.Y.S.2d 315, 322 (1955) (small size of plaintiff's recovery from defendant would not deter the court from awarding a substantial fee in case not arising under state UDAP statute).

207. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978); *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428-29 (1973).

208. Compare cases cited at notes 71, 205 *supra* with *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See Civil Right Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), described in S. REP. NO. 94-1011, 94th Cong., 2d Sess. 1-7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5908-14.

209. 488 F.2d 714, 717-19 (5th Cir. 1974).

210. 79 Mass. Adv. Sh. 2661, 398 N.E.2d 482 (1979).

While the amount of a reasonable attorney's fee is largely discretionary, the judge . . . should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amounts of awards in similar cases.²¹¹

Because the goal of fee provisions is to promote meritorious private suits to ensure full enforcement of the statutory proscriptions,²¹² state courts that have liberally construed UDAP statutes should be receptive to using these criteria in consumers' UDAP actions. In addition, not only does a wealth of case law explain the federal criteria,²¹³ but the federal criteria are also regarded as relatively easy to use. Adoption of such consistent and rational rules on fee awards in UDAP actions undoubtedly would encourage more attorneys to undertake such cases.

Part III: The Justification For Consumer Enforcement And Future Prospects For The Use of UDAP Statutes

Justifications

The explicit and positive recognition many state courts have given to FTC jurisprudence creates a solid basis for private consumer litigants to undertake state court challenges to practices that violate section 5. Regardless of the direction the FTC takes in the future, unfair and deceptive practices in the marketplace will continue to plague the consumer.²¹⁴ As a public agency having a certain expertise, and benefitting from its broad perspective on the national economy, the FTC is especially well-situated to develop consistent,

211. *Id.* at 2668-69, 398 N.E.2d at 488; *cf.* *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (court of appeals remanded civil rights class action case to the district court on the issue of the award of attorneys' fees, because the district court had failed to explain the factors upon which the award was based and because no differentiation was made between the experienced and inexperienced attorneys representing the plaintiff). It is particularly significant that the Massachusetts court articulated these standards in a case in which it also ruled that legal services organizations, whose clients are not billed for services rendered, are entitled to receive statutory attorney's fee awards. Thus, that state court's views appear to be in harmony with those of the United States Supreme Court, which recently indicated in an employment discrimination case that a party's representation by a public interest group is not a "special circumstance" that would render a fee award unjust. *See New York Gaslight Club, Inc. v. Carey*, 100 S. Ct. 2024, 2034 n.9 (1980).

212. *See, e.g., Jones v. Seldon's Furniture Warehouse, Inc.*, 357 F. Supp. 886, 887-88 (E.D. Va. 1973) (under the Truth-in-Lending Act).

213. *See, e.g., Copeland v. Marshall*, 594 F.2d 244, 249-53 (D.C. Cir. 1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

214. *See Gard, supra* note 15, at 279; D. CAPLOVITZ, *THE POOR PAY MORE* 192 (1963); *Hearings on H.R. 2213 and H.R. 2367 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 34 (1979).

reasoned consumer protection policy.²¹⁵ Effective enforcement of this policy, however, has always been and will continue to be controversial and inherently limited.²¹⁶

Even though the Commission is now statutorily-empowered to seek consumer redress, the circumstances in which it will do so are limited by law and, perhaps because of budgetary and political constraints, the gap between policy and enforcement efforts that directly benefit consumers will widen.²¹⁷ One reason for this gap is that the FTC must select cases carefully because of scarce budgetary resources. As a result, no matter how judicious the case selection, the Commission will always be vulnerable to charges of partiality and arbitrary enforcement.²¹⁸ Although selective enforcement may exert a deterrent effect on would-be violators, it will not reach many cases of simple non-compliance. Moreover, the Commission cannot devote much of its resources to the pursuit of the small operator or fly-by-night business.²¹⁹

Additionally, the FTC faces the central problem of government: bureaucratic inefficiency. The agency has long been regarded as one of the most inefficient of all government agencies because it achieves disappointing results per dollar spent on enforcement.²²⁰ A dramatic increase in the FTC's budget — an unlikely prospect in the near future — might increase the scope of its enforcement efforts. An increased budget for a government agency, however, rarely increases its efficiency; perhaps the opposite is more likely to occur.

We believe that the best solution to the serious limitations on public enforcement of unfair trade practices law is the expansion of private enforcement under state UDAP statutes. Fostered by multiple

215. See notes 8-17 *supra* and accompanying text; Comment, *Private Enforcement and Rulemaking under the FTC Act: Expansion of FTC Responsibility*, 69 Nw. U. L. Rev. 462, 475 (1974).

216. See A. STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST* 179 (1977). Stone has asserted:

Over the years the FTC has expended considerable effort in seeking to control deceptive and unfair practices. Yet, if one may judge by the enormous volume of complaints that consumers and businessmen continue to make . . . the agency's impact has not been great. One of its major short-comings has been its inability to obtain accurate, reliable, marketplace information. In the past it relied largely on complaints submitted by affected businessmen. The cost of this approach . . . has been a good deal of attentiveness to matters of little moment to consumers' safety, health or economic priorities.

Id.

217. See Givens, *supra* note 63, at 4; note 57 *supra*.

218. See, e.g., *Universal-Rundle Corp. v. FTC*, 352 F.2d 831, 834 (7th Cir. 1965), *rev'd* 387 U.S. 244 (1967).

219. Former Commissioner Phillip Elman has summarized the inadequacy of FTC enforcement:

Voluntary compliance and cease and desist procedures are . . . meaningless and unthreatening. Such a swindler does not need to be told by a registered letter from Washington that he is violating the law — he knows it, and his sole purpose is to continue his frauds as long as possible. The cease and desist order . . . will merely order the respondent to sin no more . . . for such racketeers, there is virtually no sanction and thus no effective deterrent.

Class Action and Other Consumer Protection Procedures: Hearings on the Consumer Protection Act Before the Subcomm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 63, 65 (1970) (statement of Phillip Elman).

220. See, e.g., Nader Report; ABA Report, note 32 *supra*.

damage recoveries and realistic attorneys' fees awards, private UDAP litigation can be expected to eliminate the gap between the inherent limitations on FTC efforts and the needs of aggrieved consumers. Private enforcement is not subject to accusations of partiality or arbitrariness: the process is random when compared with the FTC's selective enforcement.²²¹ By allowing consumers to enforce FTC jurisprudence, the states have opted, in part, for a private market solution in lieu of government regulation. Clearly, no level of FTC funding could ever approximate the collective enforcement energies of consumers using UDAP statutes. Effective private enforcement thus offers the best deterrent against wrongdoing in the marketplace.

The private enforcement of law, however, is not without its social costs: nuisance suits, court congestion, and lack of incentives to minimize damages are the major distortions encountered when private parties believe that substantial recovery is available through the courts.²²² The incentive to bring nuisance suits is compounded when the outcome of litigation is unpredictable, damage is highly speculative, the issues of law are vague, and the jury issues are complex. Settlement of many antitrust suits occurs, for example, because corporate managers opt for the predictability of loss through settlement rather than hazard the uncertainties of the judicial process, even

221. See Becker & Stingler, *Law Enforcement, Malfeasance and Compensation for Enforcers*, 3 J. LEG. STUD. 1, 15 (1974); Landes & Posner, *The Private Enforcement of Law*, 4 J. LEG. STUD. 1, 28 (1975).

222. These phenomena are encountered in both personal injury litigation and treble damage suits brought under the antitrust laws. When a greater probability of collecting damages is coupled with the larger damage awards permitted by law, there is a greater incentive to bring suit. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 81-96 (1976). Elzinga and Breit term these inefficiencies found in antitrust actions the "perverse incentives effect": a private party fails to modify his behavior when the damages available to him exceed the cost to him of avoiding the damage. *Id.* at 84. Because the potential litigant believes three-fold compensation is forthcoming, there is no incentive to minimize damages, perhaps the opposite. *Id.* Another inefficiency caused by the treble damage remedy is the "misinformation effect," or the tendency for a private party to claim that anticompetitive harm has occurred when it has not. *Id.* at 90. This effect is a primary stimulus for nuisance suits. Nuisance suits are encouraged by the possibility that the defendant will settle out of court rather than risk the uncertainty of a trial. *Id.* A third inefficiency is termed "reparations cost," or the use of resources to determine and allocate damages among the parties. *Id.* at 95.

To counteract these inefficiencies, the authors suggest a publicly enforced, fine-oriented system:

Under the ideal solution, the monopolistic sellers would be fined enough to cause them to cease and desist all monopolistic behavior, but they would be exempt from paying compensation to anyone who purchased from them. [W]ith no potential compensation, perverse incentives and misinformation effects would be eliminated and the . . . costs of the reparations process would vanish.

Id. at 113. Public agencies also can experience the perverse incentives and the misinformation effects, although perhaps to a lesser degree than private parties. For example, instead of bringing suit for the sole purpose of fortune, the government official may pursue an alleged violator for fame. In addition, there is always the danger that an agency will choose an inappropriate cause to pursue or simply bring suits that can be won easily. See generally G. TOLLOCK, *THE POLITICS OF BUREAUCRACY* 18-32 (1965).

when the actual risk of large losses in litigation is perceived to be small.²²³

Compared with treble damage suits under the antitrust laws, the incentive for nuisance suits under UDAP statutes is minimal. The issues involved in a UDAP suit invariably will be less vague and complex than the difficult determination of competitive injury in antitrust litigation.²²⁴ The result in an action brought under a state UDAP statute will therefore be more predictable, and defendants will be able to weigh settlements on the basis of a more accurate assessment of the risk of losing. Moreover, in contrast to antitrust cases, UDAP actions will not involve enormous monetary recoveries. With smaller stakes, the rewards will be less attractive for prospective bounty hunters.²²⁵

By providing incentives to bring these private actions under UDAP statutes, the state legislatures appear to be more interested in providing recovery to those victimized by market abuses than in minimizing court congestion. Under traditional remedies, the cost of litigation and attorneys' fees rendered most suits against consumer frauds impractical, regardless of the merits of the claim.²²⁶ The states, in remedial fashion, have now provided aggrieved consumers with a more effective redress mechanism to encourage the assertion of valid claims.²²⁷ It is our belief that consumers shortly will take more advantage of these mechanisms to enforce the FTC's jurisprudence.

223. The nuisance suit is also typical of the personal injury area, particularly when the cause of action is based on strict liability. For a description of the settlement process in personal injury cases, see L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 204-11 (1970).

224. In antitrust law, the precise nature of the activity that is often found unlawful is unclear. Guilt or innocence cannot often be predicted from the facts. As Elzinga and Breit state, "Refusals to sell, franchise terminations, exclusive dealer arrangements, territorial agreements and other such marketing violations as well as non-horizontal mergers, involve so many combinations and permutations of fact situations that a confident prediction of guilt or innocence is difficult." K. Elzinga & W. Breit, *supra* note 222, at 91.

The kinds of violations involved in UDAP statutes, although falling into broad categories of deception and unfairness, are far less complex in law and fact than most antitrust violations. Both judge and jury are able to make a determination about a consumer fraud violation much more easily than they can determine the economic consequences of various marketing practices in antitrust litigation. Moreover, UDAP litigation differs from many antitrust cases on the question of standing. The ambiguous nature of antitrust violations presents difficult issues of who has legal standing to bring an antitrust suit. This adds to unpredictability and promotes nuisance suits which in turn are settled because of this unpredictability. UDAP suits, by comparison, do not present these difficult issues of standing; the injury is direct and ascertainable.

225. The awards in antitrust litigation can be truly astronomical as, for example, in the recent AT & T-MCI litigation (MCI recovered \$1.8 billion). See [1980] *ANTITRUST & TRADE REG. REP.* (BNA), at A3 (June 19, 1980). It has been suggested that recoveries such as these represent a transfer of wealth from the corporations to lawyers. See Handler, *The Shift from Substantive to Procedural Innovation in Antitrust Suits: The Twenty-Third Annual Antitrust Review*, 71 *COLUM. L. REV.* 1, 10 (1971). Damage awards under UDAP statutes are designed to compensate the consumer for the injury he has incurred much like the damages in personal injury litigation. Treble damage awards are recognized under some UDAP statutes, but unlike their counterparts in antitrust, they are often limited to knowing or wilful violations. Generally, the scope of UDAP litigation is more limited and focused, in substance and remedy, than is antitrust litigation.

226. See Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transactions Problems*, 48 *B.U. L. REV.* 559, 569 (1968).

227. See notes 68-85 *supra* and accompanying text.

Conclusion — Future Prospects

Although the decisions indicate some uncertainty about how far to go in adopting the federal jurisprudence, we believe that as litigants in private actions make the state courts aware of the wealth of authority contained in this body of law, they will move closer to an approach that more comprehensively uses the FTC's pronouncements. In particular, we expect state courts to begin to adopt a *per se* approach²²⁸ with respect to acts that consumers challenge in UDAP actions, when those acts are alleged to transgress the standards of behavior set forth in FTC trade regulation rules or federal consumer protection statutes enforced by the Commission through section 5. These provisions may be viewed as *defining* practices that are "unfair or deceptive."²²⁹ Litigants employing UDAP statutes should not only urge

228. See generally Note, *State v. Reader's Digest Association — A Knockout Punch to Unfair or Deceptive Acts or Practices in Washington?*, 10 GONZ. L. REV. 529 (1975).

229. Virtually all FTC rules define "unfair or deceptive" acts or practices by their very structure — beginning with a phrase like, "it is [or constitutes] an unfair or deceptive act or practice . . . for a seller, directly or indirectly, to . . ." and following it with various specifically prohibited acts. See, e.g., Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2 (1980); Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. § 429.1 (1980). See also Proposed Trade Regulation Rule on Credit Practices, 40 Fed. Reg. 16,347 (Apr. 11, 1975). Some of the cases decided by state courts suggest that they will treat violations of rules promulgated under § 5 as violations of their UDAP statutes. See, e.g., *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529-30 (Alaska 1980); cf. *Household Fin. Corp. v. Mowdy*, 13 Ill. App. 3d 822, 827, 300 N.E.2d 863, 867 (1973) (attempted waiver of defense clause required by state consumer fraud act ineffectual).

The ability of consumers to enforce these rules may depend upon the willingness of state courts to do so because consumers cannot sue under § 5, and the rules are not self-executing. Take the "door-to-door sales" rule as an example. Suppose that Mary X purchases an expensive vacuum cleaner from a Y Vacuum Cleaner Co. salesperson who solicits the sale in Mary's home, and the salesperson fails to provide Mary with written notice of her right to rescind or an oral explanation of this right. See 16 C.F.R. § 429.1(a)-(e) (1980) (Cooling-Off Period for Door-to-Door Sales provisions). Mary executes an installment contract which obligates her to pay \$800, and which (fortuitously) contains the FTC "Holder Rule" legend, 16 C.F.R. § 433.2 (1980); the contract is later transferred to the Z Finance Co.

Suppose further that about twenty days after the sale, the cleaner begins to give Mary trouble, and she has second thoughts about having obligated herself to make the payments. She cannot, however, find the seller, and the FTC Cooling-Off Period Rule does not expressly extend her right to rescind until she receives the proper notices. Cf. 12 C.F.R. § 226.9 (1980) (Truth-in-Lending rescission provision). What can Mary do?

We submit that it is reasonably clear in this example that Mary can employ a UDAP statute to obtain rescission of the transaction at this time. Having failed to comply with the FTC Rule, her seller committed an unfair or deceptive act. See 16 C.F.R. § 429.1 (1980). Mary has a claim against her seller under a typical UDAP statute which she might assert if she could locate the Y company. Although she cannot do so, the "Holder Rule" legend preserves that "claim" as against Z Finance Co. Thus, in order to obtain a refund of any moneys she has already paid and cancellation of the contract, Mary could sue Z Finance Co. under a UDAP statute, seeking the remedy of rescission.

Whether she also might be entitled to counsel fees in such an action is an interesting question. Would the "Holder Rule" legend, limiting "recovery hereunder" to amounts already paid by the debtor, preclude such an award in UDAP litigation which was made necessary by a financier's refusal to recognize a consumer's claims? The question of fees should be separate from the contractual preservation of claims effectuated (and limited) by the FTC holder legend. Moreover, the refusal of fees in such a situation would undermine the purposes of the statutory fee provision.

Consumers may make similar use of recent federal consumer protection statutes

that these administrative rules and statutory provisions create categories of UDAP violations, but also that they establish public policies to which the state courts may look even when the alleged violators do not fall precisely within the scope of their provisions.²³⁰

More comprehensive adoption of FTC standards will have advantages for both consumers and the business community. The acquisition of up-to-date information and advice concerning Commission activities will serve the business community's need for predictability regarding potential liability under both section 5 and UDAP provisions. Consumers will be provided with more opportunities to act

which are enforced by the FTC; their provisions can be read as making any statutory violation a violation of § 5 as well. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692L(a) (Supp. III 1979) ("For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act"); Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(b) (1976) ("[i]t shall be a violation of section 45(a)(1) of this title . . . for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder)"); Truth-in-Lending Act, 15 U.S.C. § 1607(c) (1976) ("a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under the [Federal Trade Commission] Act"); Fair Credit Reporting Act, 15 U.S.C. § 1681s(a) (1976) ("a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in violation of section 5(a) of the Federal Trade Commission Act . . ."); Equal Credit Opportunity Act, 15 U.S.C. § 1691c(c) (1976) ("a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under the [Federal Trade Commission] Act").

When violations of these statutes are at issue, consumers may fare better by premising their claims upon UDAP statutes than by pursuing the private remedies the federal statutes give. Thus, when a Truth-in-Lending disclosure violation is claimed to be an unfair or deceptive act or practice, the consumer may be able to recover \$200 in minimum damages under a UDAP statute rather than \$100 under the Truth-in-Lending Act. *See* 15 U.S.C. § 1640(a)(2)(A)(1) (1976). Or, when the activities of a collection agency violate the provisions of the Fair Debt Collection Practices Act, the consumer may be entitled to treble his actual damages on a UDAP theory, instead of recovering actual damages (and "additional damages" in the court's discretion, not exceeding \$1,000) under the federal statute. *See* 15 U.S.C. § 1692k(a)(1), (a)(2) (Supp. III 1979).

Several state courts have examined this interrelationship in UDAP cases. *See, e.g.*, *Carter v. Empire Mut. Ins. Co.*, 1978 Mass. App. Ct. 215, 220, 374 N.E.2d 585, 592 (1978) (Truth-in-Lending and UDAP); *Ellis v. Hensley*, No. 39126, slip op. at 9-10 (Ohio Ct. App., Aug. 16, 1979) (Truth-in-Lending and UDAP); *Smith v. S.G. & B. Inc.*, No. A 7900178, slip op. at 2 (Ohio Ct. App. July 30, 1979) (Fair Debt Collection Practices Act and UDAP); *Hennigan v. Heights Saving Assoc.*, 576 S.W.2d 126, 129-30 (Tex. Civ. App. 1978) (Truth-in-Lending and UDAP); *Myers v. Lesage*, No. C291-75 Cnc (Vt. Super. Ct. May 15, 1978) (Truth-in-Lending and UDAP). *Cf.* *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 366, 254 S.E.2d 416, 417 (1979) (settlement and release of federal Truth-in-Lending claim does not bar subsequent UDAP action); *American Buyers Club, Inc. v. Grayling*, 53 Ill. App. 3d 611, 613, 368 N.E.2d 1057, 1059 (1977) (violation of Truth-in-Lending disclosure requirements affords consumer defense of illegality to enforcement of contract).

230. For example, although the provisions of the Fair Debt Collection Practices Act appear to be inapplicable to creditors collecting their own debts, even through "in-house agencies," *see* 15 U.S.C. § 1692a(6) (Supp. III 1979), the statute can hardly be read to enunciate a federal policy approving such practices as harassment, oppression, or abuse of any person in connection with the collection of a debt, 15 U.S.C. § 1692d (Supp. III 1979), when performed by creditors themselves. The opposite is obviously true, *i.e.*, that there is a clear national policy against the sorts of behavior covered by the substantive provisions of that statute. A state court should be free under the *Sperry & Hutchinson* tests, *see* notes 93-103 *supra* and accompanying text, to measure a creditor's collection practices against those standards of behavior. *See* *Smith v. S. G. & B., Inc.*, No. A 7900178, slip op. at 2 (Ohio Ct. App. July 30, 1979) (creditor's communication with debtor's employer other than as authorized by Fair Debt Collection Practices Act is an unfair and unconscionable act).

against abusive practices and easier burdens of proof in actions seeking private redress for injury. In sum, increased use of the FTC's jurisprudence in private UDAP actions will fully serve the purpose of those statutes and section 5 — to eradicate unfair or deceptive acts or practices from the mercantile environment.

APPENDIX

STATE STATUTE	(1) ALL § 5 PROHIBI- TIONS	(2) UNFAIR OR DECEP- TIVE ONLY	(3) DECEP- TIVE (ITEMIZA- TION)	(4) UNCON- SCIONABLE	(5) REFER- ENCE TO FTC	(6) PRIVATE ACTIONS	(7) MINIMUM DAMAGES	(8) MULTIPLE DAMAGES	(9) PUNITIVE DAMAGES	(10) EQUITA- BLE RELIEF (RESCIS- SION)	(11) CLASS ACTIONS	(12) ATTOR- NEYS' FEES
Alabama												
Alaska Stat. § 45.50.471	X		X		X	X	X	X		X	X	X
Ariz. Rev. Stat. Ann. § 44-1521			X		X							
Ark. Stat. Ann. § 70-901			X		X							
Cal. Bus. & Prof. Code § 17200 (West) Cal. Civ. Code § 1700 (West)		X	X			X	X		X	X	X	
Colo. Rev. Stat. § 6-1-101			X			X						X
Conn. Gen. Stat. Ann. § 42-110 (West)	X				X	X			X	X	X	X
Del. Code Ann. tit. 6 § 2511		X										
D.C. Code Ann. tit. 28 App		X	X			X	X		X	X		X
Fla. Stat. Ann. § 501.201 (West)	X				X	X						X

STATE STATUTE	(1) ALL § 5 PROHIBI- TIONS	(2) UNFAIR OR DECEP- TIVE ONLY	(3) DECEP- TIVE (ITEMIZA- TION)	(4) UNCON- SIONABLE	(5) REFER- ENCE TO FTC	(6) PRIVATE ACTIONS	(7) MINIMUM DAMAGES	(8) MULTIPLE DAMAGES	(9) PUNITIVE DAMAGES	(10) EQUITA- BLE RELIEF (RESCIS- SION)	(11) CLASS ACTIONS	(12) ATTOR- NEYS' FEES
Ga. Code. Ann. § 106-1201		X	X		X	X	X	X	X			X
Hawaii Rev. Stat. § 480-1	X				X	X	X	X				X
Idaho Code § 48-601	X		X		X	X	X	X	X	X		X
Ill. Rev. Stat. ch. 121½ § 261	X				X	X				X		X
Ind. Code § 24-5-0.5-1			X			X				X	X	X
Iowa Code Ann. § 714.16			X									
Kan. Stat. Ann. § 50-623			X	X		X	X	X		X	X	X
Ky. Rev. Stat. § 367.110		X		X		X		X	X	X		X
La. Rev. Stat. Ann. § 51:1401	X				X	X	X	X		X		X
Me. Rev. Stat. Ann. tit. 5, § 206	X				X	X				X		X
Md. [Com. Law] § 13-101		X	X		X	X						
Mass. Gen. Laws Ann. ch. 93A, § 1 (West)	X				X	X	X	X		X	X	X

STATE STATUTE	(1) ALL § 5 PROHIBI- TIONS	(2) UNFAIR OR DECEP- TIVE ONLY	(3) DECEP- TIVE (ITEMIZA- TION)	(4) UNCON- SIGNABLE	(5) REFER- ENCE TO FTC	(6) PRIVATE ACTIONS	(7) MINIMUM DAMAGES	(8) MULTIPLE DAMAGES	(9) PUNITIVE DAMAGES	(10) EQUITA- BLE RELIEF (RESCIS- SION)	(11) CLASS ACTIONS	(12) ATTOR- NEYS' FEES
Ohio Rev. Code Ann. § 1340.01 (Page)		X	X	X	X	X	X	X		X	X	X
Okla. Stat. Ann. tit. 15 § 751 (West)			X									
Or. Rev. Stat. § 646.605		X	X	X		X	X		X	X		X
Pa. Cons. Stat. Ann. tit. 73 § 201 (Purdon)	X		X			X	X	X		X		
R.I. Gen. Laws § 6-13.1-1	X		X			X	X	X	X	X	X	X
S.C. Code § 39-5-10	X				X	X		X		X		X
S.D. Codified Laws Ann. § 37-24-1			X			X						
Tenn. Code Ann. § 47-18-101		X	X		X	X	X	X		X		X
Tex. [B&C] Code Ann. tit. 2, § 17.41 (Vernon)			X	X	X	X		X		X		X
Utah Code Ann. § 13-11-1			X	X	X	X	X			X	X	X
Vt. Stat. Ann. tit. 9, § 2451a	X				X	X		X		X		X
Va. Code § 59.1-196			X			X	X			X		X

STATE STATUTE	(1) ALL § 5 PROHIBI- TIONS	(2) UNFAIR OR DECEP- TIVE ONLY	(3) DECEP- TIVE (ITEMIZA- TION)	(4) UNCON- SCIONABLE	(5) REFER- ENCE TO FTC	(6) PRIVATE ACTIONS	(7) MINIMUM DAMAGES	(8) MULTIPLE DAMAGES	(9) PUNITIVE DAMAGES	(10) EQUITA- BLE RELIEF (RESCIS- SION)	(11) CLASS ACTIONS	(12) ATTOR- NEYS' FEES
Wash. Rev. Code Ann. § 19.86.020	X					X		X		X		X
W. Va. Code § 40A-6-101	X		X		X	X	X			X		
Wisc. Stat. Ann. § 100.18 (West)	X					X		X				X
Wyo. Stat. § 40-12-101			X			X					X	X*

* Fees are awardable in class actions only.