

## Survey of Consumer Fraud Law

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National Institute of Law Enforcement and Criminal Justice  
Law Enforcement Assistance Administration  
U. S. Department of Justice

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by  
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June 1978



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National Institute of Law Enforcement  
and Criminal Justice  
Blair G. Ewing, Acting Director

Law Enforcement Assistance Administration  
James M. H. Gregg, Acting Administrator

This project was supported by Grant Number 76-NI-99-0122, awarded to the American Institute for Research by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U. S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U. S. Department of Justice.

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For sale by the Superintendent of Documents, U.S. Government Printing Office  
Washington, D.C. 20402

Stock No. 027-000-00672-8

## ACKNOWLEDGMENT

Consumer Fraud: An Analysis of Impact and Opportunities for Intervention (Grant No. 76-NI-99-0122) is a combined effort by the American Institutes for Research (AIR), Washington, D.C., and the National Consumer Law Center (NCLC), Boston, Massachusetts; the project is designed to be accomplished in three consecutive phases. This report, The Survey of Consumer Fraud Law, presents the results of NCLC's Phase I activities. The report on Phase I prepared by AIR appears in a separate volume.

Mark E. Budnitz, Executive Director of NCLC, has primary responsibility for all of NCLC's technical and administrative efforts. Jonathan Sheldon and George J. Zweibel devoted full time to the production of this document. They were assisted by Lynne B. Adams, Robert J. Hobbs, Mark Leymaster, Wendy Schiller and other members of the professional staff who worked on a task-by-task basis. Research on the laws at the several jurisdictional levels was conducted by the following law students: Betsy Westgate, Sharlyn Cohen, Linda Jason, Marek Laas, Timothy McGee, Diane Renfroe, Lawrence E. Williams, Jr., and Joan Hechering. Appreciation is extended to Marybeth Nixon who provided typing and administrative assistance to this report.



## INTRODUCTION

This report surveys existing consumer fraud law at the federal, state, and local levels, outlining the fraudulent practices this legislation is targeted against and the enforcement strategies utilized. It is a general description of the state of consumer fraud law today, delineating state, local, and federal governments' consumer fraud concerns and the methods they use to combat these perceived problems. Perspective is added by including descriptions of historical and foreign approaches to consumer fraud.

This report is an initial product of a joint study by the American Institutes for Research and the National Consumer Law Center analyzing consumer fraud's impact and the opportunities for intervention. Later reports will detail the effectiveness of present law enforcement approaches, describe the characteristics, incidence, and impact of consumer fraud, and identify promising intervention strategies. In addition, since the report only attempts to describe generally the state of the law today, no effort is made to exhaustively catalogue all statutes or cases dealing with a particular issue, or to evaluate the effectiveness of present enforcement strategies or the accuracy of present consumer fraud concerns.

The report itself is divided into five parts. Part I traces the historical development of consumer fraud laws. Part II, State Law, presents an analysis of 67 consumer fraud practices states have targeted for regulation and 33 strategies used to prevent these prohibited practices. Part III, Local Enforcement, discusses the various approaches that municipalities and counties take in policing consumer transactions.

Part IV, Federal Law, is analogous to Part II, in that it describes both the fraud practices of concern to federal agencies and the strategies utilized to prevent them; it also contains an agency-by-agency analysis summarizing important consumer fraud laws and remedies administered by 28 federal agencies.\* Part V, Foreign Approaches, sets out innovative strategies that foreign jurisdictions have utilized to combat fraud in the marketplace.

Part I, Historical Development of Consumer Fraud Law, is based on research into historical monographs, treatises, and other secondary materials as well as a review of available caselaw. No pretense is made to an exhaustive study, but enough of the available literature was reviewed to permit the outlining of important legal trends.

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\*A more complete agency-by-agency analysis, largely prepared, will be released in a separate report at a later time, as its length and technical nature is inconsistent with this report's essentially summary nature. That report will provide a guide to those wishing to do more extensive research into federal consumer fraud law.

The state law section is based on the results of three different surveys. Most states' major effort at consumer protection legislation - laws prohibiting unfair or deceptive acts or practices (hereinafter called UDAP statutes)-- were identified and reviewed for all states.\* The second survey extensively researched all other forms of consumer fraud laws for a 13-state sample. The third survey looked at legislation and regulations adopted by approximately 30 state licensing boards in a five-state subsample.

While a review of all states' UDAP statutes proved manageable, the study's scope allowed only a sampling of the thousands of other state consumer fraud laws. Consequently, the survey was limited to 13 states, facilitating a detailed analysis of all forms of consumer fraud laws within those states. Those 13 states should be representative enough to enable the report to draw meaningful generalizations about the nature of all states' consumer fraud laws, if not precise quantitative findings as to how many states have enacted which laws.

The 13 states included in the sample are:

Alabama	Massachusetts
California	New Jersey
Colorado	New York
District of	Ohio
Columbia	Pennsylvania
Georgia	Texas
Illinois	Wisconsin

These jurisdictions were selected so as to provide an adequate cross section along three variables known in advance of the survey--geographic location, form of UDAP statute, and amount of state resources devoted to consumer protection. Several states were chosen from the Northeast, Midwest, South, and West. The states also represent, in approximately correct proportions, the various forms of UDAP statutes enacted throughout the country and include the one state that has not enacted such legislation. One of the few Uniform Consumer Credit Code states was also selected. Various forms of private and state UDAP remedies and powers are all represented in roughly proportional numbers.

A similar mix of state resource commitments to consumer protection is represented. If the survey is skewed in any direction, it is toward states that are considered to possess extensive or novel consumer protection laws.

All laws in these 13 jurisdictions were reviewed to identify those relevant to consumer fraud problems. In addition, caselaw and regulations interpreting their UDAP statutes were researched.

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\* For the purpose of this report, the District of Columbia will be treated as a state.

While this 13-state sample allowed extensive research into most state legislation, it proved too large for analysis of the often lengthy regulations of the states' numerous licensing boards. Some states have more than 40 such boards.

Instead, the regulations of approximately six different boards for each of five states were selected for analysis. The five states--California, Georgia, Illinois, Massachusetts, and New York--provide geographic distribution and, based on preliminary research, represented various types of state licensing approaches.

The local consumer fraud law survey was based on a sample of approximately 30 jurisdictions--two or three towns or counties within each of the 13 target states. The jurisdictions were chosen to provide representation from urban, suburban, small town, and rural areas. Since almost all localities have very limited consumer fraud legislation, a disproportionate number of localities with more extensive consumer fraud laws were selected to allow adequate comparison of various approaches, even if infrequently enacted.

The federal survey entailed comprehensive research of all federal laws and agencies identified as having consumer fraud functions. Preliminary research suggested that as many as 40 federal agencies might have some involvement in the area of consumer fraud. Further examination narrowed this to 20 agencies whose statutory powers, and regulations promulgated under them, were found to merit detailed research. Other federal consumer fraud statutes not relating to any agency were also discovered.

Federal Trade Commission law, being of special importance, was more thoroughly inspected. FTC legislation, rules, guides, caselaw, enforcement statements and various secondary materials were scrutinized.

The research into federal law allowed the development, for each of the 28 agencies, of charts delineating prohibited practices related to the agency's consumer fraud functions and remedies for violations. These charts provided the basis for Part IV and are summarized in that Part's agency-by-agency analysis.

Foreign law received less systematic treatment. A number of foreign laws and other materials were reviewed. Based on this initial survey, innovative approaches found in Canada, Germany, Israel, and Sweden were more closely considered. In addition, recent developments at the United Nations were followed.

## TABLE OF CONTENTS

	<u>Page</u>
Introduction . . . . .	i
Part I: Historical Development of Consumer Fraud Law .	1
A. Pre-Feudal England (900-1100). . . . .	2
B. The Royal Courts in Feudal England (1100-1400). . . . .	2
C. Feudal Dispute Resolution Outside the Royal Courts (1100-1400) . . . . .	3
D. The Commercial Revolution (1400-1750). . .	5
E. Development of Caveat Emptor (1750-1900). . . . .	7
F. Modern Fraud Approaches (1900-present) . .	11
Part II: State Law. . . . .	19
A. Prohibited State Practices . . . . .	21
B. State Enforcement Strategies . . . . .	74
Part III: Local Enforcement . . . . .	125
Part IV: Federal Law. . . . .	135
A. Prohibited Federal Practices . . . . .	143
B. Federal Enforcement Strategies . . . . .	153
C. Agency-by-Agency Analysis. . . . .	161
Part V: Foreign Approaches . . . . .	195
A. Bargaining in Good Faith . . . . .	197
B. Standard Form Contracts. . . . .	198
C. Unconscionability. . . . .	201
D. Activity at the United Nations . . . . .	202
Conclusions. . . . .	205
Appendix A. Other Federal Agencies . . . . .	211

## LIST OF TABLES

1. Prohibited State Practices Chart. . . . .	24
2. State UDAP Statute Characteristics Chart. . . . .	122
3. Prohibited Local Practices Chart . . . . .	131
4. Local Consumer Protection Agency Remedies and Powers . . . . .	133
5. Prohibited Federal Practices Chart . . . . .	139

## CONTENTS-PART I

Part I:	Historical Development of Consumer Fraud	1
	Law . . . . .	1
A.	Pre-Feudal England (900-1100) . . . . .	2
B.	The Royal Courts in Feudal England (1100-1400) . . . . .	2
C.	Feudal Dispute Resolution Outside the Royal Courts (1100-1400) . . . . .	3
	1. Informal Mechanisms . . . . .	3
	2. Local and Special Courts . . . . .	3
	3. Market Regulation and the Just Price . . . . .	4
D.	The Commercial Revolution (1400-1750) . . . . .	5
E.	Development of Caveat Emptor (1750-1900) . . . . .	7
	1. Speculative Markets Change Contract and Warranty Theories . . . . .	8
	2. Courts' Support of Commercial Interests Facilitates Change . . . . .	10
	3. Actions for Fraud Limited . . . . .	10
F.	Modern Fraud Approaches (1900-present) . . . . .	11
	1. The Federal Trade Commission and Unfair and Deceptive Practices . . . . .	12
	2. Occupational Licensure . . . . .	13
	3. Criminal Statutes . . . . .	14
	4. Other Regulation . . . . .	15
	5. Warranty Law . . . . .	16
	6. Informal Dispute Mechanisms . . . . .	17

## PART I-HISTORICAL DEVELOPMENT OF CONSUMER FRAUD LAW

A brief survey of the historical development of consumer fraud law in England and later in the United States will place in perspective modern consumer fraud approaches. Nevertheless, the ensuing description is not a careful, scholarly treatise, but, instead, a simplified and deliberately provocative sketch.

Because of the great incompleteness in primary sources and the consequent lack of consensus among scholars, this historical section cannot speak with the same authority as succeeding sections will about present day legal concepts. For example, surviving case law from fourteenth century England comes disproportionately from selected records from the more sophisticated urban tribunals, with little material, if any, from outlying districts. Consequently, legal historians may take issue with some interpretations here, particularly since this section is summary historical description aimed to provoke general readers into viewing present day legal patterns with a broader perspective.

Most modern legislation was enacted to deal with flagrant abuses, while permitting the underlying consumer-merchant relationship to remain one of caveat emptor, or "let the buyer beware." But this notion of caveat emptor was fully articulated only after the 18th century. Feudal English law contained an underlying concept of a "just" or sound price for a sound product. Even though the majority of the population was excluded from the royal courts, other mechanisms regulated the marketplace and enforced this principle of fair business dealings. The Commercial Revolution in the fifteenth and sixteenth century saw the royal courts alter the common law to meet merchant needs, but notions of equity in the marketplace persisted.

Although various forces over the centuries would thwart in various ways this ideal of a just price and a regulated market, not until the development of stock speculation and futures markets in the 19th century did the doctrine of caveat emptor fully replace these earlier notions. Twentieth century consumer fraud legislation, with few exceptions, has not altered this fundamental principle of caveat emptor.

## A. PRE-FEUDAL ENGLAND (900-1100)

The foundations of Anglo-American law date back to pre-feudal English "courts" where lord and vassals acting as prosecutor, "jury" and judge in one, gathered at the baron's banquet hall to pressure and discipline their weaker brethren. These "manorial courts" kept few systematic records. Royal decrees, the "statutes" of the time, were only unevenly known or used.

## B. THE ROYAL COURTS IN FEUDAL ENGLAND (1100-1400)

By the late eleventh century certain of these courts had developed into "royal" and other specialized courts. Still other courts grew from different sources until Feudal England presented litigants an array of forums that could adjudicate disputes. The royal courts left the most substantial written record and, having the King's authority, were the most powerful in the land. Consequently, they are a good starting place to look at the development of consumer fraud law, before turning to the more numerous feudal courts and dispute resolution mechanisms that proved more influential in dealing with marketplace fraud as it affected most people.

The Crown used the royal courts to administer the realm, spell out the King's will (the "law"), punish misbehavior and make bargains for the exercise of preference. These courts thus merged traditional legislative, executive, and judicial functions, proving of great benefit to the Crown and the numerous officials representing the Crown. The courts kept the unruly nobility under constraint, but that nobility also found the courts invaluable in invoking the royal will and the royal army in their own cause. The courts also levied sizeable fines for "breach of the King's peace", allowing sheriffs and other Crown representatives to coerce significant payments from those too weak to resist collection efforts.

But the royal courts would not hear all disputes, but limited litigations to matters of special interest to the Crown, commonly real estate and other objects of value. By and large, the only individuals to sue in these courts were the nobility, certain well-to-do merchants with land holdings, and wealthy money lenders. Serfs and craftsmen might occasionally find themselves defendants, but their access to the royal courts were otherwise blocked. The courts adjudicated disputes of greatest concern to these wealthier classes who were able to bring actions—disputes over inheritance, mortgage contracts, collateral interests, other covenants, real estate bargains, and possession of land and certain valuable moveables.

A body of law slowly began to develop concerning these primarily realty issues. One might expect Crown representatives to make judicial decisions consistent with the Crown interest and other pressures applied. But the decisions were justified by reference to a preexisting local "practice", the so called



common law. Thus emerged a developing fiction that judges were not making law so much as announcing an as yet incompletely articulated law. While other courts also utilized local or "common" precedents, it was the royal courts that proceeded most formally, and developed the most standardized body of law. But even the common law in royal courts was not systematically applied. Reporting was rudimentary, biased and otherwise spotty. But the mystery of the common law added to the authority of the early courts and elevated and complicated the law as a profession for both bench and bar, adding to their power.

After the Norman Conquest, losers in the royal courts began seeking exceptions from the court's ruling from the Chancellor, the King's chief administrative agent. Later this procedure became institutionalized in the Chancery Court, a court of "equity" or extraordinary jurisdiction. It would review actions of common law courts and hear some matters that were not litigable at "law".

### C. FEUDAL DISPUTE RESOLUTION OUTSIDE THE ROYAL COURTS (1100-1400)

Royal courts were generally unavailable for resolving consumer-type fraud claims by the ordinary public unless the Crown was somehow involved. But there were alternative methods to resolve the times' marketplace disputes.

#### 1. Informal Mechanisms

Most everyday private agreements between merchants and consumer buyers were sealed with a handshake in front of witnesses. (More formal agreements involving noblemen and wealthy merchants would be evidenced by sealed documents.) In the outlying hamlets, self-help was used wherever possible to resolve simple marketplace disputes. A rough sense of justice and a shared standard of moral fairness, aided by sticks and neighbors, settled most disputes. Defrauding itinerant merchants faced corporal punishment and expulsion from town.

But over time, particularly in the larger cities, guilds and town officials began to discourage such practices and point to other dispute resolution mechanisms. Guilds preferred to discipline their own members, or present disputes during market days to the chief officer of the Guild, the Portreeve (King's agent) or an agent of the aristocrat who owned the town's charter.

An even older institution was the view of the frankpledge where all men of the lower orders were organized in groups of ten or twelve and were held responsible for each other's actions. The emphasis was on preventing misconduct, not in remedying individually defrauded customers.

#### 2. Local and Special Courts

Feudal England was dotted by numerous local and special courts with diverse functions and characteristics that regulated

the conduct of a large portion of the population. These courts and the law they interpreted differed in important ways from each other and changed over time. But whatever their form, it was these courts, not the royal courts, that affected most people's marketplace dealings. Many of these courts evolved from old manorial and church courts and the town meeting, all dating back to pre-feudal times.

Fines and some rough reformation of bargains were possible, but methods of determining which party was in the right involved primitive dispute mechanisms. Such earlier "trials" as wagers of battle (where the two parties beat at each other with knives or cudgels, the winner being declared the innocent party) or trial by ordeal were probably outmoded by 1200. Instead a gentler approach was used, called "a wager of law", the antecedent of the jury system. Each party could call upon oath-helpers who would swear to the truthfulness of their party's cause. If a predetermined number of oaths were brought forth, the defendant was acquitted. While the procedure varied, only citizens in good standing could give oaths. Slaves, outlaws, non-conformists, and outsiders were given short shrift by the "establishment" who ran these courts -- the local Elders, Churchmen, burgers and gentry knights.

### 3. Market Regulation and the Just Price

These informal dispute mechanisms and local courts were part of a pervasive system of regulation that controlled feudal England's limited and unsophisticated consumer transactions. Markets were local because regional transportation was so bad it paid to transport only luxury goods, fabrics, spices and jewelry. Famines fifty miles from plenty were common enough. Goods were made to order locally, with wholesaling virtually non-existent. Barter was an important means of exchange. Local exchange values would remain constant for many years, except briefly during catastrophes.

In this type of economy, it was possible for feudal society to attempt to solve consumer fraud problems by extensive regulation of all aspects of the marketplace, including fixing the cost of standard items at prices considered fair or just, not leaving merchants to extract whatever price they could get in a free market. It is unclear how successful feudal society was in this monumental task of informal price and quality regulation, but it is certain that several important institutions assisted in the effort.

The Crown issued a number of Assizes or royal decrees requiring the appointment of local boards to set prices for various products such as bread and ale. These boards tried to punish cases of profiteering, often with corporal punishment such as the pillory for bakers (who were usually men) and the dunking stool for brewers (who were usually women). The Statutes of

Laborers in the mid-fourteenth century sought to fix labor prices which were threatening to sky-rocket as a result of the labor shortage brought about by The Black Death.

The Guilds were another feudal institution involved in price setting and quality standards. Towns living on commerce were usually run by merchant guilds which strictly regulated their membership and set standards for weights and measures and as to terms and conditions of sales, including prices. A craftsman could offer goods in most towns only after long apprenticeship, dues and election. Refusing to follow the rules got one expelled from the town and very nearly from society.

Whether the regulation was by guilds, the Crown, or others, it pervaded all aspects of sales. The way goods could be manufactured, displayed, weighed and measured, and sold were strictly controlled. To quote one commentator: "The object of the law was to insure to every good offered for sale a fair price, full measure, and good workmanship."\* Fraud intervention approaches were based on publicity and prevention, not in remedying individually wronged customers.

Another source of rate regulation was the notion of a "just price". The concept was articulated by special merchant courts around 1200 to 1300. A sound price required sound goods. Goods had an intrinsic, just price, independent of their marketplace value determined by supply and demand. Goods should be sold at this fair price, not the marketplace price.

It is likely that this concept ante-dated its usage by merchant courts and more broadly applied to merchant-consumer relations. This would be consistent with the church supported doctrine that each thing had an intrinsic, relatively unvarying worth which was the sum of the cost of the labor and materials needed to make it. Aquinas and other church theoreticians saw a profound difference between wrongful trade carried on for profit and rightful trade which served public necessity. Profit-eering beyond the just price or selling shoddy goods at quality prices was a sin at a time when the Church's influence was profound.

It is difficult to ascertain precisely how effective were feudal England's various attempts at setting a "just" price for goods and otherwise regulating the marketplace. Certainly they were not everywhere successful. Nevertheless, it is clear that these notions were widespread and provided an important standard for consumer transactions.

#### D. THE COMMERCIAL REVOLUTION (1400-1750)

During the commercial revolution, wealth shifted from the landed aristocrats to the merchant class, resulting in the royal courts beginning to involve themselves with merchants'

\*Hamilton, Walter H., The Ancient Maxim Caveat Emptor, 15 Yale Law Journal 1133 (1931)

disputes through specialized Courts Piepowder ("dusty feet" from the French, alluding to the itinerant merchants' grime, so distinct from the noble litigant) which used a distinctly international breed of legal principles, called the Law Merchant. The Law Merchant was patterned after the law that grew up with Italian banking and Venetian trade and was very different than the Common law. In fact, most of the early merchants in England were not English, but foreigners. They used their own law in settling disputes, not English Common Law.

From about 1300 to 1500 the Law Merchant's development was largely limited to the Courts Piepowder in major trading towns. Thereafter, the royal courts began to seriously consider merchant litigants, and English jurists rapidly reformed the old common law precedents to meet the demands of the merchant class. The King recognized the new commercial law by royal decree.

The fifteenth and sixteenth century changes in the law resulted in altered and expanded causes of action that allowed defrauded buyers to seek legal redress in the royal courts. Three of these have special importance in the development of consumer fraud law.

Trespass on the Case for Warranty. This action developed from the old cause of action involving a trespass onto real property, and was abstracted to include invasions of individuals' other interests. It was used in the special circumstances when a seller more than just represented, but promised or warranted, that certain facts were true when they were not. Trespass on the Case for Warranty was very narrowly construed, with some cases failing to find a causable action if the merchant did not use the word "warrant" as in: "I warrant the following facts to be true."

Trespass on the Case in the Nature of Deceit. The limited nature of Trespass on the Case for Warranty gave impetus to the development, around 1450, of the action called Trespass on the Case in the Nature of Deceit. The action also borrowed elements from an old cause of action called Deceit involving misuse of legal process. The result was a cause of action that allowed damages for misrepresentation even if the seller did not "warrant" facts to be true. This action eventually was extended to even negligent misrepresentation.

Equity. Frauds which the law courts refused to recognize could still be actionable in the Chancery Courts in equity. Not only would equity utilize remedies not available at law - reformation or rescission of the contract, injunctive orders,

and other special rights beyond damages - but it would grant relief even in innocent misrepresentation situations when the misrepresenting party took advantage. Intent was not necessary for the grant of relief from fraud.

The Commercial Revolution also challenged the notion of a just price. The growth of markets and industry rapidly increased the number of goods sold, their uses and quality. Difficulties feudal England faced in regulating market transactions were multiplied many times over. As the merchant class rose in power, society also grew more sympathetic to a mercantile viewpoint, ignoring earlier church doctrine that found activities performed for profit sinful. These changes also coincided with a significant weakening of the central government and the church. The extent to which these challenges succeeded in breaking down the notion of a just price is unclear. Certainly the concept lived on as an ideal standard, if not always followed.

#### E. DEVELOPMENT OF CAVEAT EMPTOR (1750-1900)

At least according to one legal historian, the medieval concepts of a just price, a fair bargain and "a sound price warranting a sound commodity" persisted as late as 1800. The prices of many goods and services were settled, allowing juries and judges to view contracts for their fairness independent of the terms agreed to by the contracting parties.

In both England and America, juries and judges might not enforce contracts if there was inadequate consideration. When the selling price was greater than the supposed objective value of the product, juries could refuse or reduce damages in actions brought by sellers. Similarly, if a product did not measure up to the standards its price implied, courts could enforce buyers' implied warranty actions.

This doctrine of an independent standard of contractual fairness apart from the original intent of the bargaining parties conflicted with emerging nineteenth century commercial notions of markets, speculation and business bargains. Merchants did not want juries scrutinizing their business transactions but expected a business bargain to be enforced. If the merchant received a benefit in the bargain, he wanted to receive it if the contract was later breached and his expected profits did not result.

Merchants at first sought alternative methods to enforce their bargains, avoiding the courts' scrutiny of the contract terms. Businessmen attempted to informally settle disputes among themselves. Other matters were referred to a more formal arbitration process. If court actions were necessary, they attempted to bring them before merchant juries which

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\*Much of this section is based on M. Horwitz, "The Historical Foundations of Modern Contract Law," 87 Harv. L. Rev. 917 (1974). His article may be considered radical by some legal historians, but it is included here because it is both provocative and documented.

might ignore common law doctrine. Another approach was the inclusion of penal bonds in agreements. While courts might still challenge the fairness of the penalty agreed upon, the bonds were usually enforced.

As the market economy spread and speculation became an important activity, courts began to alter traditional concepts to accommodate these new interests. From the end of the eighteenth century to the end of the nineteenth, changed economic conditions wrought a fundamental modification in contract law, resulting in the development of the concept of caveat emptor and the recognition of the sanctity of bargained for contracts.

Under the sanctity of contract doctrine, or will theory, as it is often called, parties are stuck with their bargains, fair or not. Courts will stop their scrutiny of a contract after determining that the parties reached an agreement. Finding agreement, the courts will enforce the bargain, however ill-balanced.

### 1. Speculative Markets Change Contract and Warranty Theories

The first turn-of-the-nineteenth century crack in the just price doctrine came when courts began recognizing expectation damages in stock and commodity speculations. Foreign to the just price concept, but essential to the operation of speculative markets, is the notion that a buyer be awarded damages if the seller breached an agreement to sell because the stock had subsequently gone up in value. As one leading commentator explains:

Markets for future delivery of goods were difficult to explain within a theory of exchange based on giving and receiving equivalents in value. Future contracts for fungible commodities could only be understood in terms of a fluctuating conception of expected value radically different from the static notion that lay behind contracts for specific goods; a regime of markets and speculation was simply incompatible with a socially imposed standard of value. The rise of modern law of contract, then, was an outgrowth of an essentially pro-commercial attack on the theory of objective value which lay at the foundation of the eighteenth century's equitable idea of contract. Id. at 947.

In America, courts began awarding expectation damages in the 1790's in response to an active "futures" market in state securities. This speculation rapidly developed after the Revolutionary War in anticipation of the assumption of state debts by the new national government. The trend was facilitated by the existence of all-merchant juries.

Commodity markets developed somewhat slower and expectation damages for commodity speculation were not awarded until about 1820. Shortly thereafter, as other futures contracts became commonplace, the notion of a just price and fair exchange began to break down. In 1824, a sharply divided New York appellate court overruled one of the leading jurists of the time who refused to enforce a land contract because he found gross inadequacy of consideration. The appellate court countered:

Every member of the Court must be well aware how much property is held by contract; that purchases are constantly made upon speculation; that the value of real estate is fluctuating...(there) exists an honest difference of opinion in regard to any bargain, as to its being a beneficial one, or not.... Seymour v. Delaney, 3 Con. 448 (N.Y. 1824).

Courts' attempts to accomodate the merchant class' use of the negotiable instrument further buried notions of fair bargains. Merchants convinced courts that promissory notes, to be effective, must allow subsequent holders to make free and clear of any defenses the debtor had against the original creditor. Commercial necessity must take precedence over any unfairness to individual debtors.

Old notions did not pass away quickly. In the 1820's commentators supporting the new theory still considered it the court's function to scrutinize contracts closely if the agreement appeared very unequal. The court would then look to see if one of the bargainers did not understand the contract, was oppressed or was unfairly treated.

By the 1840's the conflict between contracts based on an independent standard of fairness and those based on the bargainers' will was settled with the latter theory triumphant. Later developments would only articulate this basic will theory, voiding contracts under certain narrowly defined conditions such as fraud or total lack of consideration.

These developments in contract law paralleled the nineteenth century's limitation on implied warranties. Late into the eighteenth century both English and American courts held that "a sound price warrants a sound commodity." But in Seixas v Woods, a leading American case decided in 1804, the New York Supreme Court held that recovery could only be had from a merchant who had knowingly sold defective goods. The view spread to American states by the mid-nineteenth century. At the same time, English courts were also limiting the use of implied warranties.

## 2. Courts' Support of Commercial Interests Facilitates Change

In the space of 50 years, from the late 18th to the mid-19th centuries, the law's view of business transactions had been revolutionized. Courts, instead of insuring that bargains were fair and that a sound price warranted a sound product, blinked at all kinds of inequities, explaining their actions with the notions of caveat emptor and the sanctity of contracts.

While this change can be explained in large part by the law's responding to the demands of modern markets, it was also brought about by a significant shift in the sympathies of American courts. Eighteenth century American courts represented the interests of the small town, the farmer, and the small trader.

The will theory of contracts is evidence of how the courts in the following century became supporters of commercial interests. By enforcing unequal contracts resulting from merchants or consumers bargaining with merchants with superior power, skills, experience and resources, the courts were shaping the law to meet merchant interests and reinforcing existing social and economic inequalities.

But 19th century American courts went even further and used the will theory when it met the needs of the commercial interests but abandoned it when it did not. Courts held laborers strictly to the terms of their contracts, giving them no partial payment if they left before the full term of the contract; the same courts gave building contractors the fair value of their efforts even if the work was not completed. As described by one commentator:

Although nineteenth century courts and doctrinal writers did not succeed in entirely destroying the ancient connection between contracts and natural justice, they were able to elaborate a system that allowed judges to pick and choose among those groups in the population that would be its beneficiaries. And, above all, they succeeded in creating a great intellectual divide between a system of formal rules--which they managed to identify exclusively with the "rule of law"--and those ancient precepts of morality and equity, which they were able to render suspect as subversive of "the rule of law" itself. Id. at 955, 956.

## 3. Actions for Fraud Limited

One final step toward the creation of the doctrine of caveat emptor was the narrowing of the common law action for fraud. The late eighteenth century action of Trespass on the Case in the Nature of Deceit was still presumed to reach both intentional



and negligent misrepresentations. But as the doctrine of caveat emptor advanced on other fronts, the notion of deceit, or fraud, as it was alternatively called, became more and more difficult to prove. Eventually, before a court would find fraud, five elements had to be proved:

- (1) a false representation, usually of fact;
- (2) reliance on the representation by plaintiff;
- (3) damage as a result of the reliance;
- (4) defendant's knowledge of the falsity, called "scienter," and
- (5) intentional misrepresentation seeking reliance.

The fifth element was not articulated until 1888 in the fraud case of Derry v. Peek, 14 A.C. 337. Until very recently, English courts refused to grant recovery for pecuniary loss where only negligent misrepresentation was involved. The same approach that purged the last vestiges of equitable price theory from the law's view of contracts can be seen in the articulation of the fourth and fifth elements of common law fraud.

American jurisdictions do not always embrace the scienter and intent elements; some states discard these elements and find sellers absolutely liable for their misrepresentations. Today in America the position has prevailed that negligent misrepresentation causing pecuniary harm is actionable. Scienter and intent may also be unnecessary in an action to rescind a contract or remedy a breach of warranty.

#### F. MODERN FRAUD APPROACHES (1900-Present)

By 1900 the doctrine of caveat emptor had replaced the "just price" concept. Defrauding merchants found courts ready to enforce their contracts no matter how unfair. Defrauded consumers, on the other hand, found little assistance but only numerous legal obstacles before them if they wished to bring actions for common law fraud or warranty.

Since 1900, various forms of state and federal legislation have, at least on their face, attempted to cure some of this imbalance. These statutes include the Federal Trade Commission Act and state statutes modeled after it, and numerous state occupational licensing acts. Other important categories of consumer fraud legislation are the thousands of statutes that directly prohibit or regulate specific practices and the Uniform Commercial Code's warranty sections. But these legislative attempts have not brought about a radical departure from the doctrine of caveat emptor, and, in fact, often reinforce it.

## 1. The Federal Trade Commission and Unfair and Deceptive Practices

One of the first such approaches was the creation of the Federal Trade Commission in 1914. The FTC was not created in response to outrages over consumer fraud but to turn-of-the-century concerns over monopolies. The new Commission was established to deal primarily with anti-trust issues. The Act passed in 1914 only prohibits "unfair methods of competition."

The courts immediately limited the scope of this rather vague and broad mandate. In FTC v. Gratz, 253 U.S. 421 (1920), the U.S. Supreme Court limited "unfair methods of competition" to acts previously considered opposed to good morals or against public policy, seeming to limit the FTC's jurisdiction to practices already considered unfair in 1914. The court further narrowed the FTC's scope in 1931 by deciding, in FTC v. Raladam, 283 U.S. 643, that the Commission could only attack practices where competitors were injured, not where only consumers were harmed. The FTC Act, which at first glance seemed to include a broad and expansive consumer protection mandate, was whittled away by the courts until it only served to attack egregious anti-competitive conduct.

The Commission did not begin to take on a consumer protection function until the New Deal. A 1934 Supreme Court decision, FTC v. Keppel & Bros., 291 U.S. 304, overturned Gratz. Congress overturned Raladam in 1938 by enacting the Wheeler-Lee Amendment that authorized the FTC to prohibit not only "unfair methods of competition" but also "unfair and deceptive acts or practices." The Commission thus was given an independent consumer protection function, irrespective of a practice's anti-competitive effects.

Deception has proved a broad and evolving standard, allowing for much easier enforcement than common law fraud. Only a capacity to deceive a significant number of consumers need be shown. No proof of intent, actual deception or even actual damage is necessary.

This standard had been hailed as ending the days of caveat emptor. But, in fact, the Federal Trade Commission Act, even as amended, did little to alter merchant-consumer relations. Private individuals cannot sue under this liberal standard, and thus must rely on the FTC's own enforcement efforts. But commentators from Ralph Nader to the American Bar Association have recently criticized the FTC for its failure to take significant action to curtail fraud.

Two recent phenomena, spurred on by the consumer movement of the late 60's and 70's, have somewhat altered this picture, and have finally begun to dent caveat emptor's armor. One is the reinvigoration of FTC enforcement assisted by recent legislation that gives it expanded powers to police fraud and redress injured consumer.

More importantly, every state but one has enacted legislation modeled after the FTC Act, prohibiting unfair or deceptive acts or practices, known as UDAP statutes. UDAP statutes not only allow states to police deceptive practices, but provide consumers with private rights of action, allowing injured individuals to bring their own suits in court. In forty-four states, defrauded consumers do not have to bring common law fraud actions but can use the more liberal FTC standard of deception.

## 2. Occupational Licensure

Occupational licensing is another 20th century legislative innovation that on its face appears to provide protections from consumer fraud. Numerous regulatory boards in all states now license individual occupations, extensively regulating who can enter occupations and how entrants can conduct themselves.

In 1900, few occupations other than lawyers and doctors were subject to state licensing. But the early twentieth century saw literally scores of different occupations licensed. North Carolina, for example, licensed 60 new occupations by 1938.

It would be convenient to report that this deluge of occupational regulation was a reaction to the public's feeling of powerlessness in light of caveat emptor. But, by and large, occupational licensing resulted instead from the efforts of members of the occupation to be regulated. Their motives were to restrict entry, reduce price competition, and consequently increase profits. Another consideration was the desire of members of an occupation to "professionalize" themselves, thus adding to their stature in the community and, incidentally, discouraging public scrutiny.

The appointment of a licensing board, comprised almost entirely of industry members, was a small price to pay to effectively preempt other efforts to impose stronger consumer safeguards. The board, by channeling all consumer complaints to it for informal industry members' resolution, effectively insulates the occupation from individual litigation or state prosecution.

Instead of undermining caveat emptor, occupational licensing may act to preserve it. Unlike the early English trade guilds, these boards do not insure that a sound price results in sound goods, but act more to preserve occupational privilege.

### 3. Criminal Statutes

A third form of twentieth century legislation altering the consumer-merchant relationship is the hundreds of state and federal statutes that prohibit specific forms of fraud, usually authorizing criminal fines or sentences as sanctions. Unlike the FTC Act that grew out of fears of monopolies, or occupational licensing that was based on merchants' desires to reduce competition, these statutes actually were reactions to public consumer fraud concerns.

The first area of business practices to be so regulated was advertising techniques. This is not surprising since aggressive mass advertising campaigns, being essentially recent phenomena, offered an easier target than business practices legitimized by their age. Nor does restricting advertising practices interfere with the merchant's ability to act as he chooses at the point of sale.

The first statutes to regulate advertising were called Printers' Ink Statutes, named after the advertising journal that, in 1911, drafted the model legislation upon which they were based. The model act prohibited "untrue, deceptive or misleading advertising" and provided misdemeanor penalties for violations. The model was soon adopted in most states.

The journal explained that the model law was based on the "recognition of the business world that the common law remedies were inadequate to restrain the excesses of advertising in an age of mass consumption." Another motive may have been to alleviate publishers' fears that they, not the advertisers, would be held liable for false advertising. The Printers' Ink Statutes, by exempting publishers from their scope, encourage publishers to be more liberal in allowing advertising to be printed. Whatever the reason for their passage, it is typical that the terms of the legislation were determined by the advertising community, not by consumers.

Mail fraud was another early legislative target. The Post Office enforced a series of statutes, passed early in the 20th century, that prohibited fraud in the use of the mails. Exaggeration or other mild misrepresentations short of fraud were not actionable.

Regulating fraud in the use of the mails, as with the Printers' Ink Statutes, did not interfere with point of sale

practices. Similarly, early FTC efforts against consumer fraud patterned themselves after the Printers' Ink and mail fraud statutes and were geared more to advertising misrepresentations than to underlying business practices.

Twentieth century consumer fraud legislation expanded from this early regulation of advertising practices, and began to prohibit specific point-of-sale and other fraudulent selling techniques. As public attention focused on particular sales abuses, statutes would be narrowly drafted to proscribe the particular practice complained of. This legislative strategy was consistent with the prevailing philosophy of government regulation impinging as little as possible with the free conduct of business.

This same guiding principle led states to minimize legislation's impact on the consumer-merchant relationship by allowing only state enforcement, with minimal criminal fines or sentences as sanctions. Since criminal prosecutions were difficult to bring, and were rarely brought against white collar crime, only the most flagrantly abusive sellers needed to concern themselves with fraud legislation.

Minor or unintentional violations or activity that could be made to look unintentional would never be challenged. Even clearcut and serious violations were rarely prosecuted. Aggrieved consumers had no viable private right of action, and could only rely on infrequent government prosecutions. Consumer restitution was not an available remedy in these prosecutions.

These narrowly drawn statutes prohibiting specific forms of fraud, and threatening criminal sanctions for violations, gave the appearance of hard hitting reform for publicly perceived abuses. But this appearance proved largely illusory.

In fairness, criminal sanctions for narrowly drawn violations was the period's primary law enforcement approach for all types of anti-social behavior, not just consumer fraud. But the important point to realize is that early 20th century consumer fraud law, by equating consumer fraud with other crimes, was just reinforcing the doctrine of caveat emptor. A strategy of giving consumers no added rights in their day to day dealings with merchants, and condoning all but the most flagrant business abuses, presupposed that the previous century's doctrine of caveat emptor, not earlier notions of fairness and justice in the marketplace, should control 20th century consumer transactions.

#### 4. Other Regulation

Public pressures earlier in this century for reform of consumer abuses did not result only in criminal statutes.

Another option was the creation of government agencies to regulate industry practices. Unlike occupational licensing boards that were created by industry members to reduce entry and professionalize an occupation, these agencies were born out of public outcries for change. Even so, these regulatory boards have been criticized for their inactivity and for being dominated by the industries they regulate.

Insurance is a glaring example of how the industries to be regulated influenced legislators to enact a statutory scheme where government regulation would have a minimal impact. The insurance industry, concerned with federal efforts to curb insurance abuses, pushed the McCarren Ferguson Act through Congress. That bill preempted federal efforts in the insurance area where the states were already regulating the same practice. The insurance industry then proceeded to advocate the establishment of departments of insurance by state legislatures, departments whose functions were little more than to provide the appearance of state regulation, thereby preempting federal jurisdiction. The insurance industry had shaped its own regulation, taking it away from the federal government, and replacing it with 50 weaker state boards.

#### 5. Warranty Law

A final important twentieth century legislative initiative against consumer abuses is the articulation of warranty laws. Before the nineteenth century, courts found various ways to enforce express and implied warranties. There were no clear distinctions between tort actions for misrepresentations and contract actions for breach of warranties. Actions such as Trespass on The Case for Warranty and Trespass on the Case in the Nature of Deceit provided vehicles to remedy most warranty-type problems. A sound price warranted sound goods. The nineteenth century brought a growing distinction between tort and warranty actions and limits on implied warranty actions. Fraud was moving in the direction where it was actionable only if the five elements including scienter and intent were proved. Warranty actions were beginning to be seen as derived from breaches of contracts in the sale of goods and were thus limited to where a contract could be shown. Caveat emptor conflicted with notions of implied warranties of merchantability.

The twentieth century eventually codified existing law first through the passage of the Uniform Sales Act and then the adoption of the Uniform Commercial Code. The UCC is a model state code that has recently been adopted in all states except Louisiana. The UCC does not focus on consumer protection issues. Instead, it is an attempt to provide uniform, predictable rules for dealings among merchants, not primarily between merchants and consumers. As such, it assumes that the two parties can bargain equally and arrive at proper arrangements as long as specific guidelines are set out.

The UCC describes when various express and implied warranties are created and how breaches are remedied. But it also sets out methods of waiving all of these warranties, assuming that such waivers will be fairly bargained out between merchants. In reality, when merchants deal with consumers, almost all implied warranties are waived. Bargaining between consumers and merchants over warranties is rare due to consumers' ignorance and inferior bargaining position.

## 6. Informal Dispute Mechanisms

Even though 20th century legislatures have adopted numerous statutes impacting on consumer fraud, consumers are still often left without legal remedy to rectify marketplace abuses. In feudal England, buyers, also finding themselves denied access to the courts, developed various informal dispute resolution methods. Present day consumers find themselves resorting to the same strategy.

Defrauded consumers in feudal England could deal with a local merchant, call on the assistance of the local citizenry, and rely on the underlying notion of a just price. Today, consumers find themselves dealing with retailers, wholesalers and manufactureres all of whom can be headquartered in other states. The local citizenry is not organized around consumer issues and the underlying legal doctrines are not sympathetic.

Nevertheless, several informal consumer strategies have developed. A common approach is complaint handling and mediation by Better Business Bureaus or other private agencies. More aggressive steps include consumer pickets, boycotts and demonstrations. Painting lemons on defective cars is one example. Perhaps the most widespread consumer strategy is to withhold payment, but present legal mechanisms give merchants strong counter-measures.

## CONTENTS-PART II

Part II: State Law . . . . .	19
A. Prohibited State Practices . . . . .	21
1. General Practices . . . . .	28
2. Specific Practices . . . . .	32
a. Advertising Representations . . . . .	33
b. Sales Approaches . . . . .	40
c. Performance Practices . . . . .	44
d. Paper Transactions . . . . .	49
3. Industry Specific Practices . . . . .	59
4. Specific Consumers . . . . .	68
5. Opportunity Schemes . . . . .	69
B. State Enforcement Strategies . . . . .	74
1. State Sanctions . . . . .	76
2. Requirements . . . . .	85
3. Private Remedies . . . . .	99
4. Requirements and Rights Facilitating Private Action . . . . .	111
5. UDAP Statutes . . . . .	121



## STATE LAW

### A. PROHIBITED STATE PRACTICES

A 13-state survey found large numbers of diverse consumer fraud laws enacted in each state. Just as diverse as the statutes were the underlying consumer fraud concerns that initiated them. This section categorizes these state concerns into 67 distinct consumer fraud practices.

The Prohibited State Practices Chart, Table #1, sets out applicable legislation that the 13 surveyed states have enacted to combat these prohibited practices. In addition to listing state statutes, the table cites applicable regulations promulgated and cases decided pursuant to Unfair and Deceptive Practices (UDAP) legislation, which are general consumer protection statutes found in most states.

Definitions of the 67 practices amplify the chart. These definitions briefly describe what the prohibited practices are and what types of state legislation have been enacted to combat them. The 67 practices are set out under five headings--general practices, specific practices, industry-specific practices, specific consumers, and opportunity schemes. It must be emphasized that these headings and the 67 practices themselves are only rough groupings created to track as closely as possible state consumer fraud concerns. The category scheme is not meant to be analytically productive, but instead attempts to roughly track the way legislators and consumer protection specialists presently classify practices.

For a complete picture of the state of the law today, the state practices section must be read in conjunction with the local and federal parts. A number of fraud practices partially or not regulated at the state level receive more comprehensive treatment at the local or, more often, the federal level.

## PROHIBITED STATE PRACTICES

### GENERAL PRACTICES

1. False, Deceptive Acts, Generally
2. Unfair or Deceptive Acts, Generally
3. Unconscionable Acts, Generally
4. Lack of Good Faith, Generally

### SPECIFIC PRACTICES

#### Advertising, Representations

5. Deceptive Pricing and Bargain Offers
6. Use of the Word "Free"
7. Bait Advertising, Unavailability
8. Disparaging Competitors
9. Misrepresentations concerning Nature of Manufacturer
10. Passing Off
11. Misrepresentations concerning Sponsorship, Approval, Affiliation
12. Misrepresentations concerning Uses, Benefits, Characteristics
13. Weights and Measures, Price per Unit
14. Other Quantity Misrepresentations
15. Packaging
16. Labeling, Adulteration, Identity
17. Other Quality, Grade, Standard, Ingredient Misrepresentations
18. Safety Misrepresentations
19. Nondisclosure of Full Terms of Transaction

#### Sales Approaches

20. Door-to-Door Sales Pressures
21. Door Openers
22. Sales Representative's Status
23. Method of Selecting Consumer
24. Oral Promises Not in Contract
25. Commissioned Sales Representatives
26. Nondisclosure, Fictitious Seller's Name
27. Auctions
28. Unsolicited Goods
29. Premiums, Prizes with Sale

#### Performance Practices

30. Theft through Deception
31. Simulation
32. Substitution of Inferior Goods
33. Sale of Damaged, Defective Goods

34. Merchantability, Fitness
35. Sale of Used as New, Prior Use
36. Unassembled Goods
37. Delay, Nondelivery, Nonexistent Product
38. Layaway Plans, Deposits
39. Disposal of Goods Left in Possession
40. Repairs and Services

#### Paper Transactions

41. Forgery, Tampering, Destruction of Documents
42. Signature by Deception
43. Future Service Contracts
44. Adhesion Contracts, Liability Waivers, Warranty Disclaimers
45. Warranties, Rights, Remedies
46. Installment Sales
47. Credit
48. Debt Collection
49. Confidential Information

#### INDUSTRY SPECIFIC PRACTICES

50. Insurance
51. Real Estate Sales
52. Landlord-Tenant, Mobile Home Parks
53. Home Improvement Sales
54. Automobile Sales
55. Mobile Homes
56. Hearing Aids
57. Funeral Practices
58. Nursing Homes

#### SPECIFIC CONSUMERS

59. Minors, Incompetents
60. Non-English Speaking

#### OPPORTUNITY SCHEMES

61. Referral Sales
62. Pyramid Sales
63. Lotteries, Prizes, Contests
64. Business, Employment Opportunities, Franchises
65. Employment Agencies
66. Vocational Schools
67. Charitable Solicitations

Table 1. PROHIBITED STATE PRACTICES CHART: Prohibited Practices in 13 Selected States

	Alabama	California	Colorado	District of Columbia	Georgia	Illinois	Massachusetts	New Jersey	New York	Ohio	Pennsylvania	Texas	Wisconsin
<b>GENERAL PRACTICES</b>													
False, deceptive acts, generally	Tit 14 § 211 Tit 7 § 108 110	UDAP(2) Bus&P §17500 Health & S §26400	UDAP § 61.101 §18.5-301	\$22.1411-1413	\$106.302 §106.503	Ch121 1/2 §312 Ch121 1/2 §157 21a, Ch38 §17.7	Ch266 §90.91B UDAP reg IV	UDAP §56.8 §24.170.42 §2A.111.11	UDAP GBL § 349 Exec Law §63(12) Ag&Mkts Law §202 a GBL §350 Penal Law §190.20	UDAP §1345.01-13	UDAP73PS §201.2 18PS §4107	UDAP §17.41 §17.12 §32.42	\$421.428 §100.183 §100.18 §942.93
Unfair or Deceptive acts, generally		UDAP(1) CC §1750		UDAP DC law 1.76	UDAP §106.120	UDAP Ch121 1/2 §261	UDAP Ch93A				UDAP73PS §201.2		UDAP §100.2
Unconscionable acts, generally	UCC2.302		UCC2.302	UDAP DC law 1.76 UCC2.302	UCC2.302	UCC2.302	UDAP reg XV UCC2.302	UDAP §56.8 UCC2.302	UCC2.302	UDAP §1345.01-13 UCC2.302	UCC2.302	UDAP §17.41 UCC2.302	UCC2.302 §421.428
Lack of good faith, generally	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203	UCC1.203
<b>SPECIFIC PRACTICES (Advertising, representations)</b>													
Deceptive pricing and bargain offers	Tit 57 §131.154	UDAP(1) CC §1750 UDAP(2) Bus&P §17500	UDAP §61.105	UDAP DC Law 1.76 §47.3001 §W DCR	UDAP §106.1203 §106.504.505	UDAP Ch121 1/2 §312	UDAP reg III	UDAP reg 13.45A.9	GBL §580	UDAP §1345.01-13 UDAP reg 01.12	UDAP73PS §201.2 53PS 4471.1	UDAP §17.41 §32.42 Art 9011 Art 4542a, §20A	UDAP reg §Ag 124 UDAP reg §Ag 127 §100.18
Use of the word "Free"										UDAP reg 01.04			UDAP reg §Ag 127
Bait advertising, unavailability		UDAP(1) CC §1750 UDAP(2) Bus&P §17500 Bus&P §12024.6	UDAP §61.105 §18.5-303	UDAP DC Law 1.76 §22.1411 §12 A.2J 788	UDAP §106.1203 §106.501 §42.421	Ch121 1/2 §312	UDAP reg I Ch266 §90.91B	UDAP §56.8 §2A.111.22 UDAP reg 13.45A.9	GBL §396.1(1) (3)	UDAP reg 01.13	UDAP73PS §201.2	UDAP §17.41 §32.42	§100.18
Disparaging competitors		UDAP(1) - CC §1750	UDAP §61.105	UDAP DC law §1.76	UDAP §106.1203	Ch121 1/2 §312		UDAP §56.8.1		§4165.01	UDAP73PS §201.2	UDAP §17.41	
Misrepresentations re nature of manufacturer		UDAP(1) CC §1750 UDAP(2) Bus&P §17500	UDAP §61.105	UDAP DC law §1.76	UDAP §106.1203	Ch121 1/2 §312			GBL §392 d GBL §396.1.9	§4165.01 §925.21.32	UDAP73PS §201.2 73PS209	UDAP §17.41	§100.18 UDAP reg §Ag 127
Passing off		UDAP(1) CC §1750 Health & S §26400	UDAP §61.105	UDAP DC law §1.76	UDAP §106.1203	Ch121 1/2 §312 Ch121 1/2 §261			Ag&Mkts Law §201	§4165.01 §3741.01.25	UDAP73PS §201.2	UDAP §17.41 §32.42	
Misrepresentations re sponsorship, approval, affiliation		UDAP(1) CC §1750	UDAP §61.105	UDAP DC law §1.76	UDAP §106.1203	Ch121 1/2 §312	Ch266 §69.72 Ch266 §90.91B			§4165.01	UDAP73PS §201.2	UDAP §17.41	
Misrepresentations re uses, benefits, characteristics		UDAP(1) CC §1750	UDAP §61.105	UDAP DC law §1.76	UDAP §106.1203	Ch121 1/2 §312	UDAP reg IV			UDAP §1345.01-13 §4165.01	UDAP73PS §201.2		
Weights and measures, price per unit	Tit 25 §87.633 Tit 7A §300(19) Tit 14 §225	Bus&P §12601 Bus&P §12918	§18.5-301 §35.14.101 §35.14.122	§10-101	§26.1706	Ch147 §101 Ch147 §125	Ch94 §181 184A Ch94 §248	§51.1.1 §51.1.92 §56.8.21	Ag&Mkts Law §188.193 b	§1327.46.61 §911.18.20 §925.21.32 §925.51.60	76PS §100 76PS 101 18PS §4107	§32.42	§98.07 §98.26
Other quantity misrepresentations		UDAP(1) §1750	UDAP §61.105	UDAP DC law 1.76	UDAP §106.1203	Ch121 1/2 §312	Ch94 §176.177			§4165.01	18PS §4107 UDAP73PS §201.2	§32.42	
Packaging		Bus&P §12601	§35.14.120 §35.29.101.109	§10-115	§26.1706	Ch147 §124.126		§51.1.94		§3717.32.34 §1327.46.61	76PS §100.24		§98.07
Labeling, adulteration, identity	Tit 25 §45.63 Tit 25 §186.207 Tit 25 §274.300 (3) Tit 25 §303.15 Tit 25 §401 (53) (69) Tit 14 §211 Tit 57 §95, 105	UDAP(2) Bus&P §17500 CC §1710.1 Bus&P §1900, §25.5.101.417 12601 Health & S §26550.26730 Agric §34091, §36061, §39431	§8.20.215 §12.22.112 §19.5.301 §25.5.101.417 §35.12.21.24, §26.27.33.34.60 §42.10.105	§6.601 §10.113 §22.3409 §33.301 §33.401	§42.201.301, 306A.401.501 601.901.1001, 1101.1.301 §29A.1002	Ch5 §102 Ch56 1/2 §66.8, 186 §66.8, 186 263.260 502	Ch94 §7.21.24 49.51.65P, 90A, 96, 181 184A.248, 277A	§4.8.1714 §24.5.1 §24.10.73.1 13.45A.3	Ag&Mkts Law §189 Ag&Mkts Law §201 Ag&Mkts Law §214g GBL §239 GBL §392 b GBL §396 a	§3741.01.25 §37.7.51.55 §3715 §3715.38 §3715.24.27 §3715.14.20 §911.18.20 §913.22.28 §925.21.32 §925.51.60	3PS §285 3PS §21 18PS §4107 31PS 35PS §780.101	§32.42 Art 4476 §3	§100.186 §94.72 §97.03 §97.10 §100.35 §100.36 §100.38 §101.125
Other quality, grade, standard, ingredient misrepresentations		UDAP(1) CC §1750 UDAP(2) Bus&P §17500	UDAP §61.105	UDAP DC law 1.76	UDAP §106.1203	Ch121 1/2 §312	UDAP reg IV	UDAP reg 13.45A.9		UDAP §1345.01-13	UDAP73PS §201.2	UDAP §17.41 §32.42	
Safety misrepresentations				UDAP DC law 1.76				UDAP reg 13.45A.4					
Non-disclosure of full terms of transaction		UDAP(2) §17500	UDAP §61.105			Ch121 1/2 §852		UDAP §56.8-1 §56.6-2		UDAP reg 01.02			§100.184 §100.18

Table 1. continued

	Alabama	California	Colorado	District of Columbia	Georgia	Illinois	Massachusetts	New Jersey	New York	Ohio	Pennsylvania	Texas	Wisconsin
<b>SALES APPROACHES</b>													
Door-to-door sales persons	Tit 4 § 23	CC § 168B 5	UDAP § 6 1 105 § 5 2 501 § 18 9 111	UDAP DC Law 1 76 § 28-3811	§ 96 906	Ch 121 1/2 § 267	Ch 93 § 6 Ch 269 § 14A UDAP reg VII	§ 17 16C 61 1	Pers. Prop. Law § 425	§ 1345 21-28 UDAP reg 01.11	73 PS 201 7	Art 5069 § 13 01	§ 423
Door openers													UDAP reg 5Aq 127
Sales representative's status	Tit 14 § 214	UDAP(1) CC § 1750 UDAP(2) Bus&P § 17500 Bus&P § 22 300 Pen § 29 530	§ 18 5 113	UDAP DC Law 1 76	§ 26 2406			§ 2A 111 18	GBL § 117 119 GBL § 396 h	§ 2913 44 UDAP reg 01.11		UDAP § 17 41 Art. 1003	UDAP reg 5Aq 127 UDAP case, 404 405 (Cir. Ct. Milwaukee)
Method of selecting consumer							UDAP reg VII			UDAP reg 01.11			UDAP reg 5Aq 127
Oral promises not in contract	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a)	UCC 2 313 (1) (a) UDAP reg 01.11	UDAP 2 313 (1) (a)	UDAP 2 313 (1) (a)	UDAP 2 313 (1) (a) UDAP reg 5Aq 127
Commissioned sales representatives		Pen § 53ba	§ 12 16 101							§ 4701 4743			
Non disclosure, fictitious seller's name	Tit 14 § 211 Tit 14 § 230	UDAP(2) Bus&P § 17500	§ 7 71 102				Ch 110 § 5 6	UDAP reg 13 45A 1		§ 1777 01-06 § 1741 01 25	§ 4 PS § 28 1 § 50 PS 121		§ 100 18
Auctions	Tit 46 § 88 Tit 46 § 64	Bus&P § 16002.1 Pen § 35 Pen § 436		§ 47 2201	Ch 84 § 18a	Ch 121 1/2 § 219 1	Ch 100 § 1	§ 45 17 5	Juris. Law § 35 a	§ 1318 01 08 § 4701 4743	§ 69 PS § 162	Art 8700	
Unsegregated goods		Civil § 1584 5 CC § 1716	§ 6 6 101		§ 96 1101 § 96 1102 § 26 1708	Ch 121 1/2 § 351	Ch 93 § 41	§ 46 30A 1	GBL § 396 (2) (3) C. Oblig. Law § 5 332	§ 133 60	73 PS 2001	Art 29 C 1	§ 241.28
Premiums, prizes with sale		UDAP(2) Bus&P § 17500					Ch 271 § 29 30	UDAP § 56 8 1	GBL § 369e GBL § 570	§ 133 01	18 PS § 7310		§ 100 15 § 100 16 § 100 17
<b>PERFORMANCE PRACTICES</b>													
Theft through deception	Tit 14 § 209	Pen § 484	§ 18 4 401	§ 22 1301 § 22 2201	§ 26 1803	Ch 34 § 16 1	Ch 266 § 30 35 Ch 266 § 73 75	§ 2A 111 1 § 2A 119 1	Pen § 155 05(d) Pen § 190 60 Pen § 190 65	§ 2913 02	18 PS § 3922	§ 31 01 UDAP case 528 § 5d 350	§ 943 20
Simulation			§ 18 5 110						Pen § 170 45 GBL § 219 h GBL § 228a	§ 2913 32	18 PS § 4102		§ 943 38
Substitution of inferior goods	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c)	UCC 2 313 (1) (c) UDAP § 1345 01 13 UDAP reg 01.18	UCC 2 313 (1) (c)	UDAP § 17 41 UCC 2 313 (1) (c)	UCC 2 313 (1) (c)
Sale of damaged, defective goods		UDAP(2) Bus&P § 17500 UDAP(1) case, 124 Cal Rptr 852	UDAP § 6 1 114 § 6 2 110				UDAP reg 1	§ 39 10 26					
Merchantability, fitness	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314	UCC 2 314
Sale of used as new, prior use		UDAP(1) CC § 1750 UDAP(2) Bus&P § 17500 Bus&P § 17027 Veh § 28051	UDAP § 6 1 105 § 42 6 201	UDAP DC Law 1 76	UDAP § 106 1203 § 68 1828 § 64 2701	Ch 95 1/2 § 3 701 Ch 121 1/2 § 312 Ch 121 1/2 § 3831	UDAP reg XIV Ch 90 § 7m Ch 140 § 57 09 Ch 266 § 92A Ch 266 § 141.141A	§ 2A 120 50 1 § 39 10 26 § 46 30A 2	GBL § 392a, e GBL § 395	UDAP § 1345 01 13 UDAP reg 01.18 § 4701 4743 § 4165 01 § 4505 19	UDAP 73 PS § 201 2 73 PS § 208 73 PS § 240	UDAP § 17 41 § 17 18 22 § 32 42 Art 6696b	§ 218 01
Unassembled goods		UDAP(1) CC § 1750 UDAP(2) Bus&P § 17500							GBL § 399 m				
Delay, nondelivery, nonexistent product		UDAP(2) Bus&P § 17500	UDAP § 6 1 105			Ch 121 1/2 § 3871	UDAP reg 1 UDAP reg XIV	UDAP reg 13 45A 1 UDAP reg 13 45A 5	GBL § 396 m	UDAP case 72 00(2d) 216 UDAP case No. 74CV 12 4741 UDAP reg 01.09	73 PS 2011 40 PS § 237		UDAP reg 5Aq 127 § 136 001
Layaway plans, deposits		CC § 1749								UDAP reg 01.07			

Table 1. continued

	Alabama	California	Colorado	District of Columbia	Georgia	Illinois	Massachusetts	New Jersey	New York	Ohio	Pennsylvania	Texas	Wisconsin
Disposal of goods left in possession	Tit 47 §160(1)	§2080, 2081	§38-21 101	§34 101	§67-1901					1333.22--26 §1333.33 41			
Repair and services		UDAP(1)CC §1750 Bus&P §9800 Bus&P §9880 §869.2 §22250		UDAP DC Law 1.76 §47-2334 reg 74.3			UDAP reg VII	UDAP reg 13 45A.7	Veh&Traf 15 NYCRR 82	UDAP §1345.1-13 UDAP reg 01 06			UDAP reg §Ag 127 UDAP case No. 404 405 Cir. Ct. Mlyk UDAP case CR 8-478 Cir Ct. Dane County UDAP reg §Ag 132
<b>PAPER TRANSACTIONS</b>													
Forgery, tampering, destruction of documents	Tit 14 §199	Pen §470	§18 5 101 §19 5 305	§22 1401	§26-1701, 2	Ch 38 §17.3	Ch 266 §31.35	§2A 109.1	Perf. 170.00	§2913.31	18 PS 4101 18 PS 4103 18 PS 4104	Art 984 Art 9014	§943.38
Signature by description	Tit 14 §213		§18 5 112	§22 1301			Ch 266 §30.35				18 PS 4114	§32.46	UDAP reg §Ag 127
Future service contracts		CC §12 80-96 CC §18 12 50-68	§12 14 101	§28 3817			Ch 255 §13K		GBL §394 b, c GBL §391 f	§1345 01-50			
Adhesion contracts, liability waivers, warranty disclaimers	UCC 2 316	UCC 2 316	UCC 2 316	UCC 2 316	UCC 2 316 UCC 2 302 case 180SE 23250 196SE 24257, 208SE 2354 204SE 20221	UCC 2 316	UCC 2 316 UDAP reg VII UCC 2 302 case 149NE 24385	UCC 2 316	UCC 2 316 Cir. Pr. §4544 Inst. Law §167 GBL §394 d GBL §369 5	UCC 2 302 cases 200NE 26738-321 UCC 2 316	UDAP case 392A2d812 UCC 2 316	UCC 2 316	UCC 2 316
Warranties, rights, remedies	UCC 2 313 315	UCC 2 313 315 UDAP(1)CC §1750	UCC 2 313 315 UDAP §1 1405	UCC 2 313 315 UDAP DC Law 1.76	UCC 2 313 315	UCC 2 313 315	UCC 2 313 315 UDAP reg II	UCC 2 313 315	UCC 2 313 315	UCC 2 313 315 UDAP §1345 01-13	UCC 2313 315 UDAP case 392A2d812	UCC 2 313 315 UDAP §17.41	UCC 2 313 315 UDAP reg §Ag 127
Installment sales		CC §1801, §2907	UDAP §6 1 105 UCC §5.1 101 5 12 105	§28 3601 §40 801 5 P DCHRR	§96 10 §96 903	Ch 121 1/2 §501 Ch 121 1/2 §501	Ch 255 §51.25 Ch 255 §51.42	§17 168.1 §17 16C 61.1	Perf. Prop 1 §301 312 Perf. Prop L §401 402	§1317.01-16 68 PS §901 69 PS §601 69 PS §1101 73 PS §500.101	Art 5069 6 01 Art 5069 7 01	§218.01 §422	
Credit	Tit 5 §277 300, 316 Tit 9 §14 20, 60 67 UCC §203.204	Fin §18000 Fin §21000, 21200 Fin §22000 Fin §24000 UCC §203.204	UCC §5.1 101 5 12 105 UCC §203.204	§2 200 §26 601 §28 3701 3702, 3801 3816 §33 3301 5 P DCHRR UCC §203.204	§84 5301 Reg 120 1 14 UCC §203.204	Ch 74 §51 Ch 107 1/2 §1 Ch 121 1/2 §401 UCC 2 302 case 303NE 24627 UCC §203.204	Ch 33 §143 Ch 140 §70 85, 96 114A Ch 140C Ch 255 §51.23 UCC §203.204	§17 28.1 §56 11.1 §45 22.1 UCC §203.204	GBL §701 707 GBL §710 716 UCC §203.204	§132 1 01, 19 §1321 51 60 §1321 71 83 §4710.01-03 §4701.4743 UCC §203.204 §2323 13	63 PS 281 7 PS 6151 7 PS 6201 18 PS 7312 UCC §203.204	Art 5069 UCC §203.204	UDAP reg §Ag 127 §422, 425, 522 §428 §138.10 §138.12 §138.09 §138.05 UCC §203.204
Debt collection	UCC §503 505 Tit 51 §492	UCC §503 505 UDAP(2)Bus&P §17500 Bus&P §6850	UCC §503 505 §12 14 101 §17 20 101	UCC §503 505 §27 3423 §28 3814	UCC §503 505 Reg 120 1 14 19 26	UCC §503 505 UDAP Ch 121 1/2 §201 Ch 121 1/2 §801 Ch 38 §17.5	UCC §503 505 Ch 93 §24 28, 49 Ch 93C Ch 255 §131. J	UCC §503 505 §45 18.1	GBL §600	UCC §503 505 UDAP case 73 002d308 Case No. 948- 069 CP1976	UCC §503 505 18 PS 7311	UCC §503 505 Art 5069 §11.01	UCC §503 505 §427.101 §425 §218.04
Confidential information		CC §1785, 1786			§26 99 20a		Ch 93 §50-6A		GBL §394 e	13333 55			
<b>INDUSTRY SPECIFIC PRACTICES</b>													
Insurance	Tit 28A §119, 220, 227	Ins §780 Ins §790 Ins §1620 1.7 Ins §10600	§10-3 1101- 1112	§35 409, 410, 714, 719, 1201, 1336 1347	Ch 56 7.33, 813a	Ch 73 §1065, 36	Ch 17 §5162	§17B 30.1, 3.4, 6 §17 13A.1 §2A 117.1	Ins §40 b, c, d Ins §110 132, 167 Perf. Prop L §413 11 NYCRR 20-28	§3023 16 §3999 10 §3901.10-16 §3911 23 §3923 15	40 PS 237 40 PS 278	UDAP §17.41 Art 21.21 Art 21.21B	§208.04 §628 34 §424 §218.02
Real estate sales	Tit 46 §298 311	UDAP(2)Bus&P §17500	§12 61 101 §18 5 302	§45 1401	UDAP §106- 1203 §84.6100 §106 901 §106 304	Ch 114 1/2 §101 Ch 30 §384	Ch 112 §87PP	§45 15 1.16.3	Real Prop L §440 442 19 NYCRR 175	§4701-4743	63 PS 431	UDAP §17.41	UDAP reg §Ag 114 §440-459

Table 1. continued

	Alabama	California	Colorado	District of Columbia	Georgia	Illinois	Massachusetts	New Jersey	New York	Ohio	Pennsylvania	Texas	Wisconsin
Landlord/tenant, mobile home parks		CC§1925 CC§1950.5 H&S§18000 UDAP(2)Bus&P §17500	§12-61-501 §38-12-101, 201 §43-5-201	§45-901	§61-6-102	Ch111 1/2 §711 Ch74 §92	Ch186§14-19 UDAP reg XVI UDAP case, 1974, Mass As1425	§46-8-21.1, 43 §48-6C-2 §52-27D-25.1	GenObligL §7-103 RealPropL §220-237	§5321-01-19 §1923-01-15	UDAP case 302 A2d 813 68 PS §250-511	Art 5236c	UDAP case No.135-091 Cir.Ct Dane County - §704 UDAP reg §Aq 125
Home improvement sales		Bus&P §7160 CC§1725, 1736 Bus&P §8642 R648		§2-2301 5Y DCRH			UDAP reg VIII	§17-16C-62, 77, 78, 95			73 PS §500-101		UDAP case C-8-478 Dane County 1973 UDAP reg §Aq 110
Automobile sales	Tit 61 §463 Tit 36 §104 107	Ch1284, 1285 Act of 1976 Veh §5906.5 Veh §11700	§12-6-101	5AA DCRH	§96-10	UDAP121 1/2 §261	UDAP Motor Veh regs I-IV	§39-10-1 §13-45A-2		UDAP reg 01-10 §4517-01-20	63 PS §801 69 PS §601	Art 1434 1436 Art 6586	§218-01 reg §MVD 24
Mobile homes	Tit 25 §124	H&S §18000	§12-51-5-101		§84-4801	Ch111 1/2 §711		§46-8-2 §52-27D-25.1	GenBusL §720 Facc L §400		63 PS §801 35 PS §655-1	Art 5221f	§218-10
Hearing aids	Tit 46 §150 (21) §39	Bus&P §651 Bus&P §3300	§12-6-101		§84-5604			§45-9A-2	GRL §780-787		UDAP case 4 Pa Cmwlth		§440-459
Funeral practices	Tit 46 §121 128	Bus&P §2600 Bus&P §9727	§10-15-101 §12-54-101	§47-2-344	§84-805 §84-1501	Ch111 1/2 §73.1	Ch112 §82	§45-7-1	PubHealth L §400-456 10NYC RR 77	§4701-4743	63 PS §479-1	Art 4562b	§440-459
Nursing homes	Tit 46 §189 (48) §63	Bus&P §3901 Welf&I §16200	§12-13-101 §12-31-101	5CC DCRH	§84-4801	Ch111 1/2 §35	Ch112 §108 UDAP reg 1.1-9.1	§30-11-1	PubHealth L §2896			Art 4442C	§440-459
<b>SPECIFIC CONSUMERS</b>													
Minors, incompetents	Tit 27 §13	CC §1556.7	§13-22-101		§20-201, 206	Ch3 §131		§2A-16-55	GenObligL §3-101			Art 5321	
Non-English speaking						Ch121 1/2 §261			UDAP case 371 NYC2d 289				
<b>OPPORTUNITY SCHEMES</b>													
Referral sales	Tit 58 §25	UDAP(1)H&C §1750		§28-3810		UDAP(1)H&C §1750	Ch271 §6A UDAP reg V			UDAP reg 01-11	UDAP 73 PS §201-2 UDAP case 321 A2d 664	UDAP §17-41	UDAP reg §Aq 121, 127 §945-12
Pyramid sales		Pen §27	UDAP §6-1-105		§106-1001		Ch13 §69	UDAP case 295A23682	GBL §359	§1-433-01-95	UDAP case 321 A2d 664	UDAP case 488 SW2d 844	UDAP reg §Aq 122 1988NW2d 598 357F Supp2d 229NW2d 622
Lotteries, private contests	Tit 14 §275 Tit 14 §358	UDAP(2)Bus&P §17500		§32-1501	§26-2705-1	Ch30 §28.1	Ch271 §7	§2A-111-6 §2A-121-2	GBL §69-6 Penalt §225-00	UDAP reg 01-06	18 PS §51-7	§32-42	§945-01 §100-17
Business employment opportunities, franchise programs		Labor §926 Corps §310-30	UDAP §6-1-105			Ch121 1/2 §701 UDAP reg 121, 122, 280	UDAP reg X	§50-10-1	GBL §396-1, 4 GBL §391-1				UDAP reg §Aq 110 §555
Employment agencies	Tit 46 §123	Bus&P §9900	§12-24-101, 201	§47-21-01	§84-4101	Ch48 §197	Ch150 §16A UDAP reg X	§34-8-1	GBL §170-19	§4143-01-29	43 PS §55-5	Art 5221-6	§105-01
Vocational schools	Ch22 §641 Tit 42 §381 398	Educ §2902 §6 Educ §290-35	§12-15-101 §12-19-101	5GG DCRH	Ch32-248	Ch144 §136	Ch13 §21-21D Ch25C-1 UDAP reg IX	§18A-69-7 §18-15-1	EducL §5001 5004 8NYC RR 126 UCC2-302 Case 357 NYS2d 378	§3301	24 PS §1725-1 24 PS §2751 24 PS 2771	Art 2922 Educ 500	§38-51 §241-025
Charitable solicitations		UDAP(2)Bus&P §17500 Pen §542(d)	§18-5-115	5V DCRH §2-2101	§96-10 §106-201	Ch23 §511 Ch38 §17.2	Ch12 §8-81 Ch16 §27, 28, 30 Ch18 §57-7A	§45-17A-1 §2A-111-28, 29 UDAP §45-81			19 PS §160-1		§100-18

## 1. General Practices

States prohibit several general categories of business practices aimed at consumers--false or deceptive acts, unfair acts, unconscionable acts, and practices lacking in good faith. These general practices do not have specified definitions, but are flexible standards geared to meet changing and novel business strategies, frustrating attempts to "get around" the law. Their very generality also contributes to their vagueness, leaving merchants uncertain whether particular acts violate these broad standards.

General categories of prohibited conduct apply not only to a wide range of practices, but also to a broad spectrum of consumer transactions and consumers. They are not specific to any one industry, any one type of sale, or any one category of buyers. The scope of these laws is limited only by a few explicit exemptions, by developing bodies of caselaw, and the individual discretion of judges and other decision makers.

### 1) False, Deceptive Acts, Generally

False or deceptive acts are the most frequently prohibited general practices. While several different types of state consumer legislation proscribe these practices, the terms are rarely defined and only statutory examples give any direct clue as to legislative intent.

Printer's Ink legislation restricts "untrue, deceptive or misleading advertising." Under these statutes advertisers incur absolute liability for their representations. Only a handful of states require proof that the advertiser knew of the advertisement's falsity, and even fewer require an intent to deceive. Consumer reliance need not be proven.

One important practice exempted from such statutes is "puffing," the normal exaggeration accompanying most sales. But the borderline between puffing and deception is not delineated. While sellers advertise at their own risk, sanctions are only minimal misdemeanor sentences.

Printer's Ink statutes, adopted in the early 20th century, were limited to advertising practices. With less frequency, states at about the same time adopted other statutes prohibiting all forms of deceptive business conduct. This legislation is often limited to particular industries such as insurance, real estate, or food and drugs. As with Printer's Ink statutes, they do not provide private enforcement and state sanctions are usually limited to misdemeanor penalties.



UDAP statutes are a recent and important source of general prohibitions of deceptive practices; 46 state UDAP acts proscribe misleading, deceptive, false, or fraudulent acts. These statutes cover acts or practices in business, trade or commerce, including not only the sale of goods but also the furnishing of services. Statutes are often ambiguously drafted to leave in doubt their applicability to credit, insurance, real estate, mobile homes, and landlord-tenant issues.

UDAP legislation commonly does not hold publishers, printers, and broadcasters liable for advertising they carry, and exempts acts specifically permitted by other agencies or laws. Some UDAP acts also exclude specific industries or professions, considering other state or private regulation of such activities adequate. Ohio, for one, exempts utilities, banks, insurance companies, attorneys, and physicians. These statutes offer a wider range of remedies--private rights of action, civil penalties, restitution--than Printer's Ink statutes.

Like Printer's Ink legislation, UDAP statutes provide little guidance in determine what acts are deceptive. State caselaw is also very limited. Consequently, the Federal Trade Commission's more developed caselaw is a good starting place. While state courts are free to develop their own definitions, many of these acts are modeled after the FTC ACT and state courts often look to FTC decisions for guidance.

A number of criteria for determining if a practice is deceptive can be developed from a review of FTC caselaw.\*

Acts or practices are deceptive pursuant to the FTC Act:

- If they have the "capacity" or "tendency" to deceive, even if actual deception is not found;
- If "the ignorant, the unthinking, and the credulous" and the "least sophisticated" would be deceived (While it is not enough if only an "insignificant and unrepresentative" segment of the public is misled, a practice can be deceptive if as few as 15% of the public are fooled. Consequently, literally true statements can be deceptive.);
- If a consideration of the entire representation, and not just the specific claim, finds the practice deceptive;

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\*Many of the criteria listed here are derived from Commerce Clearing House, Trade Regulation Reporter, volume 2, paragraphs 7530, 7533.

- If a word or term is ambiguous and one meaning is false;
- If necessary qualifications to overly broad representations are not made, if material facts are not disclosed, or if these disclosures or qualifications are too inconspicuous;
- Even if competitors engage in the same practice;
- Even if the deception is subsequently clarified;
- Even if the immediate customer is not deceived, e.g., where a manufacturer's label is not deceptive to a retailer, but is to the ultimate consumer;
- Unless the claim is merely "puffing," that is, a permissible exaggeration, or the claim is purely fanciful or a spoof, calculated to amuse and with no capacity to deceive.

## 2) Unfair or Deceptive Acts, Generally

Twenty-five state UDAP statutes track the FTC Act's language, prohibiting not only deceptive but also unfair acts. State caselaw does not provide a definition of unfairness, so once again FTC caselaw is the best guide. In 1972, the United States Supreme Court ruled that "unfairness" was broader than "deception" and the Court suggested that the FTC use, among others, the following criteria for determining a practice unfair:

- Whether the practice offends public policy. Is it within at least the penumbra of some common law, statutory, or other established concept of unfairness.
- Whether the practice is immoral, unethical, oppressive, or unscrupulous.
- Whether the practice causes substantial injury to consumers.

Even though five years have elapsed since the Supreme Court's ruling, the FTC has done little to further clarify the definition of unfairness.

## 3) Unconscionable Acts, Generally

Two types of state legislation proscribe unconscionable practices. Most states have adopted section 2-302 of the UCC, allowing courts to limit the enforcement of unconscionable contracts involved in the sale of goods. Ten state UDAP statutes and the Wisconsin Consumer Act prohibit unconscionable acts in consumer transactions.

Unconscionability, despite its widespread use, is not precisely defined. Some argue that definitional efforts should be avoided as they limit the term's intrinsic scope. But courts, by necessity, have interpreted the UCC's use of unconscionability in a number of cases. They have ruled that its purpose is the prevention of oppression and unfair surprise and the promotion of freedom of contract; merchants in their contractual dealings must use good faith, honesty, and fairness. Courts will look to see if contracting parties have freedom of choice, understanding, and the ability to meaningfully negotiate.

In adding unconscionability to UDAP statutes, legislatures apply the full spectrum of UDAP remedies to prohibit unconscionable acts in consumer transactions, not just to void unconscionable contract terms involved in the sale of goods. Those UDAP acts provide a number of criteria to judge a practice's unconscionability. While no statute includes all of these guidelines, they are all mentioned explicitly in at least some UDAP statutes. In determining whether a practice is unconscionable, courts consider:

- Whether unfair advantage is taken of consumers' lack of knowledge, ability, experience, or capacity, particularly physical or mental infirmities or illiteracy;
- Whether merchants knew of consumers' inability to receive anticipated benefits or make payment in full;
- Whether goods are grossly overpriced or agreements substantially one-sided;
- Whether consumers are required to waive legal rights or unreasonably jeopardize additional money or property;
- Whether consumers would reasonably misunderstand the transaction's true nature;
- Whether agreements contain terms prohibited by law.

#### 4) Lack of Good Faith, Generally

The UCC imposes a standard of good faith for all transactions covered by the Code, requiring a basic obligation of fair dealing. Unfair surprises, overreaching, oppressive terms, and the sale of worthless goods are all indications of lack of good faith. While these practices also indicate unconscionable conduct, lack of good faith appears to create an even stricter standard for merchants. Good faith behavior cannot be disclaimed by agreement.

## 2. Specific Practices

States prohibit not only general practices, but also a large number of specific practices. Examples are bait-and-switch advertising, deceptive pricing, and door-openers. These practices, while defining a specific form of conduct, are found in a number of different industries and consumer sales contexts.

UDAP statutes, while including general proscriptions, also define with more specificity through regulations, caselaw, or in the act itself, particular practices that are prohibited. These proscribed forms of conduct are not limited in scope, but apply to most consumer transactions. Other state consumer fraud laws concern themselves with specific practices utilized either in all consumer transactions or in particular industries only.

While theoretically already covered by general prohibitions, bans on specific practices provide merchants, consumers, prosecutors, and judges with more guidance, delineating with certainty which acts are legal and which are not.

Such specific prohibitions are also easier to circumvent. Merchants may be able to argue successfully that specific prohibitions supersede general ones, and thus conduct should not be viewed as violative of general prohibitions if it falls outside specific restrictions.

The survey identified 45 specific practices. To facilitate presentation, they have been identified under four headings--advertising and representations, sales approaches, performance practices, and paper transactions. This category scheme is not meant to be precise. Some of the performance practices involve representations; some of the advertising practices involve sales approaches. The headings themselves are only loose groupings of related practices.

Advertising and representations include various advertising techniques and categories of misrepresentations. Sales approaches involve various sales tactics used to induce purchases after the initial advertising stage--door-to-door sales, auctions, mail order practices. Performance practices include fraudulent performances of consumer transactions, not just their deceptive inducement. Examples are delivery of faulty goods, nondelivery of goods, and performance of unnecessary or unsatisfactory repairs or other services. Paper transactions include deceptive practices involving contracts, credit, warranties, and other abstract embodiments of future rights and obligations.

## a. Advertising and Representations

### 5) Deceptive Pricing and Bargain Offers

Deceptive pricing is an advertising technique intended to convince consumers that a product or service is being offered at more of a bargain price than it actually is. One approach is to misrepresent the offered price as being significantly lower than the seller's past or future price (e.g., "20% off regular price" or "special introductory offer") of lower than competitors' or normal retail prices (e.g., "wholesale price," "20% off list," or "lowest price in town").

These offers may be deceptive in several ways. The comparison prices are fictitious: a store has never sold its products at the higher prices, or has no intention of raising them after an introductory offer; competitors' prices are inflated; no merchant sells at what is called the "list" price. Alternatively, the price comparisons may be accurate, but the products being compared are not identical.

Deceptive pricing need not utilize misleading price comparisons but instead can involve fictitious reasons for sales, inducing customers to believe that products offered at such sales must be special bargains. Common examples are "going out of business sales," "fire sales," or "damaged goods sales."

Whatever the approach used, deceptive pricing is aimed at luring consumers to shop with the advertising merchant instead of with his competitors. It also impairs the consumer's understanding of the product's fair market price.

Virtually all states have found deceptive pricing illegal. Most state UDAP statutes or regulations ban deceptive price comparisons and misrepresentations as to special reasons for or the existence of price advantages. Some legislation requires products on "sale" to be clearly distinguished from products not on sale.

In addition to UDAP statute prohibitions, many states have older and more specialized acts dealing with certain bargain offers, including use of fictitious "going out of business sales," "fire sales," or "wholesale price sales." These laws sometimes require sellers to file with government officials before holding such sales or limit the number of such sales any one seller can use.

#### 6) Use of the Word "Free"

A few states ban deceptive use of the word "free." Advertisers will offer a product as "free" without disclosing that the cost of the "free" product will be recovered by increasing the price or decreasing the quality of another product that must be bought to obtain the "free" item. Other advertising fails to disclose special terms or conditions on the "free" offer.

Two of 13 surveyed states have acted in this area, both by adopting regulations pursuant to their UDAP statutes. Wisconsin's regulation applies only to free offers in door-to-door sales. Ohio's is more comprehensive, applying to all forms of "free" sales, "2 for 1" sales, "gifts," and "bonuses."

Ohio's regulation prohibits abnormal increases in the price of products that must be purchased with "free" offers. Continued use of "free" offers is also prohibited because, over time, the offer no longer remains special, but represents the normal price of the two products. The regulation also requires full and conspicuous disclosures of all the terms of the free offer.

#### 7) Bait Advertising, Unavailability

Bait advertising, or "bait-and-switch," is another technique used to lure consumers into a particular store. The seller advertises an especially attractive offer, usually a product at a low price, but with no intention of honoring the offer. Instead, once the consumer has entered the store, the seller will try to switch him to a different item which is more expensive or otherwise more advantageous for the merchant.

The seller may switch the consumer by disparaging, refusing to show or sell, or carrying an inadequate supply of the advertised item. For example, a supermarket advertises a special sale on lamb chops but does not stock an adequate quantity to meet the reasonably expected demand. Consumers lured to the supermarket, finding the lamb chops unavailable, shop there anyway.

Another method of switching the consumer involves failing to disclose unfavorable conditions to the sale or defects in the "bait" item. When the consumer discovers them, he switches from that product to another more highly priced.

Most states have enacted legislation prohibiting bait and switch advertising. UDAP statutes and other general consumer fraud statutes commonly ban sellers from advertising items without a bona fide intent to sell that product. In addition, many of these acts prohibit advertising if the seller does not have an intent to sell a reasonable quantity of the advertised item. It is common for a state to prohibit bait and switch advertising in two, three, or even four seemingly redundant statutes.

#### 8) Disparaging Competitors

A majority of states surveyed prohibit a seller from using false statements disparaging competitors. This practice is usually defined as making false or deceptive statements concerning a competitor's goods, services or business. Examples include false statements that competitors engage in illegal practices, have discontinued operations, have a poor financial status, have poor quality products, or give low quality service. Disparagement may also involve deceptive durability, effectiveness or other comparisons with competitors' products.

UDAP statutes are the most common means of prohibiting such practices. Since UDAP statutes apply to all consumer transactions with only certain enumerated exceptions, state bans on disparaging competitors are usually quite general.

#### 9) Misrepresentations Concerning Nature of Manufacturer

A significant number of UDAP statutes prohibit misrepresentations concerning the nature of a product's manufacturer or producer. While usually general in nature, several of these laws are limited to specific misrepresentations such as a product's geographic origin. Geographic origin claims usually involve questions of whether a product is American-made or imported.

A few states have enacted specialized legislation banning false claims that products are blind-made, Indian-made, or union-made. Misrepresentations that a product is "custom-made," "tailor-made," or "hand-made" would also fit in this category, but are not specifically mentioned in the legislation surveyed.

#### 10) Passing Off

A seller passes off when he attempts to represent his goods or services as those of another manufacturer or seller by copying a competitor's advertising, name, place of business, sign, trademark, container or labels. It is legal to copy

the product itself; the United States Supreme Court has ruled that state law cannot prohibit copying of unpatented products. But states can require sellers who reproduce a product to identify the product as their own where confusion may exist otherwise.

A majority of states prohibit passing off, usually through their UDAP statutes. UDAP acts apply to all kinds of products. Other more specific legislation proscribes passing off of particular products, such as foods and drugs.

11) Misrepresentations Concerning Sponsorship, Approval, Affiliation

This category of misrepresentations includes misstatements concerning a seller's or manufacturer's sponsorship, connection, association, certification, approval, or affiliation with other groups. Most states have included in their UDAP statutes or other general consumer acts prohibitions of such claims. The common statutory language does not differ significantly from the description above.

12) Misrepresentations Concerning Uses, Benefits, Characteristics

Many state UDAP statutes and general consumer legislation proscribe misrepresentations of a product's uses, benefits, or characteristics. Massachusetts is somewhat more detailed in its UDAP regulation, prohibiting deception concerning a product's construction, durability, reliability, performance, strength, condition, life expectancy, ease of operation or repair, or benefits. Examples are false claims that a product is: "automatic," "shrink-proof," "rust-proof," "fire-proof," "high-speed," "water-resistant," "unbreakable," or "lifetime durable."

13) Weights and Measures, Price Per Unit

All states have weights and measures legislation concerned with the use of false or inaccurate weighing or measuring devices. Examples can range from scales to gasoline pump gauges to taximeters. This category of abuses also includes false or inaccurate weights and measures claims on labels or in advertising. Examples are a package labeled as containing 100 units actually containing 80, a quart container not holding a full quart, or a five-pound bag weighing four pounds.



Most states have an omnibus weights and measures statute and often additional, more specialized, legislation covering such products as bread, fruits and vegetables. These acts are traditionally enforced by state or local sealers.

More recent weights and measures legislation addresses practices designed to confuse the consumer as to the price per unit. Unit pricing is one remedy that is appearing in some states. Stores are required to disclose not only the price of the good, but also the price per pound or ounce.

#### 14) Other Quantity Misrepresentations

Weights and measures legislation derives from traditional attempts to certify weights and measuring devices, primarily those dealing with foods and fuels. Recently enacted UDAP statutes have taken a more abstract approach, prohibiting quantity misrepresentations in general. This legislation applies to all types of goods and services and to all kinds of misleading representations about volume, weight, size, number of units and other quantity measurements. About half the states surveyed ban such misrepresentations in their UDAP statutes or other comprehensive consumer legislation.

#### 15) Packaging

Deceptive packaging practices are similar to quantity misrepresentations and weights and measures abuses. However, the quantity deception does not occur on the label, in advertising, or in the weighing or measuring of the good--the appearance of the package itself creates the deception.

The number of packaging tricks that mislead the consumer as to the volume or number of items enclosed is only limited by human ingenuity. Filling packages to less than their normal capacity, or slack fill, can be aided by oversized containers that hide the contents from the consumer. Containers can be designed to be slightly smaller in volume while appearing identical to normally calibrated containers.

Deceptive packaging can also mislead the consumer as to the quality of the goods enclosed, not just the quantity. For example, a colored wrapper may make meat look redder than it actually is.

Most states have enacted special statutes that prohibit wrappers or packages that lead to quantity deceptions, including the use of slack fill and false bottoms. Fewer statutes address the problem of packages disguising quality or identity of the contents. Whatever practices are prohibited, deceptive packaging legislation applies almost always to all consumer packages, with only a few statutes limiting their scope to packaging of particular commodities.

#### 16) Labeling, Adulteration, Identity

A fundamental state concern is the adulteration, mislabeling, or misleading identity of food, drugs, cosmetics, fuels, furs, agricultural products and other goods. For many of these commodities, health or safety concerns predominate, but consumer deception issues are also evident.

These statutes establish standards for using certain names or grades on a product label, as well as prescribing mandatory ingredient disclosures. Mislabeling, deceptive labeling, or failure to include sufficient information on a label are additional violations.

For example, a statute will prohibit the sale of adulterated maple syrup. It will also restrict the label "maple" or any illustration suggesting "maple" to syrups that contain a certain percentage of maple. Whatever the type syrup being sold, the act will require a label listing the packer's name and address, and the syrup's ingredients.

All states have passed such legislation, often dating back to the early part of this century. For many states, labeling legislation can be found in ten or more separate places in the state code, with individual statutes only affecting such particular products as coal, fuel oil, drugs, baking products, milk, butter, frozen desserts, eggs, fruits, or furs.

Normal state sanctions for violations are criminal fines, and confiscation of goods.

#### 17) Other Quality, Grade, Standard, Ingredient Misrepresentations

States whose UDAP statutes or regulations prohibit quantity misrepresentations also restrict various quality misrepresentations, such as a product's grade, standard, make, model, style, brand, series, or ingredients. As with quantity misrepresentations, the statute does little more than prohibit "misrepresentations" concerning a list of undefined and vague product characteristics--quality, grade, ingredients, and so forth. What this adds to UDAP statutes' basic ban on deceptive practices is unclear.

#### 18) Safety Misrepresentations

It is difficult to distinguish state actions designed to insure the safety of its citizens from those aimed at preventing deception concerning a product's safety characteristics. State safety legislation is not included in this survey, but relevant are a few UDAP statutes or regulations that enforce safety standards, finding it a deceptive trade practice to sell products not in conformance with safety standards promulgated by the Federal Consumer Product Safety Commission or other agencies.

#### 19) Nondisclosure of Full Terms of Transaction

Nondisclosure of the full terms of a transaction is used here to describe partial disclosures that make offers more appealing than they actually are because important exclusions, limitations, modifications or conditions are not mentioned. The effect is to lure the consumer into dealing with a merchant he would not have contacted otherwise.

While about half the states surveyed have enacted legislation in the area, there is little uniformity. Ohio has a UDAP regulation that prohibits the nondisclosure in advertising of exclusions, limitations, modifications or conditions. Other states narrow their concerns to gasoline price disclosures failing to include taxes, food price advertising not describing the weight or volume sold for the price, price quotations failing to state that additional required purchases are necessary, or the nondisclosure of extra service charges. Some of these requirements are placed in UDAP statutes or regulations, while others are found in separate legislation.

## b. Sales Approaches

### 20) Door-to-Door Sales Pressures

All states surveyed have enacted three-day cooling-off periods providing consumers special protection from door-to-door sales abuses. Problems associated with door-to-door sales include deceptive door openers (see 21, infra), high pressure sales tactics, misrepresentations as to quality, price, and other product characteristics, high prices for low quality goods, and the nuisance of an uninvited sales representative.

Door-to-door sellers, using polished entry techniques and persuasive sales presentations, pressure consumers into purchasing items not contemplated before the seller's visit. Such tactics contrast markedly with sales made at the seller's place of business, where the consumer enters the store voluntarily and has the option of coming back to make the purchase after further deliberations and comparative shopping.

These and other differences between door-to-door and in-store sales have led legislatures to provide buyers with cooling-off period rights for home solicitations. Sellers must provide consumers with a cancellation form and notice of their right to cancel; buyers can receive full refunds if they cancel within three days.

State cooling-off periods are standardized with the most important variations appearing in their scope. Some apply only to sales made in the home, others are applicable to telephone solicitations. Language varies also as to whether the statute applies to home solicitations or sales away from the seller's principal place of business. Other variations among states have been diminished as legislatures amend their acts to parallel the Federal Trade Commission's rule creating a three-day cooling-off period for door-to-door sales.

### 21) Door Openers

A "door opener" is a technique door-to-door sales representatives use to gain entrance to a buyer's home as a prerequisite to a high pressure sales presentation. While the various ploys used to "get a foot in the door" are innumerable, common deceptive ones are pretending to conduct a survey or test, misrepresenting the presentation length, or making a free offer. Another useful tack is to refuse to leave once gaining entry.

Only a small minority of states have passed legislation dealing with this specific practice; others rely on the effectiveness of their cooling-off periods. Door opener legislation found in UDAP statutes or regulations prohibits deception regarding the purpose of contact (such as surveys or tests), the types of goods or services offered, or the presentation length. One act specifies that sellers must leave the buyer's residence on request.

## 22) Sales Representative's Status

Another technique used primarily in door-to-door sales is for the sales representative to misrepresent his status. Such falsifications establish a stronger relationship with the consumer by cloaking sellers in trappings of legitimacy, expertise, humanitarianism, or other qualities that assist the sale.

Most states have acted in the area, usually by proscribing impersonation of a government officer or impersonation in general. Less frequently, states prohibit salesmen misrepresenting their authority to act as agents or to negotiate the final terms of an agreement.

## 23) Method of Selecting Consumer

This technique, primarily used in door-to-door sales, is closely associated with deceptive pricing. Instead of convincing the consumer that goods are a bargain because of some adversity (fire, flood, or the seller going out of business), the seller offers the consumer a special bargain because the consumer was specially selected as a contest winner or as a member of a special group. As such, he will receive a deal few individuals are fortunate enough to be offered. Only 2 of the 13 surveyed states ban this practice explicitly.

## 24) Oral Promises Not in Contract

An oral promise not incorporated into a final written agreement and not subsequently honored is a potential abuse in any sales situation not conducted entirely through the mails. But the practice is most commonly associated with commissioned sales representatives who, in their haste to finalize a sale, make unauthorized claims. Examples of unfulfilled promises include representations about: guarantees and warranties; refund and cancellation rights; length, nature, and quality of services; cost, quantity, performance of products; and the existence of added options.

All states have taken action to either deter the practice or bind sellers to their oral promises. The UCC, adopted in all states but Louisiana, establishes that a seller creates an express warranty in the sale of goods when he makes even unintentional oral affirmations of fact or promises relating to the goods that become part of the basis of the bargain. The consumer can then sue for breach of the warranty. In addition, a few state UDAP regulations directly prohibit oral promises not included in contracts. But these rules are narrower in scope. Ohio's regulation reaches only automobile sales, Wisconsin's only door-to-door sales.

#### 25) Commissioned Sales Representatives

Commissioned sales are not prohibited per se, but a few states offer consumers safeguards from such sales based on the belief that commissioned sales representatives are more likely to use abusive practices than salaried employees. In the extreme case, the promise of high commissions, and the threat of termination if quotas are not reached, spur commissioned sales representatives to go "all out" to make sales, using whatever techniques work, no matter how fraudulent. States that regulate commission sales require sales representatives to file descriptions of all sales with a state board.

#### 26) Nondisclosure, Fictitious Seller's Name

A common state concern is sellers' using fictitious names or operating under partnership names unrelated to their own. When the business terminates or, in the case of fly-by-night merchants, disappears, public officials and defrauded buyers cannot identify or locate the responsible company officials.

A majority of states require filing of the true names of individuals doing business and prohibit the use of fictitious names or the nondisclosure of true names. In addition, all states prescribe corporations incorporated within that state to register with them and provide basic identifying information. (These corporation laws are not included in the Prohibited State Practices Chart, Table #1.)

## 27) Auctions

Most states have adopted special legislation aimed at preventing abuses associated with auction sales. Auctions by their very nature pressure consumers into making quick decisions while simultaneously fostering the notion that special bargains can be obtained. Often little chance is given to inspect offered goods.

Licensing of auctioneers or auctions is the most common regulatory approach. In addition, some states require that information be filed with a government agency. Other statutes prohibit specific auction advertising practices or, in a few cases, all unfair and deceptive acts in connection with auctions.

## 28) Unsolicited Goods

Most states have attempted to stop the practice of sending consumers unsolicited goods. Sellers use the mails to deliver consumers goods that were not requested, bill the consumer for the merchandise, and follow up with various debt collection procedures. This scheme can be particularly effective if consumers consider it too burdensome to send the goods back but feel somehow guilty about getting something for nothing. The seller's subsequent debt collection efforts will soon convince the buyer to pay. A variant is to harass the buyer for goods that were not only unsolicited, but also never sent. The common law of most states was on the side of the seller when the consumer did not reject the unsolicited goods.

The almost universal state approach to this problem is the enactment of legislation giving consumers the right to keep unsolicited merchandise as a gift. Some statutes require sellers to notify consumers of this right or add state sanctions for utilizing the practice.

## 29) Premiums, Prizes with Sale

The law is traditionally skeptical of premiums or prizes offered with sales, particularly if the prize converts the consumer transaction into gambling. Thus a few statutes prohibit the offering of prizes to winners of games of chance offered to purchasers of a seller's product. Other states have laws concerning trading stamp abuses, particularly involving sellers' failure to redeem stamps. One state even prohibits the offer of free insurance as a purchase inducement.

### c. Performance Practices

#### 30) Theft Through Deception

Almost all states have enacted criminal statutes prohibiting theft through deception, an offense of general applicability where an individual intentionally obtains or withholds the property of another through the use of deception. The crime applies to all kinds of property transfers--those involving consumer transactions, and those that do not. An example involving a consumer transaction is fraudulently obtaining money from the buyer by creating false impressions as to the legal title of an object or its worth.

At common law, false promises were generally not a sufficient basis for theft prosecution. Misrepresentation of existing facts, not future events needed to be shown. Most statutes still contain this or similar requirements. But New York has recently enacted a statute creating the criminal offense of engaging in a scheme to defraud. It is patterned after the federal mail fraud statute and prohibits the obtaining of property through false promises, not just false representations of existing fact.

#### 31) Simulation

Somewhat less than half the states have enacted criminal statutes specifically prohibiting simulation, the practice of making, altering, or retouching articles with the intent to give the false appearance of antiquity, rarity, value, curiosity, or an authorship they do not have. Common examples of articles subject to imitation are art objects, antiques, jewelry, old books, maps, tapes, or even phonograph records.

#### 32) Substitution of Inferior Goods

Exchanging inferior goods involves the seller advertising, modeling or demonstrating one item, and delivering to the buyer an inferior substitute. By the time the buyer notices the switch, he has left the store. Other consumers may never notice the substitution, or only after extensive use.

The sale of used as new (see 35, infra) or the sale of damaged or defective items (see 33, infra) differs from the exchange of inferior goods. In the latter practice, the consumer actually sees a new undamaged floor model or sample, but receives an inferior substitute.

All states have legislation dealing with this problem. The UCC finds that any sample or model which is made part on the basis of the bargain creates an express warranty that the purchased goods conforms to the sample or model. A few UDAP statutes also prohibit the substitution of inferior goods.



### 33) Sale of Damaged, Defective Goods

Sellers may display and sell damaged goods without disclosing their defects and refuse to correct or replace the goods when buyers later realize the defects. Though the defect may be a breach of the good's implied warranty of merchantability (see 34, infra), sellers often avoid this by selling the goods "as is" or otherwise waiving implied warranties.

A minority of states have passed legislation prohibiting the sale of defective goods. Some of these statutes or UDAP regulations prohibit delivery of any consumer product with undisclosed defects, blemishes, or faults. Others apply only to motor vehicles or water-damaged goods.

### 34) Merchantability, Fitness

The UCC, by creating implied warranties of merchantability and fitness, gives consumers certain rights if the goods they purchase are defective or unsatisfactory. To be merchantable, goods must pass without objection in the trade; they must be fit for their ordinary use; they must conform to their label. Goods must also fit the buyer's particular purpose if the seller has reason to know that purpose and that the buyer was relying on the seller to select the goods.

If the goods do not meet either the standards of merchantability or fitness, the consumer has a cause of action for breach of warranty even if the seller never expressly warranted the goods. But this far-reaching remedy is severely restricted because in almost all states merchants can disclaim these implied warranties by selling goods "as is" or by including in the express warranty or sales contract a waiver of all implied warranties. This remedy is also limited because the UCC provision applies only to the sale of goods and not to the sale of services or repairs.

### 35) Sale of Used as New, Prior Use

The sale of used as new is the practice of representing or selling a good as new or unused when it in fact is used, rebuilt, repaired, or second hand. Returned goods not used by a purchaser are universally considered new.

Related to selling used as new is misrepresenting the prior use of a good. The classic example is rolling back a motor vehicle's odometer. Other motor vehicle examples include failing to disclose a car's unusual history of hard use, the fact that it was stolen, or was used as a demonstrator.

Almost all states have passed legislation in the area, some with as many as five separate statutes concerning the sale of used as new. The majority of UDAP statutes or regulations include a prohibition of the sale of used as new. Other acts prohibit the practice for particular products. Most states have odometer rollback legislation or other laws dealing with used motor vehicles. Scattered legislation in a few states involve such diverse products as watches, hats, household appliances, television picture tubes, and tires.

### 36) Unassembled Goods

A few states proscribe a seller's failure to disclose that delivered goods will be unassembled. One state prohibits the practice generally, another limits its scope to toys and furniture--the two most common products associated with this abuse.

### 37) Delay, Nondelivery, Nonexistent Product

This category of practices involves consumers paying for goods never delivered or delivered only after unreasonable and undisclosed waiting periods. The most common practice is sellers advertising products with no expectation of being able to make timely delivery. Classic examples are furniture delivered months late and Christmas decorations ordered in September arriving in July. Rarer but more serious schemes involve sellers soliciting sales of goods that do not exist or services that will never be delivered.

Most states prohibit at least some of these abuses. Unreasonable delays are often prohibited. Other legislation requires all deliveries to be made within some time period, such as 60 days. Failing such delivery, sellers must offer the buyer the option of accepting a refund or a substitute of equal or greater value. Some of these statutes are general in application, others are limited to mail-order sales or furniture delivered. A few states also proscribe such particular abuses as soliciting for unfunded magazines or fictitious insurance companies.

### 38) Layaway Plans, Deposits

A number of abuses are associated with buyers putting down deposits for products to be purchased later. In a layaway plan the consumer periodically gives money to the merchant, but only receives the goods when the price is fully paid. The usual expectation with a layaway plan and other types of deposits, is that the seller will hold aside desired merchandise for the consumer once a down payment has been made. Common abuses involve the merchant not disclosing the terms for the plan or deposit, disposing of or raising the price of items he was holding for the consumer, and retaining, upon the consumer's forfeiture, large deposits beyond any damage suffered by the merchant.

Only a minority of states curb abuses associated with layaway plans. Generally, the statutes prohibit the sale or increase in price of goods set aside. Full disclosure of seller's policy for retaining deposits upon buyer's default is provided.

### 39) Disposal of Goods Left in Possession

A number of legislatures regulate merchants' disposition of consumers' unclaimed property. An example of this type of abuse is a dry cleaner selling a consumer's clothes after they have been left at the cleaner's for several weeks after the pick-up date.

Some states place severe restrictions on such sales. The merchant must wait a specified period of time--sometimes as long as a year--before selling; he must notify the consumer of that sale by registered mail; the merchant must deduct the amount owed him from the sale proceeds and then hold the difference for the consumer. The most common state statutes apply to laundries, but the scope of others include storage companies or other merchants holding unclaimed goods.

#### 40) Repairs and Services

A number of states have enacted special legislation to protect consumers from fraud in the sale of consumer repairs and services. Common deceptive techniques include misrepresentations that goods are in dangerous condition or otherwise in need of immediate repair. Consumers, often lacking the expertise to make an informed decision themselves, have little choice but to agree to the repairs. If the consumer still refuses, one repairman tactic is to leave the item unassembled after inspection. Another approach is to charge exorbitant amounts for house calls or inspections.

Once the consumer is persuaded to have the product repaired, servicemen may misrepresent that repairs must be made away from the home. Away from the consumer's view, the serviceman can more easily make unauthorized or unnecessary repairs, including replacing properly functioning parts or installing used parts rather than new ones.

Other deceptive practices include misrepresenting that repairs have been made, and returning goods after promised delivery dates. More serious abuses involve repairmen stealing products to be repaired, exchanging them for inferior items, or using goods while entrusted to the repair shop.

Before possession is returned to the consumer, merchants may insist on payment significantly greater than the initial estimates (low-balling). Extra undisclosed charges may also be tacked on, such as service or reassembly charges.

About half the states surveyed have adopted laws or rules to stem some of these practices. Some state UDAP statutes or regulations prohibit misrepresentations need for repairs, unnecessary or unauthorized repairs, failure to make promised repairs, and other deceptive repair practices. Frequently, states enact narrow legislation prohibiting automobile repair fraud or licensing automobile repair shops. Less often, statutes apply to television, radio, or other appliance repairmen.

#### d. Paper Transactions

##### 41) Forgery, Tampering, Destruction of Documents

All states have passed at least one statute dealing with forgery and in some cases tampering with or destruction of documents. Since violations of this legislation can result in serious criminal sentences, criminal intent is a necessary element. These statutes can apply to such consumer frauds as forging a consumer's signature, altering a contract, or destroying documents evidencing the terms of a transaction.

##### 42) Signature by Deception

Signature by deception is obtaining an individual's signature by trick. The signatory thinks he is signing an entirely different document, does not realize he is signing a document at all, or does not understand that his signature will have the legal consequences it does.

An example of signature by deception is a salesman convincing a consumer to sign a binding vocational school enrollment contract by telling the consumer he is only applying for enrollment and his signature creates no obligation. On the other hand, if the potential student knew he was signing a binding contract, even if he did so relying on false representations, the salesman is not guilty of signature by deception.

Signature by deception is a serious criminal offense and, consequently, criminal intent must be proved. About half the states surveyed include in their criminal code either signature by deception or signature by false pretenses. Wisconsin has also promulgated a UDAP regulation prohibiting, in home solicitations, deception concerning the nature of documents signed. This regulation does not require the same degree of intent as the criminal statutes, bearing only civil sanctions.

### 43) Future Service Contracts

Future service contracts bind consumers to long-term agreements where financial obligations are incurred immediately, but where the promised services are offered over an extended period of time or are delayed until some time in the future. Examples are health spas, dance studios, summer camps, judo classes and social referral services. Vocational schools might also be included, but will be treated separately (see 66, infra).

Unique characteristics of future service contracts create a special potential for abuse. The quality or worth of services to be provided in the future are often difficult to measure or evaluate, and consumers financially commit themselves before they know what they are getting into. The resulting danger of receiving a worthless or less valuable service is exacerbated by the long-term nature and high cost of the contract. Some contracts may even be for the life of the consumer or for thousands of dollars.

Future service contracts may be marketed utilizing high pressure sales techniques and numerous oral misrepresentations concerning the quality of the service and its likely benefits. When the consumer realizes that the seller's claims were false or that he only signed because of the seller's undue pressure, his remedies are limited. The main consumer option, withdrawing from the program, will prove futile if the refund formula in the contract offers the consumer little or no refund. Moreover, the little refund that is due may never be received.

Consumers who decide to remain may also lose their money as bankruptcies close fly-by-night and other marginal operations. A buyer's claim for the return of his advanced payment holds little worth since the bankrupt's liquidation rarely provides assets to even partially repay such debts.

The most common state legislative approach to preventing these abuses is licensure. Beside licensing industry members, minimal regulation is provided concerning refund formulas, adequacy of facilities and instruction, and other aspects of the business. Examples of licensed future service sellers are dance studios, computer dating services, health spas, and summer camps.

A few states take a more aggressive approach. Massachusetts requires a broad range of future service contracts to offer a liberal pro rata refund for those who cancel. Ohio limits the duration, provides a liberal refund formula, orders services to be offered within six months of the contract, and provides various other consumer safeguards for a wide range of future service contracts.

#### 44) Adhesion Contracts, Liability Waivers, Warranty Disclaimers

Standard form contracts are almost universally used in consumer transactions where agreements are reduced to writing. The price and a few other terms may be negotiated, but the consumer does not bargain over the "small print." Instead, the contract will be a standard form selected by the seller to meet his business needs, modified by the seller's legal counsel to obtain legal advantages, and not challenged by the consumer.

These contracts are often lengthy, complicated, filled with legal jargon, and written in small print. The seller rarely discusses the contract's full contents; the consumer rarely attempts to read the fine print. Even if the buyer does read the standard form contract, he rarely understands what it means and has few, if any, choices regarding the boilerplate terms.

A consumer, even if he tries, will not successfully amend these contracts. The seller's bargaining position is far superior since almost all merchants use the same form and are unwilling to alter them. The merchant cannot afford to lose the economies of scale created by uniform contracts and sale terms. Such agreements are called contracts of adhesion since they do not represent the joint wills of the two parties, but only that of the seller. The consumer may be aware of the price and other outstanding terms of the bargain, but he is ignorant of the "fine print" and powerless to change it.

Only a few states have taken actions to improve consumers' ability to understand their contracts. New York has legislation concerning small or illegible print in consumer contracts; Pennsylvania has used its UDAP statute to prohibit incomprehensible lease terms.

Most state action concerning adhesion contracts involves substantive limitations on the types of clauses that can be placed in consumer agreements. Even this is of very limited scope. Several cases and UDAP regulations have prohibited sellers' blanket liability or warranty waivers where the terms have been demonstrated to be unconscionable or unfair. These rulings are limited to specific situations either by the narrow drafting of regulations or by judicial reticence to extend rulings beyond the facts of the particular case.

The UCC establishes general standards for interpreting and determining if warranty disclaimers are effective, but it does not prevent any disclaimers as long as the seller uses the right language. A few states have amended versions of the UCC that prohibit certain waivers of warranty rights.

#### 45) Warranties, Rights, Remedies

While state legislation does not force sellers to warrant their goods or offer consumers special rights or remedies, all states have passed laws to prevent sellers from deceiving consumers concerning their warranties, rights, and other remedies. The UCC sets up standards for when express or implied warranties have been given and when and how they may be waived. These standards are very liberal in creating warranties but equally considerate in allowing sellers to disclaim them.

Most states surveyed also use their UDAP statute or regulations to prohibit misrepresentations concerning the type of warranties or rights given and in some cases to require a full disclosure of the type of warranties and rights the seller is offering. The District of Columbia's UDAP act also prohibits the sale of goods that violate the UCC's warranty provisions. Thus a breach of warranty can be met with UDAP and not just UCC remedies.

#### 46) Installment Sales

Almost all states have one or more installment sales acts, the two most common statutes covering retail and motor vehicle sales. This form of legislation evidences a concern that consumers who sign the installment sales contracts may not appreciate the full implications of their actions as much as individuals who pay cash. Debtors also have a continuing relationship with the seller or the financier which must be regulated by a law other than the contract of adhesion.

Consumers realize that a cash sale is a final purchase. Except for unusual circumstances, the deal is closed, the money is gone, and the consumer bears the full risk of the consequences. On the other hand, signing a piece of paper does not have such a clear meaning, particularly when little or no downpayment is made. Buyers in door-to-door sale situations may even sign the offered paper just to get the high-pressure salesman out of the house.

The consumer's ignorance of his full obligations is compounded by the complexity of standard form contracts. Interest rates, payment terms, penalties for nonpayment, and other important features of the sales agreement easily escape the consumer's notice and are beyond the consumer's bargaining power. Blank spaces in the contract may be left for the seller to fill in as he pleases. If insurance is involved, the consumer may not know what insurance is included in the purchase price or who the insurer is. Consumers thus uninformed before they bind themselves to an installment contract may never discover the real terms of their agreements and the nature of their obligations.



The typical installment sales act requires conspicuous disclosure of various terms of the installment sales agreement, including interest rates, payment schedules, insurance coverage and noncoverage. In addition, the maximum interest rate will be set and certain creditor remedies may be prohibited. For example, remedies that limit the buyer's chances to raise defenses against debt collection actions and that give the buyer excessive collateral are sometimes proscribed. In addition, "balloon" payment schemes that provide that the debtor's last payment be much larger than earlier payments may be proscribed. This practice may force debtors to refinance the loan, being unable to make the last payment.

Installment acts require that buyers be given copies of the agreement, allowing consumers a further chance to understand their obligations and deterring the seller from altering the original copy after the sale. Other important information such as statements of the account's status or a copy of included insurance policies also must be made available to the buyer after the sale.

Motor vehicle installment sales acts are set up not only to meet installment sales abuses but also to deal with special problems of automobile sales. Licensing and other regulation aimed at preventing deceptive sales practices often form part of the act. While motor vehicle and retail sales are the most common installment acts, some states have adopted legislation in the area of land sales, home improvement sales, door-to-door sales, insurance sales, and other areas.

#### 47) Credit

Western civilization has traditionally disfavored high interest rates on loans. Prohibitions on usury, the charging of excessive interest rates, date back to biblical times and persist today, although not so strictly interpreted. Early in this century, states legalized higher interest rates for small loans seeing legitimate credit as a preferable alternative to the problem of the growing class of factory workers falling victim to illegal loan sharks. Today, mass merchandising has created mass credit with over \$100 billion of consumer credit outstanding.

While states have liberalized permissible interest rates, every state still sets maximum rates for various forms of credit transactions. Arguments that artificially low rates discourage the availability of credit and entrance into the market have not been completely persuasive. States do not view credit as responding to normal competitive pressures. They see consumers less sensitive to the price of credit than to the price of the product to be bought with the credit.

Most consumers obtain credit without knowing the real costs involved. Sellers encourage the use of credit to maximize sales and many lenders encourage borrowing to increase their profits or market share. This problem is compounded when consumers find themselves unable to repay the high credit costs, and subject to various one-sided creditors' default remedies included in the credit agreement and other law.

The state response to these problems is to set interest rates. Different forms of credit are regulated by different statutes, each with its own maximum rates. A few states have special acts allowing astronomical interest rates--several hundred percent--for very small loans in the \$1.00 to \$100 range. Most states have small loan acts (sometimes called industrial loan acts because of their supposed benefit to industrial workers) that allow rates varying from 20% to 40% for loans up to around \$1,000.

Personal loan statutes providing for credit in the \$1,000 to \$20,000 range set somewhat lower rates. Open end credit, revolving credit such as that offered by credit cards, varies from 10% to 18%. Credit union rates usually are fixed at 12%, and bank's at slightly higher rates. Other statutes set credit rates for the sale of homes, new and used cars, insurance, and other specific products.

Separate legislation regulates pawnbrokers, attempting to stem such abuses as the pawnbroker's failure to inform consumers how soon they have to redeem their pledges before they may be resold and what the redemption price is. Both of these practices obfuscate the real interest charged the consumer - rates that can be astronomical. They may also encourage defaults which benefit pawnbrokers who obtain pledges more valuable than the money loaned.

For all forms of credit, cost disclosure is a common remedy states apply in addition to ratemaking to curb excessive credit rates. A number of states have modeled legislation after the federal Truth in Lending Act that specifies the format and information that must be given consumers before each credit sale.

States are not only concerned with excessive interest rates, but also the existence of unfair creditors' remedies if the debtor defaults. Under 5% of debtors default; most defaults are caused by factors outside consumers' control, such as sickness or the loss of their jobs. Consequently, when consumers sign credit agreements, they do not anticipate default as very probable and do not concern themselves with remedies the contract gives to the creditor upon default.

These remedies include use of cognovit notes whereby the debtor waives his right to receive notice of or participate in court actions instituted by the creditor to collect from the defaulting debtor. Other contracts may require debtors to waive their statutory right to have certain property exempted from repossession. Debtors may agree to assign their wages automatically to the creditor on the basis of the creditor's unilateral decision to take the wages. .

Creditors, in addition, may require debtors to give a security interest in all of a consumer's present or future possessions. The creditor can then, as a bargaining tool, threaten seizure of goods of great utility and emotional value to the debtor but of little economic worth to the creditor. A credit contract can even require debtors to agree to pay large attorney's fees of the creditor if the creditor takes a defaulting debtor to court. Late payments and extensions can be assessed large fines. Defaults on one payment may cause the acceleration of the note requiring all payments to be made immediately.

A few of these practices, such as cognovit notes and unlimited wage assignments, are almost universally prohibited. The UCC, severely limits blanket security agreements that give creditors rights on property acquired after the credit agreement. The UCC and the Colorado Uniform Consumer Credit Code restrict vaguely worded collateral description. Most other creditor remedies mentioned above are still permitted with occasional legislation or cases limiting practices in individual states. (Owing to the number of these practices and the complexity of caselaw and legislation covering them, this law is not covered extensively in the Prohibited State Practices Chart, Table #1).

#### 48) Debt Collection

Attempts by creditors or collection agencies to collect past due bills can result in various abusive practices. Debt collectors may intimidate consumers by threatening legal process when they do not intend to resort to such collection means. Less direct threats include use of a lawyer's stationery or misrepresentations that the matter will be turned over to an attorney. One particularly fraudulent scheme presents debtors with documents that look like, but are not, court papers, a practice called simulated process.

Other abusive collection techniques include telephone or personal calls at all hours of the night or at the debtor's place of employment. Collectors may even misrepresent that they are government officials.

Skip-tracing is a deceptive scheme used to ascertain the debtor's whereabouts. The creditor's agent may pretend to be taking a survey, delivering a prepaid package, even offering a motion picture part to discover the debtor's new address from friends, relatives or neighbors.

Most states deal with these abuses through licensure and related forms of regulation of collection agencies. A few states prohibit unfair and deceptive debt collection techniques in general or certain specific tactics in particular.

Another form of debt collection abuse regulated by separate legislation is associated with repossessions. Creditors may repossess goods when the debtor is not in default. Creditors may also disguise their employees as sheriffs to allow the peaceful repossession of goods, since repossession can only legally occur peacefully.

An important repossession abuse involves the creditor realizing more money from the repossession than if the debtor had paid in full. This is a real possibility if the consumer has made substantial payments and consequently the goods are worth more than the remaining balance. The creditor may just keep the repossessed goods. Even more profitable may be to sell them to a related merchant, not only below their market value, but below the remaining balance. Then the creditor can still sue the debtor for the remaining deficiency. An alternative scheme is for the creditor to sell the repossessed good at its market value but not return the surplus to the debtor.

The UCC attempts to correct the above enumerated repossession abuses in several ways. Repossession can only occur when the consumer is in default, and the practice of obtaining through deception the consumer's consent to repossess a good is prohibited. Certain notice requirements inform the debtor whether the creditor intends to keep the collateral or sell it. The sale must be in a commercially reasonable manner; the surplus must go to the consumer. Violations of these UCC requirements give rise to a private right of action to recover damages or 10% of the purchase price of the goods and 10% of the interest charge, whichever is more. However, very few consumers enforce these rights.

Even when consumers do litigate the validity of repossessions, various difficulties arise. "Commercially reasonable" is an undefined and ambiguous term, leading courts to be liberal in affirming sales of repossessed goods. Even private sales are permitted. In addition, no notice to the consumer of the repossession itself is needed, only of the subsequent disposition of the goods.

Other debt collection abuses involve the misuse of judicial procedures. Creditors must notify debtors that a court action is being brought to collect the unpaid balance. "Sewer service" is a practice of plaintiffs claiming to deliver such notice to the defendant's home but actually leaving it in the "sewer," resulting in the debtor's court default because he didn't even know the action was being brought. "Sewer service" can thus be used to obtain cheap default judgments, using that judgment as leverage with the debtor in collection efforts or as justification for immediate seizure of the consumer's property.

Another abuse of court proceedings involves use of improper or inconvenient venue, that is, intentionally bringing lawsuits in courts where it is difficult for defendants to appear, facilitating default judgments. A creditor with home offices in San Francisco may be able to legally bring a default action in San Francisco against a Los Angeles debtor who borrowed money from a branch office in Los Angeles. Even if a court's venue rules do not permit such actions, the creditor may do it anyway because the debtor will have to journey to San Francisco to object to the improper venue. Use of inconvenient venue has only been prohibited in a few individual court cases.

Perhaps the greater fraud against consumers who are sued is the callousness of the law and courts to their situation. Summonses (the notice of a lawsuit) seldom clearly explain how the consumer must respond. Creditors' attorneys often engage in preserving the legal mystery if the consumer contacts him. In most courts a consumer must promptly file a written answer in legal form to preserve his right to any hearing on the suit. Most courts are open only during business hours, reducing access. As a consequence, only a handful of consumers defend collection actions. In several cities there have been attempts to make small claims courts more accessible to consumers, but progress has been slow. (see B, 26, infra)

#### 49) Confidential Information

Most government regulation of sellers' misuse of confidential information about consumers is at the federal level; only a minority of states have passed legislation in the area. Existing state legislation is patterned after the federal Fair Credit Reporting Act that regulates the kind of information credit reporting agencies can keep on consumers, who they can disclose it to, and what rights the consumer has to discover his own report and attempt to correct it. This legislation is concerned with the severe consumer injury that can result from credit reporting agency employees fabricating or sloppily creating reports on consumers.

Other state statutes deal with misuse of information obtained from individuals while providing consumer services. Data known by tax preparers may be used in reviewing loan applications; computer dating services may turn over intimate personal information to various mailing lists.

One potential problem not yet dealt with effectively by many states is the growth of electronic funds transfer systems which would automatically keep a record of all consumer purchases and sources of income. Checks would be eliminated and all transfers would occur automatically in a bank's computer and its terminals located in stores and other places. The bank would then have in its computer a complete record of all an individual's transactions, with an accompanying ability to severely misuse such consumer information.

### 3. Industry Specific Practices

It is very common for states to limit the scope of consumer protection legislation to specific industries or businesses. Instead of generally prohibiting a practice common to many industries, the statutes will regulate practices in one particular industry. Some of those practices will be unique to that industry; others will be common to other industries.

This survey will isolate consumer legislation dealing exclusively with nine specific industries. The nine have been selected as exhibiting unique potentials for fraudulent business conduct or as producing goods or services which are important consumer purchases and, consequently, where consumer injury can be significant. Other industry-specific legislation will only be briefly listed. While this other industry-specific legislation also impacts on consumer fraud, it does so to a lesser extent, and to further discuss all of them would not be productive.

#### 50) Insurance

All states regulate insurance. The McCarran-Ferguson Act preempts federal regulation of insurance where states are already acting. The insurance industry, feeling that federal legislation will be harsher than state regulation, has encouraged all states to pass such legislation.

While insurance legislation has such pro-industry origins, it does serve an important consumer need. Insurance is a costly but virtually essential consumer expenditure. The state has a strong interest in its citizens being adequately insured against unexpected and unaffordable losses.

While insurance is a critical consumer purchase, fraud in its sale is a very real threat. Insurance policies are difficult to understand, with their complex language, length, and small print. Agents do not help matters, but may, instead, misrepresent the policy's terms or other important facts. The consequences of a consumer finding that his policy does not cover what he thinks it does may be catastrophic.

Consequently, state legislation regulates such factors as price, solvency of insurance companies, when a policy can be cancelled and what types of coverage are included. Licensing of agents and brokers is also widespread. Many states prohibit unfair or deceptive insurance practices; others ban misrepresentations of terms and benefits of insurance policies or the assets of the insurance company. While there are numerous forms of insurance, e.g., life health, automobile, accident, credit and property, the scope of most insurance statutes includes all types.

## 51) Real Estate Sales

Real estate is a consumer's largest single purchase. Consequently, fraud's impact is greatest in this type of sale. Land sale frauds involve the sale of vacation homes that turn out to be in swamps or in undeveloped desert. A salesman may show impressive pictures or even demonstrate a model home. Great plans are outlined for further development of the complex. Supposed endorsements from famous individuals and government agencies add to the picture. When the consumer finally sees his actual home after the sale is finalized, it is not as represented. More importantly, the area is not and never will be developed as promised. The house may be inaccessible to utilities and roads.

Other problems can occur in the sale of real estate even if the purchaser sees the actual plot of land. Home builders may complete the house well past the agreed upon deadline or not along desired specifications.

Even if the house is sold after inspection, undisclosed defects may not be discovered. Purchase agreements may waive implied warranties and offer insufficient express warranties. Real estate agents, often paid on a commission, may utilize deceptive practices to attract and finalize sales.

All states license real estate agents. A number of legislatures also prohibit various misrepresentations in the sale of land and require full disclosure of material facts. A few states have enacted complex filing requirements and extensive regulations to discourage fraudulent land sale schemes of the type where property is found in a swamp or inaccessible to roads and utilities.



## 52) Landlord-Tenant, Mobile Home Parks

All states regulate the relationship of landlords to tenants, including eviction procedures, tenants' rights, and landlords' responsibilities for housing code violations. These issues are normally classified as "landlord-tenant" or "housing" law. Because of old property concepts, landlord-tenant relations are treated differently than other consumer purchases or contracts. But this notion is breaking down and there is a growing trend to treat the rental of an apartment as a consumer transaction and to use UDAP or other consumer statutes to regulate at least portions of this arrangement. Apartment leasing merits consumer fraud scrutiny because housing costs are a major continuing consumer expenditure necessary to even a subsistence existence.

One common consumer problem in this area is security deposits. Landlords may require excessive security deposits, offer consumers no interest on the money held, and then refuse to return deposits, without adequately accounting for damages to the apartment. Most states have some kind of legislation regulating the amount of security deposit that can be withheld, specifying whether interest must be paid on it, and requiring landlords to return deposits within a certain number of days, less the amount needed to reimburse certain types of damage.

Other legislation creates minimum standards for rental property, and prohibits misrepresentations as to the nature of rented property and nondisclosures of housing violations. Still other state laws proscribe certain oppressive lease clauses and regulate grounds for eviction or termination of the lease.

Many of these statutes are found in "landlord-tenant" sections of state codes, but at least some states deal with these problems as consumer issues. Massachusetts has promulgated, under its UDAP statute, extensive regulations dealing with conditions and maintenance of dwelling units, demands for increased rent, rental agreements, security deposits, and other leasing problems. Pennsylvania has used its UDAP act to attack incomprehensible lease terms. New Jersey has recently enacted a "Truth-in-Leasing Act" that requires landlords to make full disclosures to consumers of each side's rights and obligations.

Even more damaging than landlord-tenant abuses are those involving mobile home parks. Predominately low-income consumers rent space and facilities at such parks for their mobile homes on a semipermanent basis. Problems include misrepresentations concerning the lot and services provided, undisclosed extra charges, onerous conditions on the tenant's sale or transfer of his mobile home, unjustified eviction, and unconscionable contract terms.

About half the states surveyed regulate mobile home parks, usually by setting minimum health and safety standards. But some states have adopted UDAP regulations or brought individual cases that prohibit oppressive conditions on the tenant's resale of his mobile home, and ban undisclosed charges for mobile home park services, and other mobile home park abuses.

### 53) Home Improvement Sales

Home improvement sales are notorious for their potential for consumer fraud. Fly-by-night sellers approach consumers who are often elderly at their homes unannounced, and use various high pressure scare tactics to convince them to contract for costly home improvements: blacktopping the driveway, reinforcing the chimney, putting aluminum siding on the house, or repairing the roof.

Bargain offers underestimate the actual cost, misrepresent the quality of materials to be used, or utilize deceptive price comparisons. Alternatively the seller may provide the service at the stated price but leave town before the consumer realizes the "improvement" did not improve anything, or that it was left unfinished. These schemes are exacerbated by the practice of tricking consumers into pledging their home as security for payment for the home improvements. In addition, state statutes also create materialmen's liens on the home that arise automatically without need of obtaining consumers' signatures. In either case, the seller has a strong bargaining position if the consumer withholds payment.

While home improvement sales is only one narrow category of sales, states have shown keen interest in the industry since some of the worst and most costly consumer fraud schemes are in this field. About half the states surveyed have passed legislation geared specifically to consumer fraud in home improvement sales; New Jersey has adopted three such statutes.

State law in the area follows various strategies. Licensing and bonding are common. Some UDAP statutes or regulations prohibit specific home improvement practices involving failure to complete promised work, charging more than estimated, and various door-to-door selling techniques. Other home improvement legislation regulates credit abuses.

#### 54) Automobile Sales

All states surveyed have at least one statute regulating automobile sales specifically. While many of the deceptive practices used in the sale of motor vehicles apply to all kinds of consumer transactions, states give automobile sales special attention because of their high cost and the widespread evidence of fraud and deception in the industry.

Problems with the sale of new cars include deceptive pricing, bait-and-switch advertising, failure to disclose the product's full cost, unavailability of advertised items, sale of used as new, oral misrepresentations, oral promises not included in the contract, deceptive claims about trade-in values, nondisclosure of warranty limitations or automobile defects, and inadequate or slow repair of warranted defects.

Used car sales may involve the same practices as well as certain additional abuses. Common problems are odometer spinning and misrepresenting prior use of the vehicle. An example of the former is changing the odometer reading from 50,000 to 20,000 miles. An example of the latter is claiming a car was driven by a little old lady when, in fact, it was submerged in water and then received unusually hard use. Used car dealers may also fail to disclose known defects while selling the car "as is." The dealer may so confuse the consumer that he does not realize the car is being purchased with no warranties at all.

State legislation aimed at combatting these problems takes several forms. Dealer licensing statutes, motor vehicle installment sales acts, and odometer tampering legislation are the most common. Some states apply their UDAP statute or regulations to these problems. A few individual statutes prohibit such practices as failing to disclose a car's previous submersion in water or failing to include oral promises in the sales agreement. Massachusetts has an interesting statute that allows purchasers to void sales if the automobile requires a sizeable expenditure to pass state inspection.

#### 55) Mobile Homes

Mobile homes are an important source of housing for low-income consumers unable to afford traditional dwellings. Since defects in mobile homes are widespread and can literally force the buyer out into the cold with no place to live, mobile home sales abuses merit strict scrutiny.

The slow performance of repairs under warranty is a serious problem, particularly if the unrepaired defects lead to unsafe living conditions. Dealers and manufacturers exacerbate the delay by passing responsibility for repairs back and forth between them.

Another mobile home abuse is the misrepresentation of the size and quality of the product. A common deception is use of a "model" mobile home that does not conform to the delivered product.

Most states surveyed have set minimum warranty, construction, and installation standards for mobile homes. Other states license dealers.

#### 56) Hearing Aids

Various deceptive and high-pressure sales techniques are associated with the sale of hearing aids. These practices include deceptive performance claims, demonstrations, and advertising. Door-to-door sales representatives make unannounced visits, apply high pressure tactics and falsify their status (e.g., claiming to be a physician or hearing specialist).

Used hearing aids are sold as new. False claims are made that hearing aids will restore normal hearing, reverse the progression of hearing loss, eliminate unwanted noise, or not be seen. The end result is consumers purchasing hearing aids for which they will receive no real benefits.

These abusive practices are encouraged by the special nature of the hearing aid sale. Many of the potential buyers are of advanced age and vulnerable to sophisticated sales approaches. Their hearing problems increase this vulnerability.

It is difficult for even the most sophisticated consumer to determine the effectiveness of a particular hearing aid without a trial period. The sale of a medical item without the consumer first consulting with a physician leaves the buyer relying exclusively on the seller's authoritative sounding claims.

The most common state approach to these problems is licensure of hearing aid dealers and fitters. While some of these licensing statutes function primarily to restrict entry, more recent acts aim more aggressively at alleviating consumer fraud. Nonlicensing statutes deal with various advertising practices. Pennsylvania, for example, has interpreted its UDAP statute as prohibiting various hearing aid advertising and sales techniques.

#### 57) Funeral Practices

Funeral industry practices have been subjected to close government scrutiny in recent years, resulting in the uncovering of a number of abuses. Examples are funeral directors obtaining custody of the deceased body or embalming without permission, refusing to release the deceased body when money is owed, refusing to make available low-cost containers for use in immediate cremations, and displaying the least expensive caskets in repugnant colors. Despite representing certain items as "cash advances" or "accommodations," funeral directors make profits on expenses owed to third parties (e.g., the cemetery, pallbearers, flowers, or clergy honoraria).

Funeral directors, desiring to sell extra services or products, may misrepresent legal requirements, public health needs, religious practices, or the preservative value of embalming, caskets, or burial vaults. Other funeral industry abuses include bait-and-switch advertising, disparaging a consumer's concern for price, refusing to give price information over the telephone, and not itemizing or displaying prices.

These funeral industry practices exploit the consumer's peculiar vulnerability at the time of a family member or friend's death. Comparison shopping is rarely possible or even considered. The consumer has other more immediate concerns taking precedence over the purchase of funeral services and will rely on the funeral director's expertise.

All states surveyed regulate funeral transactions through licensing boards composed predominately of funeral directors. These boards were created early in this century not to meet the various consumer abuses described above, but to limit price advertising and entry into the profession.

A current Federal Trade Commission rulemaking proceeding has spearheaded a growing awareness of the need for more consumer protection in the funeral transaction. Massachusetts, for one, has proposed UDAP regulations that would prohibit many of the practices outlined above.

## 58) Nursing Homes

Consumer fraud in nursing homes is the target of a number of recent prosecutions and investigations. Nursing home abuses include overcharging, offering inferior services, and enforcing unconscionable contractual terms that put patients virtually at the mercy of the nursing home.

Nursing home patients are generally vulnerable, being old and often sickly. The patient, if dissatisfied, is rarely in a position to take action because children or others outside the institution often pay for the services. The medical aura surrounding the nursing home further insulates it from careful consumer scrutiny. Thus, as with the funeral transaction, nursing home practices offer a unique combination of consumer vulnerability and other circumstances that allow unscrupulous operators to easily perpetrate various consumer frauds.

Most states regulate nursing home practices, usually through licensure. Other legislation attacks various consumer abuses more directly. Massachusetts UDAP regulations require disclosure of the level of care offered, and of the nursing home's policies and state requirements as to patients' rights and responsibilities. Various billing practices are prohibited and full disclosures of charges and rates must be made. Certain limitations on access to family and other individuals outside the facility are also proscribed. Standards concerning patients' control over their personal funds are enumerated. The Massachusetts rule also regulates medical treatment, discharge, transfer, and information disclosure to nursing home patients.

## Other Industry Specific Practices

States regulate the practices of a number of other industries. Licensing is the predominate form of legislation. Ratemaking is found in utilities and a few other areas. Consumer fraud is only a secondary concern of many of these statutes. These industries include:

accountants	motor fuels
acupuncturists	nurses
amusement parks	optometrists
apartment referral agents	opticians
architects	osteopaths
attorneys	pet shops
bail bondsmen	pharmacists
banks	physical therapists
barbers	plumbers
baking exhibitors	psychologists
butchers	radio and television repairmen
chiropractors	private detectives
cemeteries	speech pathologists
cosmetologists	taxis
dentists	tax preparers
electricians	theaters
engineers	transient merchants
freezer meats	truckers
laundries	veterinarians
marriage counselors	watchmakers
medical doctors	
midwives	
motor clubs	

#### 4. Specific Consumers

Some practices are prohibited only if geared toward a specific class of consumers. For example, special safeguards protect sales involving minors, incompetents, and non-English speaking consumers. These standards generally apply to all types of transactions, practices, and industries, and are only limited by the nature of the consumer.

##### 59) Minors, Incompetents

States create special protections for minors and certain individuals considered incompetent. Contracts or purchases entered into by such consumers are often voidable at the option of the consumer. Minors and incompetents are considered incapable of making informed purchase decisions and merchants are not allowed to exploit their vulnerability.

##### 60) Non-English Speaking

Consumers who do not speak English need special protections. Such consumers may be sold products in their native language (often Spanish), but be presented with English language disclosures and contracts. Unscrupulous sellers can therefore make oral promises in the sales presentation that are at variance with the actual contract. Consumers may never understand their contractual rights and obligations.

Only a few states attempt to deal with these problems. The Illinois UDAP statute requires that consumers receive contracts in their own language. A New York case ruled that a salesman's obtaining a signature through high-pressure tactics without explaining the contract terms to a non-English speaker is unconscionable pursuant to the UCC.



## 5. Opportunity Schemes

States treat certain opportunity schemes as consumer frauds even though they may not strictly involve consumer transactions. These schemes attempt to convince individuals that they can get rich quick, enter a rewarding career or start a profitable business. The sale of a business opportunity is not literally a consumer transaction, but states generally use consumer protection agencies and consumer statutes to prevent such fraud. In addition, the victims of these schemes often involve persons who have never before been involved in business transactions except as consumers. Moreover abuses in the sale of opportunities closely parallel those in the sale of consumer goods and services.

Charitable solicitations have also been included in this category for want of a better place. They are not strictly opportunity schemes since individuals are asked to donate for charitable and not selfish reasons.

### 61) Referral Sales

A referral sale offers product discounts if buyers supply the seller with a list of referrals and such referrals also buy the product. These referral offers may be accompanied by exaggerated claims concerning the size of the eventual discount, even representing that the buyer will ultimately get the product for free.

However, such claims are contingent on future events, and the seller frequently has no basis for the claim. Buyers will often receive no discount at all. Communities become so saturated with referral sales that it becomes mathematically impossible for later buyers to obtain the promised rebates. Even if referrals result in significant sales, the consumer may not be able to rely on the seller to credit him properly with the appropriate discount.

Most states have enacted laws that severally limit such sales. About half of all states use their UDAP statute or regulations to ban referral selling per se. Other states only prohibit deceptive discount promises or other misleading aspects of the plan.

## 62) Pyramid Sales

Pyramid sales schemes are of two types. One approach creates a multi-level organization where individuals move up the various levels and consequently achieve greater returns on their investments by encouraging investors in levels below them to do likewise. Each higher level usually calls for a greater investment in money or merchandise that accrues to the benefit of investors in the still higher levels of the organization.

Another pyramid scheme offers an individual, for payment of an inflated fee, the opportunity to become a founding member of an organization. The individual in turn encourages others to pay an inflated fee to become founding members until enough capital exists (after commission to founders are paid) to open a distribution center where goods are sold cheaply and where the founders reap the rewards in profits for each sale made to the public.

In both instances, what is being peddled is the right to encourage or solicit new memberships in the pyramid, not the product itself. In both instances, the mathematical reality is that only early participants recoup their initial investment and make sizeable profits. Latecomers invariably lose out.

About half the states surveyed have acted against pyramid sales, often through UDAP statutes, regulations, or cases. Some of these actions completely prohibit certain multilevel distributor schemes. Other states proscribe deceptive earning claims or failures to make full disclosures in regard to pyramid sales.

## 63) Lotteries, Prizes, Contests

The law takes a dim view of lotteries, prizes, and other contests, because they are gambling and may lead to fraud. Common contest abuses include misrepresentations about individuals' chances for winning and the value of the prize to be offered. Sham contests are utilized to gain sales leads or track down debtors (skip-tracing). Another ploy uses an initial easy contest to lure consumers into investing money or purchasing goods in order to enter subsequent more lucrative rounds where entrants' chances of winning are virtually nil.

Most states have enacted legislation in this area, often prohibiting lotteries except under certain conditions. Other acts simply proscribe various deceptive techniques associated with lotteries.

#### 64) Business, Employment Opportunities, Franchises

There are a limitless number of employment or business opportunity schemes which promise participants they will get rich quick or achieve a high income. Associated misrepresentations include inflated claims of past or future earnings, unsubstantiated general claims such as "earn big money," and the use of testimonials from nonexistent or unrepresentative individuals.

Other misleading practices involve salary offers that turn out to be offers of income based solely on commission, false claims that sales territories will be exclusive, and sellers' failure to pay owed commissions, travel expenses or other costs.

These schemes may result in individuals losing sizeable initial investments. Commissioned salesmen may find themselves working for months with incomes not even covering expenses.

About half the states surveyed have acted on these problems. Various UDAP statutes, regulations and cases prohibit deceptive offers of employment, false earnings claims, or nondisclosure of important qualifications on employment. Some states have created detailed standards for earning histories necessary to support earning claims. State legislation is usually narrow in scope and rarely applies to all business, employment, and franchise offers.

#### 65) Employment Agencies

Various employment agency practices may lead to consumer fraud. Employers and the prospective employee may pay high fees for inadequate services or results. Misleading advertising and misrepresentations concerning job offerings may be used to convince the public that a particular agency will be able to locate appropriate employment for them. But if the agency does not provide the job seeker with suitable employment, the agency may instead apply deceptive sales techniques to pressure the consumer into accepting a less desirable job.

All states surveyed license employment agencies, usually with the regulatory board composed of members of that occupation. Bonding is often required; various deceptive practices are prohibited; license revocation is often the only sanction.

## 66) Vocational Schools

Vocational schools offer an opportunity scheme--training to obtain a well-paid and rewarding career. Vocational school courses offer correspondence or residence training for trade, business, secretarial, technical, and other occupations.

Abuses associated with the sale of these programs include deceptive or ambiguous job and earnings advertising, and other misrepresentations about the school, courses, cost, government benefits, equipment, teachers and other matters. These claims often are integral parts of sophisticated door-to-door sales presentations.

Commissioned sales representatives with no background in education or counseling enroll students indiscriminately with many consumers not knowing what they are getting into financially or educationally. A common sales technique questions whether a consumer is good enough to enter the highly selective school; in reality, everyone is admitted even if the student is unqualified to benefit from the course.

Schools do not disclose their high dropout rates and low placement rates. The courses themselves are often inadequate to obtain the promised employment.

A number of unique factors contribute to vocational school sales abuses. Sales are targeted at a particularly vulnerable consumer class--the young, the unemployed or underemployed, the uneducated, and the unsophisticated. The future service, long-term enrollment contracts provide an added opportunity for abuse and fraud. The complexity of government loans and grants used as sales inducements further confuses the consumer's purchase decision.

The difficulty of evaluating the purchase is also hindered by the lack of independent evaluations of the course, particularly for correspondence courses. The difficulty of the decision is exacerbated by its importance. The purchase is costly and its impact on the consumer's educational and occupational development may be even more critical.

All but a handful of states have adopted legislation regulating vocational school sales through approval agencies or licensing boards. Theoretically, they monitor advertising, conduct periodic inspections of the schools, and set minimum refund policies for students who drop out. State refund standards vary from those less generous to students than the industry's self-imposed requirements to those of a few states which use pro rata formulas favorable to students.

State agencies evidence more interest in classroom size or numbers of instructors than in placement or graduation success or in recruitment methods or other business policies. While a string of various deceptive practices, such as job guarantees or advertising in help wanted sections, are prohibited, most sales abuses are not regulated. The common sanction is revocation of school approval.

#### 67) Charitable Solicitations

A series of abuses is associated with solicitations for charities. The charity may be nonexistent. The solicitor may not be an agent of the charity and may fail to turn the contribution over to the charity. Other organizations may deduct such a large percentage of contributions for expenses and other costs that virtually nothing makes its way to the ultimate beneficiaries.

Most states have adopted legislation prohibiting one or more of these practices. Some statutes include elaborate reporting requirements to demonstrate that a significant portion of charitable contributions in fact go to the intended recipients. While charitable solicitations are not consumer transactions, states often treat them as such, using UDAP statutes to prohibit such practices and enforcing existing legislation with the same agency that prosecutes consumer fraud. Recently, consumer and citizen organizations have begun to complain that some of these restrictions may go too far and prevent necessary fundraising.

## B. STATE ENFORCEMENT STRATEGIES

State laws authorize various strategies to combat the consumer fraud practices described in the previous section. These strategies include state sanctions and private remedies for law violations, state-imposed requirements that prevent fraud, and state-created rights that facilitate private actions against fraud.

Thirty-three strategies or categories of strategies have been isolated. Each strategy is separately described with a brief discussion of the types of practices it is used to combat, the way it works, its strengths and weaknesses, and the frequency of its use among the surveyed states.

After these strategies are analyzed individually, the section will describe their applicability to state unfair and deceptive acts or practices (UDAP) statutes, the most important form of consumer fraud legislation. The State UDAP Statute Characteristics Chart, Table #2, displays various characteristics of all 50 states' UDAP statutes. The accompanying text elaborates on the chart's findings.

## ENFORCEMENT STRATEGIES

### State Sanctions

1. Criminal Sanctions
2. Cease and Desist Orders, Injunctions
3. Civil Penalties
4. Restitution
5. Receivership
6. Condemnation and Seizure
7. Prosecution Costs

### Requirements

8. Labeling
9. Pre-Sale Disclosures
10. Post-Sale Disclosures
11. Recordkeeping, Inspections
12. Licensing
13. Bonding
14. Ratemaking
15. Other Requirements, Standards of Conduct
16. Rulemaking

### Private Remedies

17. Rejection, Revocation of Acceptance
18. Rescission, Contract Unenforceable
19. Injunctions
20. Damages
21. Multiple Damages
22. Statutory, Punitive Damages
23. Attorneys' Fees
24. Retention of Goods
25. Class Actions
26. Small Claims Court

### Requirements and Rights Facilitating Private Action

27. Warranties
28. Remedy Waivers, Defense Cut-Offs
29. Cooling-Off
30. Affirmation
31. Refunds
32. Limitations on Contract Duration, Costs
33. Regulation of Contract Substance

### UDAP Statutes

## 1. State Sanctions

The most common approach to enforcing state consumer fraud laws is for the state to request courts, or in some cases administrative agencies, to impose sanctions on the offending parties. Common state sanctions are criminal fines and sentences, civil penalties, and injunctions. Legislation less frequently authorizes restitution, condemnation or other remedies.

These sanctions are utilized for conduct defined as fraudulent and for violations of statutory requirements aimed at preventing fraud. State sanctions serve several functions, depending on the particular remedy used. They may deter misconduct, punish wrongdoers, encourage prosecution, compensate victims, or just prevent future misconduct by the same merchant.

### 1) Criminal Sanctions

Criminal sanctions are used to deter and punish. Penalties range from minimal fines to misdemeanor sentences of several months to felony sentences of up to fifteen years. Criminal prosecutions brought by thousands of federal, state, and local officials represent one of government's greatest resource commitments to preventing consumer fraud.

The advantages and disadvantages of criminal sanctions are in clearest focus when considering serious felony sentences. While rare compared to the utilization of other criminal punishments for consumer fraud, felony sentences are often authorized for forgery, tampering or destruction of documents, criminal simulation, and theft by deception. These practices can draw sentences up to ten or fifteen years. Some states also treat as serious felonies fraudulent practices associated with insurance, franchises, retail installment contracts, pyramid sales, bankruptcy and receiver's sales, weights and measures, and consumer reporting agencies. Particularly for repeat offenders, maximum sentences for these practices can be in the one to five year range.

Such sanctions can discourage misconduct since the threat of imprisonment and the attendant publicity is a more effective deterrent than any threat of monetary loss. Effective deterrence will reduce fraud without involving the government in expensive and disruptive regulation of individual businesses.

But there are numerous obstacles to making realistic the threat of imprisonment. The public, prosecutors, judges, and juries traditionally do not consider white collar crime as serious as violent crimes.



Whatever public concern there is in these cases is aroused by economically wronged consumers. Consequently, defendants can usually buy themselves out of the case by compensating those who have complained. Even if imprisonment is considered, it may be difficult to find someone with enough culpability to sentence. Fraud may be perpetrated by large corporations where top executives only indirectly encourage but do not carry out the criminal acts.

The biggest impediments to seeking felony sanctions in a consumer fraud case are the procedural difficulties which are far more severe than in comparable civil cases. Probable cause hearings, pleading rules, strict venue requirements, and the need for the defendant's physical presence at the trial complicate any action. Most debilitating to the prosecutor is his burden of proving "beyond a reasonable doubt" to a unanimous jury not only that the fraud took place, but that the defendant had criminal intent. In civil proceedings, the state need only convince a jury or a judge by a "preponderance of the evidence" that the law has been violated, and intent may not even be a necessary element.

The special nature of consumer fraud crimes further complicates the prosecutor's burden of proof since consumer fraud operators often work on the fringes of the law, utilizing whatever loopholes are available in the applicable statutes.

In addition, evidence is often difficult to obtain in these cases. Consumers defrauded out of small amounts of money are afraid they may be made to look foolish by defense lawyers and are less willing to take the time to testify than individuals who, for example, were assaulted. Defrauded consumers may not report problems to the police, not considering business rip offs as criminal. In a truly successful fraud scheme, the victims do not even know they have been defrauded. Complex and costly accounting and investigative techniques may be necessary to uncover the fraud.

The jury trial itself can be costly and take up significant prosecutor and court resources. If the government loses, usually there is no retrial or appeal. If the government wins, sentencing is often light. Except when the threat of criminal prosecution convinces the defendant to make restitution, defrauded consumers receive no compensation.

Most consumer fraud statutes do not provide felony sentences, but are limited to misdemeanor punishments of a few months maximum or, more likely, to a small fine, often in the \$50 range. Such penalties are imposed for unlicensed practice, false advertising, mislabeling, violating agency regulations, or for technical violations of complex statutes regulating business behavior.

These lighter sentences make things easier for the prosecutor. Fines and minimal criminal sentences do not require all of the same comprehensive procedural protections that felony trials do. Cases may be tried without a jury by special misdemeanor courts that have a quick turnover of cases and informal procedures.

Nevertheless, these less serious cases invariably result in small fines or suspended sentences, and consequently a reduced deterrent effect. Many businessmen will treat minimal fines lightly as just a cost of doing business. The threat of a suspended sentence or probation does not have anything like the deterrent effect of a prison sentence.

## 2) Cease and Desist Orders, Injunctions

Unlike criminal penalties, cease and desist orders and injunctions do not provide immediate sanctions, but only inform those engaging in fraud not to do it again, warning them of more severe sanctions if they do. Cease and desist orders and injunctions are essentially the same, with the former being particularly associated with administrative proceedings and state UDAP statutes. The two terms will be used here interchangeably.

All state UDAP statutes provide for injunctions or cease and desist orders. Because these sanctions involve no immediate criminal penalty, they may be imposed after hearings that do not offer respondents all of the due process rights provided at criminal trials. Guilt beyond a reasonable doubt need not be proved; intent to deceive need not be found. Juries and even judges are not necessary. Instead, administrative officers may preside.

Cease and desist orders warn respondents that what they did in the past has been found deceptive and they should cease doing it in the future. As such, they are particularly proper in areas where the law is not clearly defined and the respondent did not know his actions would be considered illegal.

While a cease and desist order theoretically only prevents a respondent from repeating his illegal actions, it is often worded to place greater restraints on offending merchants. Practices not committed, but related to those the respondent did commit, can be included in the cease and desist order to "fence in" the respondent--that is, to disallow the possibility that a slight modification of the fraudulent scheme would place it outside the scope of the order.

Cease and desist orders have also been "stretched" to include prophylactic requirements that impose affirmative duties not required of competitors. An example is an order requiring the respondent to disclose information to prospective purchasers that other industry members do not have to disclose.

Cease and desist orders have even been stretched to force respondents to take corrective actions for past wrongs. The Federal Trade Commission has obtained restitution through a cease and desist order by ordering companies to cease withholding monies improperly held. At least one court has voided such an order.

Not all cease and desist orders are the result of adjudication. A respondent can waive a hearing and agree to a consent decree which incorporates a cease and desist order. The respondent, while often not admitting past guilt, will then be liable for the usual penalties for the order.

Violations of cease and desist orders generally draw stiff fines and even imprisonment in some states. Common statutory fines found in UDAP statutes are \$5,000, \$10,000, and even \$25,000 per violation. Violation of a court ordered injunction will also place one "in contempt of court," and thus subject to contempt sanctions.

Actions to enforce cease and desist orders are simpler than the initial proceeding that resulted in the original order. All that must be proven is that the order has been violated, not whether the underlying conduct independently is illegal.

Cease and desist orders have been criticized as providing just a slap on the wrist, not deterring misconduct by others and even failing to prevent continued fraudulent activity by the offending merchant. They are certainly less effective in dealing with fly-by-night operations or hard core fraud than with merchants with honest intentions who mistakenly consider their practices permitted by existing law. Cease and desist orders do not compensate defrauded consumers, except when "stretched" to include restitution.

### 3) Civil Penalties

Civil penalties for initial violations range from as little as \$25 to as much as \$10,000 per violation. The smaller fines are levied by administrative agencies for violation of agency rules or by courts for violations of various technical, or not so technical, statutes regulating business. Thirty state UDAP statutes assess larger penalties for initial violations. Common amounts are \$500, \$2,000, and \$5,000 per violation.

Statutes vary as to whether sizeable penalties may be levied absent proof of intent, malice, or other willful conduct. Courts, in determining judgments, will, nevertheless, consider these factors even if not specified by legislation.

Civil penalties escape many of the drawbacks of criminal sanctions. Illegal conduct must be proven by a preponderance of the evidence, not beyond a reasonable doubt. Other procedural requirements, such as juries and even judges, can be dispensed with. More informal hearings can be used. In addition, courts may be more willing to enter verdicts against sellers when the stigma of criminal guilt is not involved.

Penalties do not compensate wronged consumers, but this avoids difficult proof and distribution problems. Often law violations are easy to prove, but actual damages are hard to calculate or demonstrate. Even when damages are estimable, injured parties may be difficult to locate and other distribution problems arise. Civil penalties solve this problem by delivering all the money to the state, with no attendant need to prove damages.

Consequently, the sole function of civil penalties is to deter misconduct and punish wrongdoers. Even with minimal penalties, some corporations concerned with their public image find such publicity embarrassing. For other sellers, limited fines are a permissible cost of business, violating the law creating more profits than are forgone by the fine. Higher penalties, as authorized by many UDAP statutes, may correct this problem if prosecutors are vigorous and courts liberal in awarding large penalties.

The money going back to the state also serves to reduce the costs to the state for investigatory and legal expenses, encouraging an active prosecution program. States may be more generous in funding such revenue producing agencies than if they got no return for their investment.

#### 4) Restitution

Forty-seven states allow restitution as a civil sanction for violations of their UDAP statutes, but the remedy is normally not available to enforce other state legislation. In a restitution action, the state prosecutes the offending merchant, but requests the court to order the merchant to pay damages directly to injured consumers, returning defrauded buyers to the status quo.

Restitution is particularly appropriate when the seller never delivers paid for goods or services or fraudulently sells goods that are essentially worthless. The order becomes almost self-executing, requiring the seller to return the money paid by all consumers affected.

If the seller's fraudulent performance was of some substantial value to the consumer, difficulties arise in awarding damages. The deception or other illegal conduct may be easily proved, but the determination of which consumers should receive how much becomes complicated. Restitution is concerned with returning consumers to the status quo, not in providing them with windfalls.

If the consumer never receives the purchased goods or services, or they turn out to be worthless, the fraud is certainly material to the consumer's purchase decision. But if buyers receive something of substantial value, the deception involved in the sale may not have been material to many consumers' purchase decisions.

When large numbers of consumers are involved, the state may face an impossible burden of showing that each individual consumer was deceived, and that the deception was material to that individual. Most courts, when ruling on requests for restitution to compensate indeterminate numbers of materially deceived consumers prefer to err on the side of windfalls to the defrauding merchant than to potentially injured consumers.

Even if the individuals materially misled can be identified, it may be difficult to measure the correct amount of damages. If what the consumer received was of substantial value, refunding the full purchase price will give the buyer the benefit of the goods or service without payment. But rescission of the purchase may be impossible. Consumers cannot return services already performed by the seller. Goods, by the time restitution is ordered, will be old and used.

To return the consumer to the status quo, a complicated damage measurement must be made as to the difference in value of what the consumer got to what he should have received.

This calculation may be different for each buyer, making a damage determination involving large numbers of consumers nearly impossible. And again, courts are reluctant to provide consumers with windfalls.

Nevertheless, consumers are often better off with the state at least attempting a restitution remedy since this may be their only chance of getting some of their money back. Consumers usually do not consider legal action on their own. If they do, the possible return will usually not justify the expense of an attorney and inconveniences of litigation.

A state's attorney general or similar office is in a unique position of receiving complaints from various sources, seeing a pattern of abuse defrauded consumers may not even see, and bringing an effective action. While state prosecutors are usually reluctant to bring criminal fraud actions that seek minimal fines or sentences, they may be more enthusiastic about bringing an action where there are real benefits in terms of compensating injured members of the public.

The state prosecutor is even in a better position than a private attorney bringing a class action suit. Merchants take attorneys general and other public officials more seriously than private plaintiffs. Beneficial settlements consequently become easier. Moreover, restitution actions do not have the procedural entanglements that class actions have (see 25, infra). Notice need not be given to affected consumers; common issues need not predominate; certification of a class by the court is unnecessary. Restitution provides more flexibility than class actions in reaching settlements, and determining and distributing damages.

While restitution may be a relatively efficient method to get money back to injured consumers, its deterrent effect is minimal. Restitution only returns parties to the status quo. Courts do not award multiple or punitive damages in restitution actions. If the merchant gets caught, he is only returned to where he was before the deception. In fact, because of difficulties in determining and distributing damages, the seller almost always gets to keep some of his fraudulent receipts.

Compensatory damages such as out-of-pocket reliance losses are rarely considered in restitution actions, so the merchant's losses are strictly limited to the difference in value of what he gave and what he received. Even if compensatory damages are allowed by law, they are difficult to prove. Moreover, because few actions for restitution are brought, they do not deter business conduct.

Even when actions are brought, a restitution order may be futile if the defendant has no assets. Where the whole thrust of a business is fraudulent, the business's revenue is quickly spent on salaries and expenses, reserves are few, and future revenue can be produced only by perpetuating the fraud.

The final, and not inconsiderable, difficulty with restitution actions is that a state office may not represent private interests as well as a private attorney would. The state, for political, resource priority, or other reasons may not prosecute a matter at all. If it does, the state may be less than vigorous in its prosecution and may settle for a less favorable agreement than a private attorney directly representing the defrauded consumer would agree to. This factor is highly variable with time and place as there is a fairly high turnover of state enforcement personnel.

#### 5) Receivership

Appointment of a receiver is a special remedy courts utilize in three circumstances. A receiver may be appointed to preserve a company's assets pending trial, thus preventing the defendant from skipping town with the only money that could pay off the plaintiff's claim.

A court wishing to deal harshly with a defrauding management, but not wishing to drive the company itself out of business, can appoint a receiver to keep the business operating on a permanent basis. Consumers can continue to receive owed services or products. Future profits can be used to pay off defrauded consumers.

Thirdly, receivers may function solely to preside over the liquidation of a company's assets, allowing at least some payment to be made to defrauded consumers. But, too often, the receiver retains as his salary the lion's share of the liquidated assets and expenses eat up much of the rest.

Receivership is a specialized remedy useful in unique situations. By itself, it cannot deter fraud or fully compensate consumers, but it does serve useful functions when used in conjunction with other sanctions.

Twenty-one UDAP statutes explicitly grant courts authority to appoint receivers; other courts may have such power pursuant to their own intrinsic equitable authority. Numerous other statutes explicitly or implicitly authorize receiverships, some dating back 100 years or more.

## 6) Condemnation and Seizure

An extraordinary state remedy is condemnation and seizure. The government, with little or no notice or hearing, seizes or condemns merchandise. The traditional justification for such relief is an immediate and serious threat to public health or safety, with there being no other adequate remedy. The power is sometimes extended to mislabeling or even false advertising, where health and safety threats are more attenuated.

These sanctions have the advantage of quickly stopping threatened sales and placing the merchant on the defensive, forced to resort to often slow court action to recover his property. This is compared with an injunction, where the merchant can act as he likes until a court issues an order. Pending injunctions, parties can seek temporary restraining orders, but these are only granted in special circumstances. But the severity of condemnation or seizure also militates that they be used in only extraordinary circumstances.

## 7) Prosecution Costs

Fourteen UDAP statutes and various other state consumer fraud acts authorize courts to assess the defendant the state's prosecution costs. In most states the costs award goes into the state's general revenues and does not provide a means for directly increasing the enforcement agency's revenues. However, revenue production by an enforcement agency removes a political and fiscal constraint to its existence and expansion.

In states where the enforcement agency is permitted to retain some or all awards of costs, this reimbursement stretches the state's budget for consumer fraud enforcement, allowing more cases to be brought. Without the award of such costs, prosecutors can be forced to settle cases in the defendant's favor because the prospect of a long, expensive litigation would put too much of a drain on public resources.

Conversely, defendants, faced not only with losing a long, drawn out trial, but also with paying for it, will be more favorable to settle cases according to the state's liking. But the awarding of the state's prosecution costs is not a significant deterrent to other fraudulent sellers, and it does not compensate victims.



**CONTINUED**

**1 OF 3**

## 2. Requirements

State consumer fraud legislation does not just prohibit various deceptive practices. An important alternative approach is to create additional requirements that merchants must comply with--such as labeling, other affirmative disclosures, licensing, and bonding. Violations of these requirements are sanctioned in the same way as fraudulent practices are.

This legislation does not define deceptive conduct, but sets up affirmative requirements that are used to prevent fraudulent acts or diminish consumer injury when they occur. It is easier to enforce such laws than prohibitions of particular deceptive practices since it may be difficult to prove that a scheme is fraudulent, while easier to show that a specific affirmative action has not occurred.

### 8) Labeling

Labeling legislation requires the disclosure of information on products' labels or containers. All states have enacted such legislation--often in as many as ten or more specialized statutes. Typical products covered are foods, drugs, cosmetics, fuels, furs, and agricultural products. These statutes require identification on the label of such data as the name of the manufacturer, the proper name of the product, its ingredients, proper uses and nutritional contents. Weights and measures legislation requires accurate specification of a product's weight, volume, or count. Unit pricing and other statutes prescribe disclosure on the label of the price per unit or total price. Recent laws specify that perishable food products and other substances must bear expiration dates.

These labeling requirements prevent consumer fraud and facilitate prosecution of such activity. Labels conflicting with misleading advertising or sales representations may cure such deception.

Merchants are also discouraged from practices such as selling a product as butter when its label says margarine. If the seller is unscrupulous enough to label margarine as butter, state prosecution will still be facilitated. It is easier to prove that a product labeled "butter" is margarine than to prove that a merchant orally or indirectly led a particular consumer to believe that margarine was really butter.

Placing information permanently on the product itself allows consumers to read the disclosure not only before the sale but also afterwards at their own leisure. Critics claim many consumers--particularly low income consumers--do not utilize disclosures. But labels divulging a product's name, weight, ingredients, and price are more understandable and useful than other more complicated disclosures, such as a buyer's warranty rights. Moreover, the use of disclosed information by a small minority of consumers may put sufficient pressure on a manufacturer or seller to cause a change in marketing practices. This change may not always be positive, however, as the decision could be to concentrate marketing efforts on the less selective consumer.

Sellers may attempt to circumvent labeling requirements by making them as noninformative as possible by using small print or confusing language. But legislation can specify, within limits, the manner of disclosure and the information to be printed.

#### 9) Pre-Sale Disclosures

In addition to the above discussed labeling requirements, numerous state statutes require merchants to disclose to consumers important information before the sale is made. These disclosures must be made in contracts, special consumer notices, or even orally.

Installment sales contracts and other credit agreements must reveal interest rates and other facts concerning the credit terms. Door-to-door sellers must provide consumers with special notices of their rights to cancel. Nursing homes, landlords, used car dealers, and other sellers in some states must inform consumers of their rights and remedies. Merchants must clearly notify buyers of the nature of offered warranties. Door-to-door sellers may be required to hand consumers a card disclosing the sales representative's status and affiliation, and the purpose of his visit.

Pre-sale disclosures can contradict and thus decrease the impact of sellers' deceptions. The very existence of conflicting information will deter deceptive claims. Forced disclosures of unfavorable aspects of a sale will improve consumer decisionmaking and discourage merchants from using hidden "catches" in their sales. Thus disclosures serve to prevent fraud by arming consumers with information to see through deceptive schemes.

Sellers' compliance with mandated disclosures is easier to enforce than policing for fraudulent schemes. It is a straightforward question whether certain written disclosures have been given to the buyer; more difficult to prove is whether some scheme is in fact fraudulent.

States also prefer disclosures to outright prohibitions of various practices because they are less restrictive on individual conduct. Disclosures allow sellers to do what they want as long as they inform consumers of certain information that lawmakers consider will prevent or cure any fraud in the transaction. The cost to the seller of making the disclosure is also minimal compared to other forms of government regulation.

Disclosures not only deter fraud, but also facilitate the proper working of the free market system by increasing the rationality of consumer decisionmaking, with the accompanying improved allocation of social resources. It is often difficult to determine whether states adopt disclosure requirements primarily to prevent deception or to maximize rational consumer behavior.

Nevertheless, disclosures have been criticized as being ineffective. Merchants will only inform consumers of mandated data late in the sales presentation, well after the consumer has been "sold." While the sales contract may not be signed, the buyer has already made up his mind. Disclosures have a more marked effect if they are made earlier in the transaction.

Disclosures are also difficult to read in a sales setting. Skilled sellers will try to distract consumers or otherwise make it difficult for them to sit down and carefully scrutinize the notice. If the buyer does read the disclosure, the language may be so complex as not to be understandable. Simultaneously, sellers may be telling their "version" of the disclosures, nullifying or garbling their true meaning.

To some extent these problems are unavoidable. But states can mandate the print size and even the exact language of disclosures to make them conspicuous and readable. The most extreme example of this is the health warning on cigarette advertising, where the FTC mandates the exact language, the size of print, the spacing of the print, the coloring of the background, the size of the box around the disclosure, and its relation to the rest of the advertisement. Other FTC consumer notices are experimenting with readable language. But limitations of human reading and analytical skills and attention span still limit the number of persons and situations where disclosures will be successful. In addition, the very complexity of the task points to the difficulties inherent in mandated disclosures.

Somewhat apart from these specific problems is the question of whether people read disclosures at all. Low-income consumers, in particular, may not do so. Of course, disclosures are better than nothing if at least somebody reads them. But critics argue that disclosures do not work to prevent or cure fraud. By allowing sellers to utilize potentially deceptive practices as long as they are accompanied by full disclosures, the state is giving sellers a license to defraud. The better alternative, they argue, is to ban the potentially deceptive practice outright.

#### 10) Post-Sale Disclosures

Post-sale disclosures serve different purposes than pre-sale disclosures. They inform consumers of their post-sale rights, describe what further performance they should expect, and document the terms of the sale. Post-sale disclosures are not necessarily made after the sale. But, whenever the disclosures are made, they serve to explain the buyer's post-sale rights. While such disclosures are rarely the major focus of state legislation, many statutes do include such provisions. Merchants must give consumers receipts, itemized bills, copies of their contracts and warranties, insurance policies, cancellation notices, care manuals, copies of other documents, and even replaced parts on serviced items.

Consumers rarely question before a sale what their rights or remedies are if something goes wrong. If they are so informed, they may not pay attention. Thus it is essential for purchasers to be given copies of their warranty and cancellation rights so that they can be referred to if anything goes wrong.

Contracts also spell out the extent and nature of buyer's and seller's continuing performance obligations. This allows consumers to independently verify sellers' claims and evaluate the adequacy of their performance. The buyer also has a second chance to reflect on the nature of the agreement to determine if fraud is involved.

Post-sale disclosures such as copies of contracts and receipts provide evidence of the nature of the transaction that can be used by government investigators and private attorneys to piece together what happened. Consumer memories and understanding of the nature of transactions they are involved in are notoriously faulty. One document is often worth a thousand words. Consumer possession of a copy of a sales contract is particularly useful if there is a dispute as to the nature of that agreement or if the law requires certain disclosures to be made in that contract.

Itemized bills for automobile repairs, funerals, or other services can show consumers exactly what they paid for. If particular items are unreasonable, consumers can complain to the merchant or take other actions. Replaced repair parts, if returned to the consumer, can be inspected to determine if unnecessary work has been done. If a discrepancy is found, consumers are in a better position to correct the abuse than if they did not have physical proof of the discrepancy.

While buyers may find themselves helpless without copies of such documents, the utility of post-sale disclosures can be exaggerated. Since most documents are standard forms, drawn up to meet the merchant's and not the consumer's needs, they are usually one-sided, disclaiming sellers' obligations and describing in detail buyers' obligations.

### 11. Recordkeeping, Inspections

Similar to post-sale disclosures are state requirements that sellers keep adequate records of sales transactions and other information, making such data open to state inspection. This information can range from records of sales transactions to substantiation for advertising claims.

Such recordkeeping requirements provide government officials and attorneys representing consumers with documentation of the consumer's payments, remaining debt, the terms of the agreement, and outstanding seller's obligations. While consumers may receive such information from the merchant directly, most consumers do not routinely retain documents. Thus most documentary evidence for any suit against a defrauding merchant will be in the merchant's sole possession.

Recordkeeping requirements and surprise audits can also be utilized to deter fraud. The deterrent effect rests on two factors. The recordkeeping system must be able to reveal fraudulent sales and the threat of inspection must be real. For some industries, this seems to function properly. Bank examiners conduct thorough audits that will uncover and deter some fraud. But other types of consumer fraud may be difficult to find just by examining business records.

Nevertheless, such recordkeeping requirements, with the potential of spot inspections, may be a far more feasible enforcement strategy for a small agency with broad responsibilities than the alternative of requiring sellers to file periodic reports. The latter approach may swamp the agency with work, insuring it does not pay adequate attention to any sellers' reports. In response to inadequate review, the filings soon become sloppy and incomplete.

Spot inspections allow agencies to concentrate their resources on a few sellers. This may be particularly profitable if the agency discovers from other sources that particular companies may be engaging in fraud. Then the inspection may assist an already ongoing investigation.

## 12) Licensing

Licensing is a widespread consumer fraud enforcement approach. Every state has scores of licensing boards that regulate occupations or industries. While these boards often unnecessarily restrict entry, reduce price competition, insulate the industry from regulation by other agencies, and "professionalize" the industry, they may also function to prevent consumer fraud.

Licensing boards, appointed to regulate particular professions or other sellers, rarely have jurisdiction over more than one occupation. Consequently, some states have over 100 boards. Occupations with high potentials for consumer fraud that are commonly licensed include:

debt collectors	television repairmen
small loan companies	auto repairmen
vocational schools	plumbers
real estate agents	electricians
insurance agents	appliance repairmen
funeral directors	physicians
hearing aid sellers	dentists
automobile and mobile	optometrists
home sellers	attorneys
nursing home owners	
employment agencies	

There are important distinctions between licensure, registration, and certification. Licensure limits entry to an occupation to those who pass certain minimum standards. Unlicensed practice is illegal.

Registration does not limit entry, but instead requires all those wishing to practice to pay a minimal fee and provide minimal information to a government agency. Certification involves an evaluation of the competence and integrity of members of a profession, usually by a nongovernment body. Individuals or companies passing certain standards are certified. Others can practice, but cannot claim certification.

Compare occupation A that is licensed with occupation X that registers with the state and is certified by some other body. A consumer wishing the services of occupation A has no choice but to contract with a licensed merchant that has

passed certain minimum standards. A consumer desiring to use the services of occupation X can hire anyone to perform the service, no matter how untrained or inexperienced. If the consumer wishes to pay for the best, he will deal with a certified seller.

Since occupation A restricts entry, prices should be higher and services less available. Occupation X, on the other hand, should provide consumers with a choice of differently priced and skilled sellers. But consumers dealing with occupation X may be defrauded by paying high prices for incompetently performed services. All members of occupation A have passed at least certain minimal standards.

Almost all regulation by occupational boards involves licensing, not registration. Entry examinations and minimal schooling requirements are common; other standards also limit entry. Serious questions have been raised in recent years over the ability to predict or create competency and ethical behavior through examination or schooling.

Boards assess license fees that often cover the board's own expenses. This is a popular financial approach among states with tight budget squeezes but does create conflicts of interest. By keeping fees low, the industry insures inadequate regulation. Conversely, revoking a license will just take money away from the very body revoking the license.

The boards themselves are usually appointed by the Governor and are largely dominated by members of the industry being regulated. In recent years, states have claimed to add consumer representation by adding one or two public members to boards that often comprise seven or more members. Only a handful of licensure boards approach 50% public representation.

Industry domination of these boards has been blamed for their inactivity and industry bias. But many of these agencies perform technical tasks regulating numerous aspects of an occupation. If the board does not possess special expertise in these matters, it might be questioned why it is necessary to have an industry-specific board at all.

Restricting entry to an occupation is not the only way the boards prevent consumer fraud; they also independently prohibit fraudulent conduct by licensed members of the industry. Commonly, the board issues regulations prohibiting "fraud," "deceit," or some such general term. Other boards, such as those regulating automobile repairs or vocational schools, may supplement these general prohibitions with lists of more specific proscribed deceptive practices.



Board remedies to enforce these laws and regulations are almost always limited. License revocation is the most frequent sanction. The severity of the remedy means it is rarely used, and then only after extensive hearings. Other sanctions include injunctions and minimal fines. Serious criminal sentences, restitution and large civil penalties are almost unheard of. Only a few statutes offer private rights of action, such as California's auto repair statute, Massachusetts' collection agency law, and Illinois' proposed vocational school legislation. These private rights of action rarely offer more than actual damages.

Many licensing boards also limit price advertising. These across-the-board bans are justified, at least in part, by price advertising's potential for deception, inducing consumers to go to the most disreputable members of the profession.

Critics claim these restrictions are blatant attempts to limit price competition. The United States Supreme Court has struck down prescription drug price advertising restrictions as anticompetitive and numerous other bans are presently being challenged.

Other licensing board consumer fraud strategies include bonding and the filing of periodic financial statements. These requirements are concerned with sellers' financial instability that can lead to bankruptcy and resulting consumer injury.

Other licensing board powers include inspections of business activities and records, requirements for periodic filings, and rulemaking. Boards use their rulemaking powers to set out numerous requirements for proper business conduct, many geared toward consumer abuses. This extensive regulation of a particular occupation's method of doing business is only possible because the rules are drafted by members of that industry with knowledge of the demands of that business. Others would say the regulation is possible politically only because the requirements are weak and the enforcement nonexistent.

Thus licensing as a strategy delegates to members of a particular occupation responsibilities to extensively regulate all aspects of that business, including consumer fraud. The board is given power to determine who will practice and how they will practice. On first blush, this seems a powerful approach. But boards have been criticized for their inactivity, pro-industry bias, inadequate arsenal of remedies, and anti-competitive effects.

California and other states are beginning to utilize boards that have significant public participation, strong state and private enforcement remedies, and a dedication toward aggressively serving the public. Price advertising bans and barriers to entry are being limited, and registration is replacing licensing in some areas. It is too soon to see if this will be effective.

In the meantime, in many states, licensing activities preempt enforcement of state UDAP statutes. UDAP statutes specifically exempt certain regulated industries, taking away not only attorney general prosecution but also private actions. In these instances, if licensing boards do not protect the consumer, no one at the state level will.

### 13) Bonding

Bonding legislation requires businesses to purchase bonds in a specified amount from private bonding companies. If the business becomes insolvent, the bonding company must pay off the business debts up to the limit of the bond for claims covered by the bond.

An example of the use of a bond is requiring home improvement contractors to take out a \$2,000 bond for each contract in case the work is not completed. The contractor will pay the bonding company significantly less than \$2,000 for the bond. If he skips town without completing the work, the consumer sues the bonding company for up to \$2,000.

Bonding serves two functions. It protects consumers from being injured by merchants' insolvency. It also acts as a means of shifting the burden from the consumer to the bonding company to evaluate a merchant's reliability and solvency. In theory, the bonding company is better equipped to make that judgment and can vary the cost of the bond accordingly. Businesses that are likely to skip town, go bankrupt, or otherwise leave the consumer holding the bag have to buy higher bonds and thus are discouraged from doing business.

Bonding is a common form of regulation found in licensing statutes and legislation regulating repairs, bailments, future service contracts, or other future performance transactions. Bonding is one of the oldest consumer protection strategies.

It is also rarely effective. Bonds are invariably too low. Old and outmoded statutes specify dollar amounts that may have been realistic when passed, but are not so now. A bond adequate to fully protect all consumers would be so expensive as to provide a barrier to entry and raise the cost of doing business for all merchants. It is thus not surprising that legislatures, attempting to protect legitimate businessmen, rarely impose high bonds.

Private bonding companies naturally try to interpret bonding coverage as narrowly as possible, so as to be able to refuse claims on the bond. Another bonding company tactic is to invalidate the bond because it was acquired through fraud. It is not surprising that a fraudulent seller would also misrepresent himself to the bonding company.

Bonds only help consumers who can prove valid claims against an insolvent seller. Bonding does not simplify the consumer's task of proving actionable fraud and establishing legal damages.

#### 14) Ratemaking

Consumer fraud schemes can be generalized as attempts to charge consumers too much for what they get. One prevention strategy is for the state to set fair prices through ratemaking. While the concept of a "just" price has a strong tradition in Anglo-American law, ratemaking today is limited to a few industries at the state level, credit, utilities, and insurance being the most common. While fraud prevention can be viewed as an effect of rulemaking, it is seldom the major articulated goal.

If the state fixes prices, fraudulent sellers will be encouraged to devise schemes to give consumers lower quality products for the fixed price. For some products it may be extremely difficult for the government to control such quality variations. But for others, such as credit or utilities, state regulators may have sufficient authority and ability to insure that all consumers get the same quality product for the same price.

The major argument against ratemaking is that free enterprise and competition in the long run provides the best products at the lowest prices in desired quantities with the least waste of social resources. Ratemaking raises costs because of increased paperwork and added decisionmaking expenses. Price setting for personal services and consumer goods that vary in quality is a complex and difficult matter.

These arguments have prevailed for almost all industries. The most common targets for ratemaking today are industries where natural monopolies exist, such as power and telephone companies. Consequently, for most industries where at least some competition is present, states resort to other strategies to control fraud.

### 15) Other Requirements, Standards of Conduct

States not only prohibit enumerated deceptive or fraudulent practices, but also set up affirmative requirements aimed at preventing these practices. Labeling, disclosures, recordkeeping, licensing, bonding, and ratemaking are the most common, but not the only, state approaches. States are really only limited by their own ingenuity. Four additional categories of state requirements can be identified.

Standards of conduct may prohibit nondeceptive activity in order to allow clear-cut lines to be drawn between legal and illegal conduct. An example is a law that requires that mail-order merchandise be delivered within 60 days unless special conditions are met. Under certain circumstances a delay of 50 days may be fraudulent, and under others a delay of 70 may not. But the state has set up a precise standard of conduct easing state enforcement and business compliance. Another example is a law requiring prices to go up within 90 days of a "special introductory offer" and to stay at the higher price for at least four weeks.

States have to draw lines somewhere if merchants are to be given precise time limits to perform certain activities. But the concept that time limits or other precise standards have to be set at all is a special state strategy.

A more radical approach is for states to ban whole categories of conduct when only some of the included practices are deceptive. This often occurs when the category of practices is rampant with abuse and attempts to isolate and stop particular offenses are futile.

Good examples are state bans on all pyramid sales and all referral sales. A seller fully disclosing to consumers all the dangers and the realistic expectations of these plans could run them in an honest, nondeceptive manner. But states have found abuses so serious, so hard to control, and legitimate activity in the area so infrequent, that a total ban seems appropriate.

Another example of an across-the-board ban is occupations' restriction of price advertising. Various professional groups have restricted all price advertising as unprofessional and leading to consumer abuse. While these blanket prohibitions are probably illegal, they have stood for many years.

Another particularly interesting example is the growing concept of prohibiting unsubstantiated advertising, even if it turns out to be true. Thus a seller charged with having an inadequate basis for advertised claims cannot defend himself by proving them to be true. He must show that, at the time he made them, he had data to substantiate them. This strategy is meant to ease enforcement and deter deceptive claims. The burden of proof is shifted from the government to the seller who must produce specific data he had in his possession at the time he made the claim to back up that claim.

Another consumer fraud enforcement approach is to prescribe contract content. These requirements that facilitate private action will be discussed in more detail below. (See 27 to 33, infra) Suffice it to say here that states may radically alter the nature of consumer transactions, and thus the potential for fraud, by tinkering with private contracts, adding provisions and proscribing others.

The fourth category of state requirements preventing consumer fraud is the most general. States, usually through licensing boards, order sellers to conduct themselves in particular ways in particular situations. While acting otherwise may not be fraudulent, states find the potential of abuse real enough to prescribe exactly what sellers must do.

All four of these state enforcement approaches can be effective in preventing fraud and easing enforcement. Prosecutors need not prove the underlying deception, but only sellers' violation of clear-cut standards or requirements. But these approaches often draw heavy criticism for their excessive interference with the free market and with merchants' rights to run their businesses as they wish.

#### 16) Rulemaking

Legislatures delegate state agencies rulemaking authority to flesh out general and often vague legislation. Specialized, expert agencies with expedited rulemaking proceedings are better equipped than state legislatures to adopt and amend specific requirements to reflect changing business conditions and to thwart unscrupulous sellers' attempts at circumvention. Specific rules can also be tailored to the technical market and economic realities of a particular industry.

General state laws without rules defining in more permissible conduct may also prove inadequate. Courts may be loathe to mete out harsh sentences to businessmen found to have violated broad, vague and undefined laws. Similarly, merchants, consumers, and prosecutors will better

be able to guide their actions if rules define with more specificity what practices are and are not legal. On the other hand, a rule may be too narrow to cover all potential abuses or may contain loopholes allowing circumvention of the intended policy.

The alternative to rulemaking is costly and time-consuming case-by-case litigation. But even a series of court rulings may provide few guidelines as to the dividing line between legal and illegal conduct. Court decisions often turn on the facts of the particular case and judges are adverse to go beyond those facts to set out general standards.

Rulemaking, on the other hand, sets out specific standards of conduct with which most merchants will comply. Enforcement against violators is simplified because all that need be shown is that the rule was violated, not that the seller's actions fall within a vague general standard of prohibited conduct. Since such violations are less likely to be innocent, sentences can be harsher.

State procedures to promulgate rules are less cumbersome than those for individual lawsuits. Written notice and an opportunity for written comment may be the extent of the rulemaking proceedings. Other states require informal hearings to allow interested parties to speak their piece. But such hearings do not have the formalized adjudicatory procedures individual litigations utilize.

State consumer fraud rulemaking emanates from two sources. The most important is rules promulgated by attorneys general or, in a few instances, other state agencies interpreting UDAP statutes. About 35 states authorize these UDAP regulations, but some states have not used these powers. Other states have adopted extensive sets of rules in such traditional areas as bait-and-switch, deceptive pricing, and repairs and services, and in such nontraditional areas as nursing homes, used cars, and landlord-tenant.

UDAP statutes are natural candidates for rulemaking because of their general prohibitions of deceptive conduct. Rules serve to specifically define which practices are in fact deceptive and thus fall within the statutes' scope.

Other practices not covered by rules may still be deceptive. Nevertheless, merchants may be able to argue that conduct closely related to the subject of a rule, but not prohibited by that rule, is permissible.

Some UDAP rules do more than define deceptive practices. They set up affirmative requirements that prevent deception. A three-day cooling-off period and affirmative disclosure requirements are examples. State attorneys general or other consumer agencies dealing continuously with particular forms of consumer fraud may determine that simple prohibitions of deceptive practices are insufficient to prevent fraud, and that affirmative requirements that are more restrictive but easier to enforce are necessary.

Other consumer fraud rules are promulgated by various licensing boards and other regulatory agencies. These regulations are not solely consumer fraud oriented, as UDAP rules are, but deal with most aspects of a particular industry. It is usually these regulations that draw the loudest complaints about government overregulation and businesses being buried under innumerable rules and regulations.

### 3. Private Remedies

An important alternative to state enforcement of consumer fraud legislation is for aggrieved parties to bring their own enforcement actions. Instead of a state agency investigating consumers' allegations of misconduct and using its own discretion whether to bring an action, injured parties can directly litigate law violations. State government will normally act only after a pattern of abuse has emerged. Private action can respond to individual wrongs, not having to rely on the resource allocations, energy, and good intentions of state agencies.

Sellers engaging in fraudulent conduct, on the other hand, need fear both state agencies and consumers they deal with. States can provide consumers with remedies that not only compensate themselves, but also deter misconduct, punish wrongdoers, and provide compensation for other similarly injured consumers. Because of the difficulties individual litigants with small monetary stakes face bringing expensive actions against large businesses, the nature of procedural requirements and potential remedies are critical in determining whether private individuals will attempt such litigation.

#### 17) Rejection, Revocation of Acceptance

The UCC provides consumers who have been fraudulently sold any type of goods a number of direct private remedies. Buyers do not have to pay for undelivered goods. If delivered goods do not conform to the sales contract, and the seller has been seasonally notified of that fact, the goods may be rejected in whole or in part.

After this rejection, the buyer must hold the rejected goods with reasonable care awaiting the seller's disposition of them. If the time for performance has not expired, the seller may attempt to cure with a conforming delivery.

Acceptance of goods by the buyer precludes rejection. Mere receipt is not acceptance; acceptance occurs when the buyer, after an opportunity to inspect the goods, signifies that he will retain them or that they are conforming, fails to object to the goods, or otherwise acts inconsistently with the seller's ownership of them.



While goods accepted may not subsequently be "rejected," acceptance may be "revoked" when a substantial impairment of value is found. A buyer may revoke acceptance if the non-conformity was difficult to discover or if the seller assured the buyer it was free of defects.

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for revocation, and before a substantial change in the condition of the goods, not caused by the defect, has occurred. Revocation only takes place when the seller is notified.

Rejection is a far better consumer posture than revocation. The consumer can reject for any non-conformity and the seller must bear the burden of proof that the goods are conforming. A consumer can revoke only if there is a substantial impairment of value, and then he has the burden of proving this fact.

Once the seller fails to deliver, or the buyer rejects the goods or revokes acceptance, the UCC gives the buyer certain remedies. The buyer may obtain specific performance where the seller fails to deliver or repudiates. Whether the seller delivers or not, the buyer may cancel the contract and recover monies paid. The buyer can also receive a security interest in the goods in his possession.

The consumer may receive damages measured by the difference between the original contract price and the cost of goods bought as substitutes. The buyer may also receive consequential and incidental damages, including expenses reasonably incurred in inspection, receipt, transportation, care and custody of the goods and other reasonable expenses incident to the delay or breach.

Consequential damages may be recovered for loss resulting from the buyer's special needs which the seller, at the time of contracting, has reason to know of. The buyer can only get consequential damages for losses that cannot reasonably be prevented by buying substitute goods. Cancellation of the contract and recovery of all monies does not bar an action for these damages. Nor does the UCC preempt other common law remedies for fraud or misrepresentation.

While, in theory, rejection and revocation of acceptance provide the consumer with strong private remedies, their utility is diminished by several practical considerations. Consumers rarely return goods immediately, and this retention signifies acceptance. To revoke his acceptance, the consumer has the burden of proving a substantial defect, often a considerable burden. Courts have found for the merchant where a mechanic would have to charge \$700 to identify the

defect or where a car has blown up, making proof of the defect impossible. Courts have also interpreted the notice requirements stringently, causing consumers to lose cases by their inaction or slowness in utilizing rejection or revocation.

Even if the consumer properly rejects the goods or revokes acceptance, businesses may refuse to honor the remedy. Consumers may thus find themselves in a bind. For example, a consumer hands over a defective car to the seller, requesting the return of his money. The merchant refuses and the consumer has to resort to litigation. But in the meanwhile the consumer has no car and no money to buy a replacement. If he keeps the car, he forfeits his right to reject. There is little incentive for merchants to willingly honor rejections because courts do not add on punitive damages for intransigence.

#### 18) Rescission, Contract Unenforceable

The traditional common law remedy of rescission contemplates the consumer tendering goods to the seller and then seeking rescission of the contract. This is a similar remedy to rejection or revocation of acceptance under the UCC. Since the UCC applies only to the sale of goods, common law rescission is still important for service agreements.

As discussed with rejection, tender of the goods involved puts the consumer in a difficult bargaining position, owing money but having nothing in return. Recent legislation provides for statutory rescission where only notice to the seller, not tender, is the prerequisite to the action. This provides a superior consumer remedy to rejection or revocation of acceptance.

Consumers usually prefer to rescind a sale than to receive damages for the diminution of the product's value because of defects or breaches involved. Consumers rarely wish defective goods at low prices but instead desire new, working products at regular prices. Even if damages are preferred, they are often difficult to prove.

Rescission suggests that the two parties be returned to their original positions, without either side gaining by the transaction. Courts will thus try to return parties to the status quo.

This does not hold true if a contract is found unenforceable. Traditionally, illegal contracts or those involving "unclean hands" are not enforced by the courts. The parties are left to their own devices. A consumer who has received his end

of the bargain but still owes payments will realize a windfall if the credit agreement is found unenforceable. Common examples of unenforceable contracts are those entered into by minors or incompetents. A rarer use of this remedy involves violations of usury statutes.

The remedy is simple, avoids complicated issues of damages, and can provide consumers with compensation well beyond their damages, deterring seller misconduct. But the remedy can be so harsh that courts will only use it in extreme cases of fraud.

### 19) Injunctions

The most useful form of injunction in private consumer fraud legislation is a temporary restraining order or preliminary injunction prohibiting the seller from certain activities pending the outcome of the trial. Such orders are useful because trials can drag on for years, allowing the defrauding merchant to continue business as usual.

Examples of useful injunctions are immediate court orders forbidding merchants from disposing or removing assets from the state, or from attaching the consumer's property. Injunctions are only issued to prevent irreparable injury, when no other remedy is available, and when the moving party has a likelihood of prevailing on the merits.

Of less utility to the individual litigant is a court's final ruling issuing a permanent injunction, preventing the seller from continuing his fraudulent activity. The individual consumer will rarely continue to deal with the same seller and thus the seller's future conduct is of little concern to him.

For this reason, courts are reluctant to grant injunctions if there is no prospect of the litigant being defrauded again and no proof of other future impact. Permanent injunctions are more useful to merchants litigating to enjoin conduct by rival businessmen that adversely affect the plaintiffs.

Nevertheless, 19 state UDAP statutes and other legislation specifically authorize private consumers to seek injunctions. Individuals may also seek injunctions under courts' intrinsic equitable powers.

This popularity of the injunctive remedy, despite its drawbacks, can be in part explained by its advantages. Individual litigants do not have to prove damages and injunctions may be issued with less convincing proof of fraudulent intent or of actual deception. While bringing their own

case, litigants will act as private attorneys general, aiding other consumers who deal with the seller in the future. While individuals may rarely be motivated by such altruistic goals, the simultaneous award of attorney's fees and damages may make such actions less altruistic.

## 20) Damages

Money damages are the normal remedy in a private action. The consumer first proves that he has a legitimate cause of action, that he has been wronged. Then he must prove the extent of his damages, and may not recover beyond that amount.

Damages are available in most private actions. All 44 UDAP statutes that provide for a private right of action allow money damages. While most other consumer fraud statutes do not provide a private right of action, those that do offer the damage remedy.

Damages have the obvious benefit of compensating injured consumers. Courts are ready to offer such compensation since no special penalty is imposed on the seller. But damages are inadequate to deal with consumer fraud.

The small damages involved in most consumer fraud cases will not merit a costly court action, so the remedy is often illusory. When actions are brought, they have no deterrent effect. The seller only has to pay damages to those few consumers who successfully prosecute court actions. No other penalty is involved. Future misconduct is not even enjoined.

Consumers who bring actions are not even fully compensated. The litigant must first prove his damages. Not only will provable damages invariably be less than actual damages, but several categories of damages may not even be actionable. For example, only a minority of states allow damages for mental suffering alone in debt collection actions. Many courts will only allow damages for physical injury and for the difference between the value of the thing bought and the price paid for it.

Other indirect damages are rarely actionable. Consequential damages for injuries resulting from the seller's misconduct often cannot be recovered. For example, no compensation can be had if a defective car causes a consumer to miss a prepaid charter trip or lose a job.

## 21) Multiple Damages

Because of the failings of ordinary damage awards, states authorize consumers to recover multiple damages. Most commonly, treble damages are allowed; only a few statutes authorize double damages. The remedy operates by awarding the injured party his provable actual damages; this amount is then increased by the appropriate multiple.

Multiple damages were first popularized in antitrust statutes. Seventeen state UDAP statutes and a small number of other consumer acts also allow multiple damages--usually only for willful or knowing violations.

Courts may be reluctant to authorize this extraordinary remedy, considering the consumer the recipient of an unjustified windfall. But there are sound public policy arguments supporting the remedy. Real damages are invariably greater than provable legal damages. Multiple damages are a means of roughly approximating actual damages.

Often damages are never sought because the excessive costs of bringing suit and proving damages do not justify the small amounts at stake. Multiple damages encourage consumers to bring justified actions by increasing their stake in a winning verdict.

At the same time, the threat of multiple damage awards is a strong deterrent to wrongdoers. Instead of only dealing with occasional suits for actual damages, a defrauding merchant must fear more frequent and costly court awards. The unscrupulous businessman cannot rely on government inaction to permit him free reign. Even if the state fails to prosecute, private individuals may.

Judges may be less reluctant to award multiple damages than other windfall remedies, such as voiding existing contracts, since multiple damage awards are more in line with actual injury suffered and do not involve the sometimes spectacular windfalls that voiding a contract may cause. Even so, judges tend to award multiple damages only if seller's conduct is willful, serious, and involves a substantive statutory violation. Technical violations rarely result in more than actual damage awards.

Beside judicial reluctance, other factors diminish the usefulness of multiple damages. If consumer injury is small, three times this amount may still not justify a private lawsuit. Nor does tripling the recovery eliminate the problems of proving damages.

## 22) Statutory, Punitive Damages

Statutory damages is the minimum amount that those violating a statute must compensate injured parties. Proof of actual damages is unnecessary; only proof of the statutory violation is needed. Even if actual damages are far less than the statutory damage, the aggrieved party receives the full amount authorized. Statutory damages, as authorized by 14 state UDAP statutes, range from \$25 to \$1,000, with \$100 or \$200 awards being the most common.

Unlike actual damage remedies, proof of damages is unnecessary, and consumers are encouraged to bring actions to remedy wrongful conduct, no matter how small their claim. When statutory damages are awarded in class actions, the potential recovery can be staggering. For example, if a large seller technically violates a statute by leaving out required information on disclosures mailed to its one million customers, statutory damages could add up to a \$100 million award to a class of consumers never seriously injured.

Judges are reluctant to grant such windfalls and often interpret statutes as not authorizing awards to each member of the class. The federal Truth in Lending Act has been amended to explicitly require sellers to compensate each class member, up to a maximum seller liability. Thus sizeable, but not outrageous, class action recoveries are allowed.

But even for individual actions, there may be judicial reluctance to award statutory damages that result in sizeable windfalls. While such an award has a deterrent effect, courts often consider this inadequate justification and refuse to order the damages. Most statutory damage schemes make no effort to even approximate the size of the award to the amount of injury.

A notable exception is the UCC that provides a floating statutory damage remedy for violations of its repossession sections. Merchants who improperly repossess goods must pay actual damages or 10% of the value of the good, whichever is more. This allows sizeable recoveries when automobiles are involved, but minimal ones when inexpensive radios or kitchen appliances are at issue. But the very floating characteristic of the scheme destroys, for small purchases, statutory damages' intent to encourage actions involving minor consumer injury.

Another method of awarding consumer monies, even when actual damages are difficult to prove, is punitive damages. These damages are awarded in addition to actual damages, and need bear no resemblance to them. Unlike statutory damages, which can be awarded for technical violations, punitive damages are used to deter or punish willful and wanton conduct. The consumer windfall serves the public policy of punishing flagrant violators.

Fourteen UDAP statutes explicitly allow punitive damages and courts may often award such damages on their own authority. The advantage of punitive damages for punishing misconduct is that a criminal proceeding is unnecessary and aggrieved parties need not rely on the state to take action, but can do so on their own.

### 23) Attorneys' Fees

Litigants normally pay the fees of their own attorneys. Attorneys can bill for their actual time and expenses or they can serve on a contingency fee basis, retaining a portion of a favorable judgment, but receiving nothing if they lose. For consumers with limited income, contingency fees may be the only financially feasible option. But attorneys will accept a case on a contingency fee basis only if there is a substantial likelihood of winning and if the potential recovery is substantial.

Most UDAP statutes that provide for private actions also authorize the court to award attorneys' fees. The court uses its own discretion in determining the amount the defendant merchant must pay the consumer's attorney. Usually the court will only grant such fees if the consumer wins.

Attorneys' fees encourage lawyers to accept cases if they think the possibility of winning is good even if the recovery allows an insufficient contingency fee. While private actions are encouraged, frivolous ones are not, because judges can refuse to allow attorneys' fees in those cases.

#### 24) Retention of Goods

Retention of goods is a specialized private remedy authorized in most states when a seller delivers and bills a consumer for unsolicited goods. Private remedies such as damage suits for return mailing costs or injunctions against bill collecting efforts are impractical. Unwilling to rely solely on government sanctions, states have turned to an ingenious private remedy to protect consumers from this scheme--allowing the consumer to keep the unsolicited goods as a gift. This not only provides the consumer with a viable remedy but discourages the practice itself.

#### 25) Class Actions

The class action is a procedural device whereby a small number of people can bring a lawsuit on behalf of themselves and a large number of others to litigate the similar claims of the whole group. This procedure provides a remedy for consumer fraud or other injury to many injured persons without each person hiring an attorney and filing a lawsuit. The people on whose behalf the class action is brought are identified collectively as "the class" and individually as "class members."

One of the primary functions of the class action device is to deter mass wrongs and fraud, providing a realistic threat of a major lawsuit for substantial damages against the defrauding party. Class actions also provide a remedy for the small claimant and the uninformed. Many consumers injured by a fraudulent practice do not have the resources to maintain an action against the offending party, are not aware of their rights, and/or do not have a sufficient monetary stake to warrant litigation. Class actions are well recognized for their use in providing a remedy for such consumers.

Class actions also protect the rights of consumers reluctant to file individual actions against merchants with whom they have a continuing relationship. For example, the consumer may be a debtor or an employee of the offending party, and fear economic reprisal for the initiation of litigation. Through a class action, the consumer can secure redress without active participation.



Where administrative remedies and governmental enforcement are inadequate to deter and compensate consumer fraud, class actions may be the only viable alternative. As fraud schemes and the corporations that use them become larger, more complex, and more spread out throughout the nation, the class action device becomes more essential. Only a sizeable action can hope to properly investigate and prove such schemes, match the litigative resources of a large corporation, and bring sufficient pressures to stop and deter future misconduct.

Class actions also can focus courts' attention on the common pattern of a fraudulent scheme, not the confusing individual factual variations that do not elucidate the underlying pattern. Class actions also generate greater publicity and public awareness, providing consumers with the awareness that they too were defrauded, and warning others about similar frauds.

While a class action is a powerful procedural device when utilized, courts have limited their use. Courts require that issues common to the class must predominate over issues individual to each class member.

Courts commonly dismiss class actions claiming common law fraud where the existence of material misrepresentations, the question of reliance, or other elements of the cause of action can be proved only on an individual basis. Other courts, notably in California, have allowed class actions in at least some common law fraud circumstances.

Courts are more willing to allow class actions brought under state UDAP statutes which typically do not require proof of consumer reliance. Class actions may also prove effective in challenging consumer fraud under such theories as illegal overcharge, unconscionability, breach of contract, violation of substantive statutes, and breach of warranty.

Besides the requirement of commonality of issues, other impediments limit the usefulness of class actions. Many states still use old limitations on the availability of the class action, abandoned by federal courts in 1938. Class actions are allowed only where all class members share a joint interest in the subject matter of the action, such as where many persons claim title to the same land. Thus class actions are not allowed in the consumer fraud context where many persons have been subjected to the same conduct or injured in similar way but are otherwise unrelated.

If state courts do not provide a forum for class actions, all avenues may be closed because of recent decisions severely limiting this procedural device in federal courts. In most cases, each class member must have suffered \$10,000 injury to bring an action in federal court. Even if an action can be brought under certain laws waiving this \$10,000 requirement, the courts require the class representative to notify each and every class member of the pending action--usually a prohibitively expensive proposition.

Once a class action is properly brought, class members are almost always better off than if an individual action was brought. While the extra legal work involved in prosecuting a class action may delay relief in comparison with a simple individual action, the absent class members are given the option of being part of the class action or excluding themselves and bringing their own actions.

Few class members exercise the option of excluding themselves. When they do, it is often under pressure from the defendant or from fear of some retaliation, as when the defendant is the creditor of the class members. A court, however, has the power to stop this abuse by ordering the defendant not to communicate with the class members regarding the action.

#### 26) Small Claims Court

Almost every state in the country has established a small claims court system to provide a quick and inexpensive means of suing for small amounts of money (usually around \$500 or less). Simple procedures are established for filing complaints and obtaining trials. Trials are scheduled within several weeks of filing. Service of a summons on the defendant is simple and no pretrial discovery is allowed. Filing and service fees are low. Lawyers are not required and, at least in theory, not needed.

Most small claims courts have jurisdiction over all tort and contract cases except slander and libel. Therefore, any action in which a consumer alleges breach of contract based on fraudulent misrepresentations, or based on the tort of deceit, can be brought in small claims court. UDAP statutes often cannot be enforced in small claims courts, either because of jurisdictional requirements of small claims courts or the UDAP statute itself.

Another limitation on the utilization of small claims courts for consumer fraud actions is that typically the court only allows damage remedies. If a consumer wants other types of relief, such as rescission or injunction, the action must be brought in a different court. Although the process is inexpensive, small claims courts also require the parties to take a day off from work, which can be costly, if not impossible.

In addition, critics allege that small claims courts have become collection mills for creditors and insurance companies. The cheap, quick procedure is utilized by department stores, utility companies, and other creditors who use nonlawyers highly skilled in small claims practice to file dozens of cases every week. Defendant consumers have to hire lawyers to defend themselves against the companies' experienced and aggressive representatives. Rather than go to this expense, many defendants default.

When a consumer sues in small claims court, even a judgment in his favor can be a hollow victory. The procedure for enforcing a small claims judgment (getting paid) is slow, cumbersome and expensive. Experienced companies and landlords know how to avoid and delay the enforcement process so long that the consumer stops trying to collect.

As presently structured, most small claims courts do not offer private litigants with small consumer claims a viable enforcement remedy. But such changes as sessions on weekends and evenings, simpler judgment enforcement procedures, jurisdiction for UDAP actions, and more flexible remedies would facilitate such actions. The critical issue still being debated is the extent to which the small claims court goals of informality and high volume necessarily undermine the goals inherent in the concept of justice: consistency, fairness and accuracy of factfinding. This issue is frequently aggravated by the low quality of small claims judges--their pay and status are low.

#### 4. Requirements and Rights Facilitating Private Action

Certain statutes do not prohibit fraudulent sales but instead provide consumers additional options to cancel, rectify, or dispute defective purchases. Knowing that all abuses cannot be prevented, states create consumer rights that let consumers help themselves without resorting to court action. If litigation is required, these statutory rights are easier to enforce than attacking the underlying fraud. Three-day cooling-off periods, warranty rights, prohibitions on remedy waivers, refund standards and similar requirements or rights do not directly attack fraud but give consumers tools to fight it more effectively.

##### 27) Warranties

Defrauded consumers can litigate breaches of express or implied warranties without proving fraud or deception. The Uniform Commercial Code, adopted in all states but Louisiana,\* determines what warranties exist in the sale of goods and what remedies consumers have for their breach.

A seller gives an express warranty in the sale of goods when he makes an affirmation of fact or promise relating to the goods that becomes part of the basis of the bargain—such as a description of the goods or the demonstration of a sample or model. Conduct as well as statements create express warranties; the seller does not have to use any formal words such as "warrant" or "guarantee;" a warranty can be created after the deal is closed. Intention or reliance are not necessary, and good faith is not a defense.

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\*The Louisiana Civil Code, adapted from the French Civil Code, delineates warranty rights that, despite unusual terminology, are similar to the UCC's and even provide consumers some added remedies. A 1974 amendment limits the buyer's remedy to repair of the defect if the seller was unaware of the defect at the time of the sale. If the seller was aware of the defect, remedies depend on whether the defect was substantial enough to have prevented the buyer from purchasing the good in the first place. If it is not, buyer's remedy is a reduction in price; if it is, the remedy is an action called redhibition. Redhibition will grant rescission of the contract, expenses incurred as a result of the sale and defects, other damages including mental anguish and reasonable attorneys' fees.

The UCC finds an implied warranty of merchantability in the sale of goods when the seller is a merchant with respect to those goods. "Merchantability" means that the goods must pass without objection in the trade; they are fit for the ordinary purposes for which such goods are used; they conform to the promises or affirmations of fact made on the container or label; and quantity goods are of even kind, quality and quantity within each unit and among all units. The UCC has a strong policy in favor of the creation of an implied warranty of merchantability for both new and used goods.

The seller creates an implied warranty of fitness for a particular purpose when he has reason to know of a particular purpose for which the goods are required and that the buyer was relying on the seller's skill or judgment to select the goods.

The UCC limits implied warranties in two ways. Implied warranties do not cover defects an examination should have revealed to the buyer where the buyer examined the goods as fully as desired or refused to examine the goods. In addition, a course of dealing or performance, or the usage of the trade, can exclude or modify an implied warranty.

Implied warranties can be waived by the seller--that is, sold "as is." The UCC, except in a few states, does not limit such waivers, but only requires that they be clearly given. As a result, most sales of goods waive implied warranties. This is not suprising since implied warranty standards are generally tougher than those set by the marketplace.

After the buyer notifies the seller of a breach of warranty, the buyer can seek damages for the difference between the value of the goods accepted and the value they would have had if they were as warranted, unless special circumstances show proximate damages of a different amount. The buyer can also claim consequential damages for losses resulting from his needs which the seller had reason to know of when the contract was made, and for injury to person or property.

These warranty rights may never be utilized. The consumer must first know of his warranty rights. Then he has the burden of proving the defect. If the seller refuses to honor the warranty, the small amount of money at stake may not justify court action. It may make more sense just to pay to repair the item. Express warranties can only be enforced if given, implied warranties if not waived. And whatever UCC warranty rights exist apply only to the sale of goods, not services.

## 28) Remedy Waivers, Defense Cut-Offs

Whatever rights a consumer can waive will be waived. Because of the unequal bargaining balance between merchants and consumers and because of consumer ignorance, whatever ancillary advantage a merchant can derive from a sales agreement will normally be realized. Consumer contracts waive implied warranties, procedural rights to defend against collection suits, the right to raise legitimate defenses against the seller's assignee, statutory rights exempting certain property from repossession, and virtually every other consumer right or merchant obligation.

These waivers do not just cause substantive damage to unknowing or powerless consumers. The waivers also abrogate important consumer safeguards against other forms of consumer fraud. Contracts stripping preexisting remedies and procedural rights leave consumers with inadequate means to protect themselves from deceptive or illegal business practices. An important state enforcement strategy is to void those remedy waivers that encourage fraud by leaving consumers defenseless.

Recent government scrutiny has focused on the ability of sellers to cut off consumer defenses to collection actions by selling the consumer's indebtedness to a third party. If the product is defective or not as promised, the consumer has no recourse against the third party and must pay in full.

The consumer's only means of obtaining satisfaction is to sue the original seller. But this involves an expensive court action against a seller who, by the time of the final judgment, may have left the state or dissipated all its assets. This legal concept where third party purchasers of consumer debts are entitled to full payment, no matter how fraudulent the underlying transaction, is called the holder in-due-course doctrine.

Many state laws and a recent FTC rule void this doctrine for consumer transactions. The basic justification for the ban is that allowing consumers to raise defenses against third parties will mitigate and prevent consumer fraud. Consumers can use their power of stopping payment knowing that they can raise the merits of the entire transaction in dealings with the financier of the transaction. It will be easier for consumers to defend collection actions than to bring their own court suits. Third party holders of the consumer debt will be more able to obtain reimbursement from defrauding sellers than will the consumer. The third party will also be in a better position to evaluate the seller's integrity and financial stability than the individual purchaser.

It thus makes sense to place this burden on the party most able to bear it. Unscrupulous sellers will find fewer purchasers for their consumer paper, requiring them to offer greater discounts for it. Fraud will be less profitable and thus less frequent. Voiding the holder-in-due-course doctrine discourages fraud for sales based on credit where the creditor is the original seller or is affiliated with that seller.

Analogous to bans of the holder-in-due-course doctrine are restrictions on waivers of implied warranties. Implied warranties shift the burden of product defects from the buyer to seller who can more readily prevent and check them. But sellers will often try to waive implied warranties. (See 27. supra)

Only a handful of states, including Massachusetts, Maine and Maryland, have blanket prohibitions of waivers of implied warranties. Ohio and Kansas find certain such waivers unfair or deceptive. But most states only require the disclaimer to be brought to the buyer's attention or otherwise clearly disclosed. Individual cases may find certain waivers unconscionable.

A more widely prohibited waiver involves cognovit notes whereby the buyer gives up his right to defend himself in a court action or even to know that it has been brought. Court or legislative action in virtually every state bans

#### 29) Cooling-Off

Most states deal with door-to-door sales pressures by providing buyers with a cooling-off period. Typically, these laws require sellers to honor consumers' written cancellations within a three-day cooling-off period. The seller must return all monies accepted and cancel any indebtedness; the buyer must make the cancelled purchase available for return to the seller.

Cooling-off periods are enacted to allow consumers to rethink their purchase. Friends may be consulted; comparative shopping can be performed; the contract can be studied. Sales representations can be considered away from the salesperson. If the goods have been received, they can be compared against sales claims.

Consumers can then cancel purchases induced by fraud or oppressive sales techniques. The very right of cancellation will also discourage sellers from using such tactics.

Cooling-off periods need not apply only to door-to-door sales. Some states, such as Ohio, apply them to telephone solicitations. A number of states provide cooling-off periods for vocational school sales, even if made at the school.

While three days is the usual state derived balance between the consumer's interest in reconsideration and the merchant's desire for speedy determination, cooling-off periods can be of any length. Pennsylvania until recently had a two-day cooling-off period. Some states require vocational schools to give longer periods. Cooling-off periods are either triggered at the time of purchase or only when mandated disclosures have been made.

The state cooling-off requirement only works if the seller includes a notice of the buyer's cancellation right in the sales agreement, as usually required by state law. But if a seller violates the statute by failing to even include the cooling-off right in the contract, the only remedy is under the statute, and usually entails only state enforced sanctions.

Cooling-off periods are only effective if consumers know enough to use them. While state legislation usually requires disclosure of buyer's cancellation rights, it is questionable how many consumers read and understand these notices. If the consumer does wish to cancel, the onus is on him to do so in writing, or even by certified mail in some states, within the cooling-off period. Thus many consumers who wish to cancel may never do so effectively.

Three days is usually not an adequate period to judge a product's effectiveness and reliability. Problems may arise after the period has lapsed. Consumers rarely investigate their purchase, compare prices, or analyze documents within that time. The cooling-off period, on the other hand, may prove effective for buyers who have an immediate, emotional feeling that they have been had, that high-pressure salesmen convinced them to sign contracts they did not want to sign.



### 30) Affirmation

Affirmation is the requirement that the buyer affirm a previously signed contract before that initial agreement is legally binding. For example, an affirmation requirement could prescribe that, after a door-to-door seller obtains the buyer's signature on an agreement, the company must mail the consumer a form to be signed after the buyer has had a chance to rethink his decision. If the form is not returned, the buyer is not bound to the contract and has no financial obligation.

Two rationales have been advanced for an affirmation requirement. Cooling-off periods do not offer consumers sufficient safeguards from high-pressure sales tactics. After thinking over their contract decision, some purchasers wish to cancel but do not realize they can, or do not cancel in time. Evidentiary problems develop when buyers claim to have sent, but sellers claim not to have received, the cancellation notice. A cooling-off period consequently puts the burden on the consumer.

Affirmation shifts the impetus to act to the seller. The buyer's ignorance of his rights, indecision, or inaction do not result in any obligation. The consumer is only bound if the seller obtains and can produce evidence of the affirmation. Sellers are better equipped to bear this burden, and, it is argued, affirmation will consequently result in a higher percentage of consumers bound to contracts they wish to be bound to.

Affirmation's second rationale is that buyers cannot make certain purchase decisions without certain disclosures, and that those disclosures cannot be meaningfully delivered at the time of sale. For example, commissioned door-to-door salesmen may be expected to distort or obfuscate the meaning of required disclosures. Affirmation allows buyers to receive disclosures after the salesman's visit, evaluate the information at their leisure, and then decide whether to be bound to the contract by affirming it.

Skillful sellers can circumvent affirmation's objectives. Salesmen can trick buyers into signing the affirmation form at the time of the original sale, or the salesman can return to the buyer's home to resell him into signing the affirmation form. To combat these tactics, sellers can be required to mail the affirmation forms to the consumer after the sale and not contact the consumer between the sale and the affirmation.

Affirmation is more of a theoretical than actual consumer fraud strategy, particularly at the state level. Model codes and commentators have recommended broader use of affirmation but with no present success at the state level.

The Veterans Administration requires certain vocational school enrollment contracts to be affirmed no sooner than ten days after they were first signed or the student does not become eligible for veteran's benefits. The FTC has proposed but not adopted, an affirmation requirement for most vocational school sales. Both the VA and FTC use of affirmation hinge heavily on the abusive door-to-door sales techniques prevalent in the vocational school industry.

### 31) Refunds

Cooling-off periods and affirmation requirements are designed to enable consumers to think twice and to back out of contracts or purchases with no obligation. Refund requirements allow consumers to cancel their contracts with a minimum of financial loss after cooling-off or affirmation rights expire, the contract has become binding, and the seller has begun to perform his part of the bargain.

Refund formulas determine a buyer's obligation to the seller if the buyer partially uses the contracted for goods or services, most commonly involving future service contracts. The financial obligations of a health spa member who drops out after one month or a consumer who quits dance lessons half way through are determined by the refund formula that is specified in the contract or by law.

The word "refund" is used because consumers commonly prepay their contracts, and thus receive some form of refund upon dropping out early. But if prepayment is not made, the "refund" formula may specify that the consumer owes money on dropping out.

The common law will not enforce penalty clauses and other arrangements that force consumers to pay inordinate amounts upon their breach of contract. But, short of this, a seller can include whatever refund policy he wishes in the sales agreement, including clauses that would be found unenforceable in court.

Legislators and agencies have supplemented the common law by creating refund policy standards for certain industries. These statutory requirements may be passed in order to

balance the seller's loss against the buyer's when the contract is terminated before completion. But liberal refund policies also serve to prevent or compensate consumers for fraud.

Consumers' receipt of refunds upon dropping out discourages sellers from utilizing deceptive practices to sign up consumers who, upon learning the truth, will cancel. Such early cancellations under liberal refund policies provide little profit or even create losses for the seller. Sellers are encouraged to sign only those who will be content with the services offered and remain enrolled.

Even if the refund policy does not discourage deceptive sales practices, the refund standard will minimize fraud's impact by allowing consumers to withdraw without incurring large economic losses, thus providing a continuing cooling-off period during which the buyer can evaluate the services offered against the sales promises made.

One of the most liberal standards is a pro rata refund where the consumer only pays for that portion of the service he receives and not for that portion he cancels. Massachusetts applies this policy to most future service contracts. Other states and federal agencies apply or have proposed some form of pro rata policy for selected types of transactions, such as vocational school sales or health spas. Other state refund standards, where they exist, are less liberal to the consumer.

Whatever refund policy is used, if the seller incorporates it into his contract, private individuals will be able to enforce that contract upon cancellation. If the policy is not incorporated into the contract, as required by law, the seller faces whatever enforcement actions the law permits--usually not including private action.

### 32) Limitations on Contract Duration, Costs

Limitation on agreements' cost and duration is another strategy, like refund policies, that deals with fraud in future service contracts. A pro rata refund policy allows the merchant to sell the consumer a service of indeterminate length and cost, but allows the consumer to cancel at any time and receive a refund for the cancelled portion. Limitations on the size, length, or cost of a contract do not give a cancelling buyer special protection, but do limit the consumer's maximum financial obligation.

An example of such a limitation would be a prohibition of lifetime \$10,000 dance studio contracts, setting the maximum obligation at \$1,000 and one year. If the buyer wants to stay enrolled after the year, he must sign a new contract. A pro rata refund on a \$10,000 contract would allow the consumer to cancel at any time and receive a sizeable refund. If he cancels early enough, his obligation will be far less than \$1,000. On the other hand, a contract with a limited term, while not making it easy to cancel during that term, makes it easier to cancel between \$1,000 contracts. The only way not to cancel is to sign a new contract.

Just as affirmation makes it easier to cancel than a cooling-off period, so not signing a new contract is easier to do than cancelling an old one. Pro rata refund rights still places the burden on the consumer to understand his cancellation and refund rights, to take action, and to provide sufficient evidence of his cancellation.

Pro rata refunds, on the other hand, facilitate early drop outs when consumers discover the service is not as represented. Limiting the cost and length of a contract only facilitates cancellation at the end of the contract's term.

Legislation involving contract size and length limitations of future service contracts most commonly involve dance studios and health spas. The strategy, though, applies to all future service contracts.

### 33) Regulation of Contract Substance

Private action is facilitated if state requirements not only exist in statute books but are incorporated into consumer contracts. When a consumer's statutory rights appear clearly in a binding legal agreement with the seller, a private cause of action is created to enforce those contractual rights. Moreover, incorporating statutory rights into the contract allows the consumer to see them in black and white, and does not force him to visit to a law library. Rights can only be pursued if consumers know they have them.

Similarly, legislation prohibiting the enforcement of certain contract terms does consumers little good if sellers continue to incorporate the prohibited terms in their contracts. After sellers point out their existence in black and white, few buyers will challenge their legality.

Examples of legislation requiring consumer rights to be incorporated into private agreements include cooling-off periods and refund formulas. Several UDAP statutes define as unconscionable the inclusion of illegal terms in contracts.

These requirements that phrases be included or excluded from contracts are enforced with states and, in some cases, private sanctions. These compliance actions are comparatively straightforward. The only real issue is whether the required or prohibited language is printed in the sales agreement. If the threat of these actions induces a high degree of industry compliance with the law, then private consumers will be able to rely on their contracts to inform them and provide a basis to vindicate their legal rights.

The difficulty with this approach is expecting legislation to be able to effectively regulate the substance of millions of lengthy, complicated, and often diverse consumer sales agreements. While some consumer remedies may be included and merchant rights excluded, legislation cannot be expected to deal with all possible eventualities in advance.

Moreover, as more and more information is disclosed in a contract, less is understood by the consumer. Even without government-required inclusions, sales agreements are often lengthy and unreadable. Required inclusions can only be useful if they are conspicuous and understandable.

## 5. UDAP Statutes

All states except Alabama use UDAP statutes as their major weapon against consumer fraud. The acts proscribe broad categories of fraudulent acts and provide strong and flexible state and often private remedies to enforce the statutes. State and private remedies vary by state (see State UDAP Statute Characteristics Chart, Tab13 #2).

UDAP statutes facilitate not only state and private actions, but also local enforcement efforts. While New Jersey is the only state to give local consumer protection agencies authority to prosecute UDAP violators, many states delegate this function to local district or county attorneys.

State UDAP statutes also serve as a means to implement FTC standards at the state level since the FTC's own resources are inadequate to extensively police fraud at the state level. State UDAP statutes, modeled after the FTC Act, can incorporate FTC interpretations of the FTC Act into state law, allowing those interpretations to be enforced by state or private action.

All state UDAP statutes, except Oklahoma's and the District of Columbia's, prohibit deceptive or misleading acts. As discussed in A, Prohibited State Practices, deception is a broad standard not requiring a showing of fraudulent intent or the other elements of common law fraud.

Oklahoma, the District of Columbia, and eight other states prohibit unconscionable acts. Twenty-five states proscribe not only deceptive but also unfair practices. In addition, 35 states itemize specific deceptive practices.

While UDAP statutes apply generally to consumer transactions, certain conduct is excluded from their coverage. Almost every state exempts publishers, printers, and broadcasters of deceptive advertising from culpability if they act in good faith. About half the states also exclude from UDAP coverage practices allowed by other state laws or regulated by other state agencies.

Table 2. STATE UDAP STATUTE CHARACTERISTICS CHART

(all numbers in thousands of dollars)

	ALA	ALAS	ARIZ	ARK	CAL(1)**	CAL(2)**	COL	CONN	DEL	DC	FLA	GA	HAW	IDAH(1)	ILL	IND	IOWA	KAN	KY	LA	MAINE	MD	MASS	MICH	MINN	MISS	MO	MONT	NEB	NEV	NH	NJ	NM	NY	N CAR	N DAK	OHIO	OKLA	ORE	PA	RI	S CAR	S DAK	TENN	TEXAS	UTAH	VT	VA	WASH	W VA	WIS	WYO
PROHIBITIONS																																																				
False, fraudulent																																																				
Misleading, deceptive																																																				
Unfair, deceptive acts																																																				
Unconscionable																																																				
Itemized practices																																																				
EXCEPTIONS																																																				
Publishers, printers																																																				
Regulated, allowed by law																																																				
Other																																																				
PRIVATE REMEDIES																																																				
Damages																																																				
Multiple damages																																																				
Punitive damages																																																				
Statutory damages	2												1	5									02					2			1					1	2	1	2					1		1	2					
Attorney's fees																																																				
Rescission																																																				
Injunction																																																				
Other																																																				
Class action																																																				
ADMINISTRATIVE REMEDIES																																																				
Cease and desist injunction																																																				
Cease and desist violation	25	10			6	10	25			10	5	25	10	10				10		5	10		10	1		5	5	10	5			25				5	5	25	5		15	5	1	10		10		25	10	5		
Criminal																																																				
Civil penalty	5	5			2	5		2		1		2	10		5			2	25			25		25	25	5		5	5	2	5	10		5	5	5			2	1		5	2		2		10	1	2	5		
Restitution																																																				
Receiver																																																				
License revocation																																																				
Costs																																																				
Other																																																				
ADMINISTRATIVE POWERS																																																				
Rulemaking																																																				
Subpoena																																																				
Civil investigative demand																																																				
Administrative hearing																																																				
AGENCY																																																				
Attorney General																																																				
Local enforcement																																																				
Special agency																																																				

Legislative drafting also often causes troubling questions as to UDAP coverage of credit, insurance, real estate, mobile homes, and leases. UDAP statutes will refer to the sale of goods and services, leaving unspecified whether "services" includes credit and insurance transactions. A lease is sometimes interpreted not to be a sale and thus not covered. Buying a home or even a mobile home may be considered a purchase of real property, not a consumer good. A Pennsylvania case, considering some of these issues, resolved, after extensive litigation, that a lease of an apartment was covered by the Pennsylvania UDAP statute.

Forty-four state UDAP statutes offer consumers private rights of action. This is particularly important because the Federal Trade Commission Act does not provide for such actions and private litigants would otherwise be forced to prove common law fraud.

All statutes providing for individual actions allow damages, but only 16 authorize treble damages and one double damages. Fourteen states allow statutory damages ranging from \$25 to \$1,000, with \$100 and \$200 being the most common figures. Eleven states explicitly provide for punitive damages. In all, 32 of the 47 states offering private rights of action provide for more than just actual damages. This is usually awarded only if the seller's conduct was willful or fraudulent.

Almost all UDAP statutes award attorneys' fees to consumer litigants. Consumers can seek rescission in only five states, but can apply for injunctions in 19. In addition, 13 states offer other private remedies, usually a general authorization to seek equitable remedies, which may include injunctions or rescission. Similarly, while only 17 statutes authorize class actions, other states provide, in other legislation, for general utilization of the procedural device, including its use in private UDAP actions.

All state UDAP statutes provide for state enforcement through injunctions or cease and desist orders. (One of California's two UDAP acts only offers a private right of action.) Penalties for violation of cease and desist orders or injunctions are usually spelled out and range from \$1,000 to \$25,000 per violation; \$5,000 and \$10,000 are the usual figures. Eleven states even provide criminal penalties, usually for violations of injunctions.



Thirty states can also seek civil penalties for initial violations. These are smaller and range from \$250 to \$25,000 with \$2,000 being a common penalty per initial violation. Restitution is more popular, with 47 statutes authorizing this remedy.

About half the states can also seek court approval for the appointment of receivers in UDAP cases. Twenty-one states tie license revocations to UDAP actions. Only fourteen acts allow states to recover their prosecution costs. Ten states authorize various other remedies.

State prosecutions and private actions can be facilitated by rulemaking that defines with specificity acts that violate the statute's general standards. While many statutes itemize certain specific deceptive acts, rules can lay out specific standards for still other practices. Nevertheless, only 35 states authorize rules, usually promulgated by the attorney general's office, but sometimes by a consumer protection agency or department of commerce.

Another powerful tool for prosecutors is the ability to subpoena documents and testimony. The merchant usually possesses much of the evidence that must be developed in any case brought against him. Prosecutors need the ability to quickly get at this information, with severe penalties for sellers' destruction or falsification of evidence. UDAP statutes, by and large, provide prosecutors with these powers giving them the ability to subpoena documents and testimony and/or the ability to seek information through civil investigative demands.

Most states enforce their UDAP statutes exclusively through court proceedings. Others utilize special examiners who are expert in consumer protection matters and who judge matters on the basis of less formal administrative hearings. But the remedial powers of these hearing officers are usually limited, with extensive court review of the exercise of even these limited powers.

Almost every state's attorney general's office has the primary responsibility to enforce the state's UDAP act. In addition, 18 states authorize their county or district attorneys to bring cases under the act and New Jersey provides for enforcement by county consumer protection agencies. Thirteen states give rulemaking, investigatory, or even prosecutory powers to state-wide consumer protection agencies.

### **PART III: LOCAL ENFORCEMENT**

## LOCAL ENFORCEMENT

The scope of local consumer fraud ordinances is significantly narrower than that of comparative state laws. Forty-eight states have comprehensive UDAP statutes, and all states have enacted additional legislation concerning particular consumer fraud practices. A wide range of enforcement strategies are used to administer these statutes.

Local governments, on the other hand, take little independent action but defer almost completely to state activity. A number of local jurisdictions report enacting no consumer fraud ordinances. Most others participate in only one or more of the three traditional local consumer fraud enforcement activities -- district attorney prosecutions under state criminal laws, sealer administration of weights and measures legislation, and local licensing of selected occupations and activities such as door-to-door sales.

Recent enactments of UDAP statutes at the state level and growth of consumer movements at the local level are altering this pattern. Counties and towns have created local consumer protection agencies that are enforcing local and even state UDAP statutes. These new local efforts will be described after reviewing the three traditional local approaches to consumer fraud enforcement.

### Local Prosecution of State Criminal Laws

Local police, prosecutors, and courts enforce state criminal laws, including most criminal consumer fraud legislation. Local enforcement efforts traditionally are directed toward crimes of violence or theft, but resources are now also being used to punish consumer fraud offenders. District attorneys offices are creating special consumer fraud or economic crime units; the National District Attorneys Association's Economic Crime Project is providing coordination for these units.

### Licensing

Local licensing of occupations or activities is used to prevent consumer fraud. Local officials can identify and locate licensed sellers, revoke or refuse to grant licenses to undesirable sellers, and use selling without a license as a readily provable independent ground for prosecution.

Itinerant door-to-door sellers are common targets of licensure ordinances. These sellers are often immune to local prosecution, leaving town before officials can react to their illegal actions. Licensure is used as a means of keeping track of such itinerant vendors. But sanctions for licensed sellers' improper activities are usually only license revocations or minimal fines. Penalties for unlicensed activity are also light--often fines or other misdemeanor sentences.

Some local jurisdictions regulate these sellers more restrictively. Examples are \$100-a-day license fees, bonding, the submission of an inventory of goods to be sold, a ban on unsolicited door-to-door sales, or even a total prohibition of the door-to-door sale of goods.

Local officials also license such other occupations as used car salesmen, pawnbrokers, home improvement contractors, massage parlors, dry cleaners, auctioneers, second-hand dealers, mobile home installers, plumbers, and taxi drivers. Again, sanctions for improper activity are usually limited to license revocation or minimal fines.

As with door-to-door sellers, some communities do not just license, but also extensively regulate particular industries' local activities. A Milwaukee home improvement contractor ordinance sets forth 3 required and 23 prohibited practices. An Aspen, Colorado, ordinance prohibits licensees from engaging in deceptive trade practices as defined by the Colorado Consumer Protection Act.

While these two ordinances attempt to expand traditional local consumer fraud enforcement methods, they are still entrenched in traditional licensing notions. Violators face only license revocation and, in the case of Milwaukee, a minimal fine.

#### Weights and Measures

Local governments also traditionally appoint a sealer to enforce state and local weights and measures legislation. The sealer inspects such weighing and measuring devices as scales and taxi meters, and investigates quantity or price misrepresentations concerning goods sold by weight, measure or count. The scope of most weights and measures legislation includes food commodities, fuels such as coal, oil, or gasoline, and sundry other products. Sanctions are usually limited to minimal fines.

More recently, local governments have been delegating their weights and measures offices new duties. Massachusetts sealers, as an outgrowth of their traditional responsibilities, inspect for "unit pricing" violations and discrepancies in automated retail checkout systems.

Other jurisdictions, such as Columbus, Ohio, and Chicago give their sealers more far-reaching and novel duties, requiring them to administer general consumer sales laws that prohibit fraudulent or deceptive advertising and sales practices, including sale of used as new, unreasonable delivery delays, deceptive pricing, and bait-and-switch advertising.

Sealers also are delegated enforcement authority for such other local ordinances as those dealing with cooling-off periods for door-to-door sales and home improvement contracts. Sanctions are usually minimal fines and, occasionally, criminal sentences in the one to six month range.

Westchester County, New York, gives its sealer broad powers well beyond those of the Columbus and Chicago sealers to enforce the county's consumer protection code that prohibits deceptive or unconscionable acts. The sealer has full investigative powers and can negotiate settlements, administratively impose civil penalties up to \$250 per violation, file criminal complaints seeking fines up to \$1,000 for initial violations, with higher fines and imprisonment up to three months for subsequent convictions, and request the county attorney to bring injunctive actions.

Westchester County's Consumer Protection Code, which the sealer enforces, compares favorably with the coverage of many state UDAP statutes and regulations. The Code regulates the following practices:

- deceptive or unconscionable acts
- unavailability of advertised items
- selling goods at higher than advertised prices
- selling defective goods
- selling used goods as new
- concealing cash registers or scales from view
- nondisclosure of refund or exchange policies
- nondisclosure of dates beyond which perishable goods should not be consumed
- labeling, other practices relating to sale of meat
- refusing to sell food in quantities smaller than prepackaged amounts
- failure to deliver automobiles, furniture, and appliances when promised
- repairs of consumer goods
- future service contracts
- prizes and contests
- vocational school practices
- credit practices
- debt collection practices

Giving established local weights and measures offices broad consumer protection functions is an important local alternative to the creation of a specialized consumer protection agency. Keeping all consumer protection responsibilities in the sealer's office insures greater centralization, continuity, and utilization of the office's expertise and experience. Other communities prefer to couple innovative consumer protection legislation with a specialized consumer protection agency, not wishing to leave enforcement with a traditional weights and measures office.

#### Local Consumer Protection Agencies with Advisory Authority

While the three traditional approaches to consumer fraud--district attorney criminal prosecutions, licensing, and weights and measures enforcement--still predominate among local jurisdictions, some communities have experimented with the institution of various forms of local consumer protection agencies.

One such approach is the creation of a largely advisory agency with limited or no enforcement authority. Examples are the Boston Consumer Council, the Los Angeles and Orange County Bureaus of Consumer Affairs, the Westchester County Consumer Policy Board, and the Columbus Consumer Protection Commission.

These local consumer agencies conduct investigations, research into matters affecting consumer interests and education, reporting the results to interested agencies, recommend legislation and testify at hearings, develop consumer education programs, handle consumer complaint mediation, and encourage business self-regulation. Some agencies, such as the Westchester County Consumer Policy Board, also advise and assist the sealer or other enforcement agencies in formulating basic policy.

The Atlanta, Georgia, Office of Consumer Affairs, in addition to its basic advisory powers, has enforcement responsibility for all local ordinances relating to advertising or sales practices. Unfortunately, the office has no local ordinances to enforce.

#### Local Consumer Protection Agencies with Enforcement Powers

Not all local consumer protection agencies are mere advisory boards. Some have legislative mandates similar in scope to state UDAP statutes. The extent of these local laws is demonstrated by comparing the Prohibited Local Practices Chart, Table #3, delineating the range of prohibited practices enforced by seven local consumer protection agencies, with the Prohibited State Practices Chart, Table #1.

Local governments commonly enact UDAP statutes simultaneously with their creation of consumer protection agencies. Special ordinances later supplement the scope of practices these agencies regulate. For example, Nassau County, New York, subsequently gave its Commissioner of Consumer Affairs enforcement responsibility for ordinances involving home improvement sales, cash register figure blockage, and foodstuff expiration dates.

Typically, a consumer agency only administers these special ordinances and the local UDAP statute, with another local agency enforcing the weights and measures act, and yet another the licensing legislation. Only a few local governments have centralized in the consumer protection agency responsibility for all consumer fraud enforcement functions. New York City's Department of Consumer Affairs is the classic example, centralizing in one agency responsibility for administering as much consumer fraud legislation as many states possess. (Compare Table #3 and Table #1.)

**Table 3.**  
**PROHIBITED LOCAL PRACTICES CHART:**  
**Prohibited Practices in Five Selected Cities/Counties**

		Nassau County, New York	New York, New York	Canton, Ohio	Cincinnati, Ohio	Dallas, Texas
<b>GENERAL PRACTICES</b>	False, deceptive acts, generally	•	•	•		
	Unfair or deceptive acts, generally		•		•	•
	Unconscionable acts, generally	•	•	•	•	
	Lack of good faith, generally					
<b>SPECIFIC PRACTICES: Advertising, representations</b>	Deceptive pricing and bargain offers		•	•	•	
	Use of the word "free"	•	•			
	Bait advertising, unavailability		•	•	•	•
	Disparaging competitors		•	•		•
	Misrepresentations re nature of manufacturer, seller		•	•	•	•
	Passing off					•
	Misrepresentations re sponsorship, approval, affiliation		•	•	•	•
	Misrepresentations re uses, benefits, characteristics		•	•	•	•
	Weights and measures, price per unit	•			•	•
	Other quantity misrepresentations		•	•	•	•
	Packaging					
	Labeling, adulteration, identity	•	•			
	Other quality, grade, standard, ingredient misrepresentations		•	•	•	•
	Safety misrepresentations		•			•
	Nondisclosure of full terms of transaction	•	•		•	
<b>Sales approaches</b>	Door-to-door sales pressures				•	
	Door openers		•			
	Sales representative's status				•	
	Method of selecting consumer					
	Oral promises not in contract					
	Commissioned sales representatives					
	Nondisclosure, fictitious seller's name		•			•
	Auctions		•			
	Unsolicited goods					
	Premiums, prizes with sale					
<b>Performance practices</b>	Theft through deception					
	Simulation					
	Substitution of inferior goods				•	
	Sale of damaged, defective goods					
	Merchantability, fitness					
	Sale of used as new, prior use		•	•	•	•
	Unassembled goods					
	Delay, nondelivery, nonexistent product		•			•
	Layaway plans, deposits		•			
	Disposal of goods left in possession					
<b>Paper transactions</b>	Repairs and services		•	•	•	•
	Forgery, tampering, destruction of documents					
	Signature by deception					
	Future service contracts		•			
	Adhesion contracts, liability waivers, warranty disclaimers		•	•	•	
	Warranties, rights, remedies		•		•	•
	Installment sales					
	Credit	•	•		•	
	Debt collection	•	•	•		
<b>INDUSTRY SPECIFIC PRACTICES</b>	Confidential information		•			
	Insurance					
	Real estate sales					
	Landlord-tenant, mobile home parks					
	Home improvement sales		•			•
	Automobile sales	•			•	
	Mobile homes					
	Hearing aids					
	Funeral practices					
<b>SPECIFIC CONSUMERS</b>	Nursing homes					
	Minors, incompetents					
<b>OPPORTUNITY SCHEMES</b>	Non-English speaking		•	•		
	Referral sales				•	
	Pyramid sales		•			
	Lotteries, prizes, contests					
	Business, employment opportunities, franchises		•			
	Employment agencies					
	Vocational schools		•			
	Charitable solicitations				•	

In some states, town or county governments, instead of adopting extensive consumer protection laws and regulation opt to enforce existing state laws. The UDAP statutes in 18 states delegate enforcement authority to district or county attorneys.

New Jersey is the only state whose UDAP statute delegates this authority to county and certain municipal consumer affairs offices. While these local agencies lack the state's authority to administratively exact civil penalties or promulgate rules, they can seek various remedies in court.

Whatever law local consumer protection agencies administer, a grant of adequate administrative remedies and powers is necessary to prevent consumer fraud. Table #4, Local Consumer Protection Agency Remedies and Powers, displays the remedies and powers of seven such agencies. Note that none of the locally enacted UDAP statutes allows private rights of action; the New Jersey state UDAP statute provides for both local and private actions.

The Dallas, Texas, Department of Consumer Affairs has the narrowest range of remedial powers--criminal sanctions and seizure of deceptively sold merchandise. All other agencies can seek injunctions. Three departments can seek criminal penalties; the other four can request civil penalties for initial violations. Only New York City's Department of Consumer Affairs can obtain restitution for its citizens and revoke licenses. New Jersey County Departments of consumer affairs can seek that companies be put in receivership and reimburse the county for prosecution costs.

Five agencies have rulemaking authority; the New Jersey county departments of consumer affairs enforce state-adopted regulations. All seven can issue subpoenas and conduct investigations. Only Cincinnati's Consumer Protection Division can initiate administrative hearings.



**Table 4. LOCAL CONSUMER PROTECTION AGENCY REMEDIES AND POWERS**

**Seven Selected Cities/Counties**

(all numbers in thousands of dollars)

	Camden County, New Jersey	Somerset County, New Jersey	Nassau County, New York	New York, New York	Canton, Ohio	Cincinnati, Ohio	Dallas, Texas
<b>PROHIBITIONS</b>							
False, fraudulent	•	•					
Misleading, deceptive	•	•	•		•		
Unfair, deceptive acts				•		•	•
Unconscionable	•	•	•	•	•	•	
Itemized practices	•	•		•	•	•	•
<b>EXCEPTIONS</b>							
Publishers, printers	•	•	•	•		•	•
Regulated, allowed by law						•	
Other				•		•	
<b>PRIVATE REMEDIES</b>	•	•					
<b>ADMINISTRATIVE REMEDIES</b>							
Cease and desist injunction	•	•	•	•	•	•	
Cease and desist violation	25	25					
Criminal					•	•	•
Civil penalty	5	5	.5	5			
Restitution				•			
Receiver	•	•					
License revocation							
Costs	•	•		•			
Other							•
<b>ADMINISTRATIVE POWERS</b>							
Rulemaking			•	•	•	•	•
Subpoena	•	•	•	•	•	•	•
Administrative hearing						•	

## CONTENTS-PART IV

Part IV: Federal Law . . . . .	135
A. Prohibited Federal Practices . . . . .	143
1. General Practices . . . . .	143
2. Specific Practices--Advertising, Representations . . . . .	144
3. Specific Practices--Sales Approaches . . . . .	147
4. Specific Practices--Performance Practices . . . . .	148
5. Specific Practices--Paper Transactions . . . . .	149
6. Industry Specific Practices . . . . .	150
7. Specific Consumers . . . . .	151
8. Opportunity Schemes . . . . .	152
B. Federal Enforcement Strategies . . . . .	153
C. Agency-By-Agency Analysis . . . . .	161

## FEDERAL LAW

Consumer fraud activity by the Federal Trade Commission and other federal agencies parallels state action in many important respects. The practices prohibited and the strategies used are often similar. Consequently, this Part follows the same format as that used in Part II, State Law, and concentrates on differences between federal and state consumer fraud law.

The Prohibited Federal Practices Chart, Table #5,<sup>1</sup> is modeled after the Prohibited State Practices Chart, Table #1. Listed practices defined in the state part are not redefined in the corresponding federal section. Practices not prohibited at the state level which have been added to the federal chart are marked with asterisks. The federal chart includes practices proscribed by 28 federal agencies and by miscellaneous federal laws.

The federal law discussion is divided into three sections:

A. Prohibited Federal Practices. Briefly surveys the consumer fraud concerns of the 28 federal agencies, and points out distinctions between federal regulation and state enforcement relating to the same practices. Prohibited practices not dealt with at the state level are described in more detail.

B. Federal Enforcement Strategies. Surveys the often complex and overlapping consumer fraud jurisdictions of the various federal agencies, then describes the various strategies used by these agencies. Reference should be made to Part II, B, State Enforcement Strategies, for more detailed analysis of these particular strategies. Finally, the section details the Federal Trade Commission's special remedial scheme.

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1. This chart uses several abbreviations, which are defined as follows:

"16 CFR 233" is a citation to Title 16, section 233, of the Code of Federal Regulations.

"Dkt" refers to a Federal Trade Commission Docket number.

"31 FR 21059" is a citation to volume 31, page 21059, of the Federal Register.

"TRR" refers to a Federal Trade Commission Trade Regulation Rule.

"2 TRR §1000" is a citation to volume 2, paragraph 1000, of the Trade Regulation Reporter published by Commerce Clearing House.

"405 US 233" is a case citation to volume 405, page 233, of United States Reports, which contains cases decided by the U.S. Supreme Court.

"15 USC 52" is a citation to Title 15, section 52, of the United States Code.

C. Agency-by-Agency Analysis. Provides, for the 28 federal agencies included in the Prohibited Federal Practices Chart, Table #5, a more detailed analysis of prohibited practices and the available remedies to prevent such acts. A more detailed agency-by-agency analysis, more suited to attorneys and others doing research in this area, will be released as a separate report at a later date. Brief descriptions of federal agencies which were examined but found not to have made important consumer fraud functions are included in Appendix A.

**Table 5.**  
**PROHIBITED FEDERAL PRACTICES CHART**

PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES	PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES
<b>GENERAL PRACTICES</b>					
False, deceptive acts, generally	15 USC 52 (foods, drugs, medical devices, cosmetics) (FTC Act)	Alcoholic beverages Banks Bills of lading Broadcasters Commodity transactions Credit unions Educational institutions Energy efficiency Fruits, vegetables Gold/silver coins, bullion Indians, contracts with Interstate commerce, gen. Interstate land sales Mails Military bases, sales on Securities Seeds Telephone, telegraph Turpentine	USDT DOD, FHLBB, FRS ICC FCC CFTC NCUA VA FEA USDC CFTC USDI ** HUD USPS DOD SEC USDA FCC USDA	* Image advertising Proposed Enforcement Policy-12/4/74	
			Passing off	15 USC 1054 (trademarks) (statute) 2 TRR §§7785, 7795 (cases)	Trademarks, patents USDC
			Misrepresentations re sponsorship, approval, affiliation	2 TRR §§7575-7583 (cases)	Air carriers, agents Banks Commodity transactions Government affiliation Indian products CAB CC, FHLBB, FRS CFTC ** USDI
			* Deceptive endorsements, testimonials	16 CFR §255.3, 255.4 (guide) 16 CFR §255.1, 255.2, 255.5 (prop. guide) 2 TRR §§7671, 7673, 80 FTC 53, 81 FTC 5 (cases)	Agency endorsement Alcoholic beverages CFTC, DOD, HUD, SEC USDT
Unfair or, deceptive acts, generally	15 USC 45 (FTC Act) 405 US 233 (case)	Banks Educational institutions Fruits, vegetables Home sales Military bases, sales on Mobile homes Motor carriers Packers Railroad carriers Securities Water carriers	CC, FDIC, FRS VA USDA VA DOD VA ICC USDA ICC SEC FMC	* Misrepresentations, failure to disclose government inspection, grade, or insurance	2 TRR §7771 (cases) Agricultural grading Banks Clinical laboratories Consumer products Credit unions Drugs Electronic products Mobile homes Motor vehicles Tobacco USDA FDIC, FHLBB, FRS FDA CPSC NCUA FDA FDA HUD DOT USDA
Unconscionable acts, generally			Misrepresentations re uses, benefits, characteristics	2 TRR §§7593, 7597, 7683, 7685 (cases)	Air carriers Alcoholic beverages Automobiles Civil service schools Energy efficiency Foods Interstate land sales Patents CAB USDT DOT CSC FEA FDA HUD USDC
Lack of good faith, generally			Weights and measures, price per unit		Alcoholic beverages Fruits, vegetables Household movers USDT USDA ICC
<b>SPECIFIC PRACTICES</b>			Other quantity misrepresentations	2 TRR §7855 (cases)	
<b>Advertising, Representations</b>			Packaging	15 USC 1451 (Fair Packaging and Labeling Act)	Drugs, cosmetics, medical devices Eggs Foods Fruits, vegetables Industry standards, gen. Meat, poultry Poisons, hazardous substances FDA USDA FDA USDC, FDA USDC USDA CPSC
Deceptive pricing and bargain offers	16 CFR 233 (guide) 31 FR 21059 (proposed guide) 2 TRR §§7837, 7842 (cases)	Airline ticket agents	CAB		
Use of the word "free"	16 CFR 251 (guide)				
Bait advertising, unavailability	16 CFR 424 (TRR) 16 CFR 238 (guide) 2 TRR §7815 (cases)				
Disparaging competitors	2 TRR §§7655, 7659 (cases)	Food stamps Health services	USDA HEW		
Misrepresentations re nature of manufacturer, seller	2 TRR §§7575-7583, 7725 (cases) Indian-made Enforcement Policy-4/10/68	Air carriers Alcoholic beverages Banks Clinical laboratories Foods Fruits, vegetables Government affiliation Health services Indian products Origin, place of Patents Veterans medals	CAB USDT CC, FCA, FHLBB, FRS FDA FDA USDA ** HEW USDI USDC, USDT, ** USDC **	Labeling, adulteration, identity	15 USC 68 (woolens) (statute) 15 USC 69 (furs) (statute) 15 USC 70 (textiles) (statute)
					Alcoholic beverages Biologicals Boats Consumer products Drugs, cosmetics, medical devices Eggs Electronic products Energy efficiency Fabrics, flammable Foods Fruits, vegetables USDT FDA DOT CPSC FDA USDA USDC, FEA CPSC FDA USDA

(continued)

Table 5. continued

PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES	PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES
		Hearing aids Imports, generally Indian products Industry standards, gen. Meat, poultry Motor vehicles Poisons, hazardous substances Seeds Sound recordings Tires Tobacco			FDA USDT USDI USDC USDA DOT CPSC USDA ** DOT USDA
Other quality, grade, standard, ingredient misrepresentations	2 TRR §§7605-7619, 7845-7854 (cases)	Gold, silver			USDC
* Deceptive demonstrations, pictorial misrepresentations	380 US 374; 2 TRR §7567; Dkt 8889 (cases)	Subliminal techniques			FCC
Safety misrepresentations	16 CFR 439 (flammable plastics) (proposed TRR) 16 CFR 450, 451 (over-the-counter drugs) (proposed TRR) Dkt C2180-1185 (cigarettes) (consent orders)	Air transportation Boats Cigarettes Common carriers Consumer products Drugs Electronic products Fabrics, flammable Health services Mobile homes Motor vehicles Poisons, hazardous substances Refrigerators Tires			CAB DOT FCC ICC CPSC FDA FDA CPSC HEW HUD DOT CPSC CPSC DOT
* Nondisclosure of full terms of transaction	42 USC 4321 (energy consumption) (statute) 16 CFR 409 (lightbulbs) (TRR) 16 CFR 422 (octane rating) (TRR; stayed) 16 CFR 423 (carc labeling) (TRR) 16 CFR 432 (amplifiers) (TRR) 16 CFR 437 (food nutrition) (proposed TRR) 16 CFR 445 (air conditioners) (proposed TRR) 16 CFR 454 (protein supplements) (proposed TRR) 275 F.2d 680; 281 F. 744; 2 TRR §§7837, 7845 (cases)	Air carriers Air charters/tours Banks CB radios Commodity transactions Correspondence schools Credit unions Energy efficiency Hearing aids Home loans Household movers Indians, contracts with Interstate land sales Motor vehicle mileage Packers Railroad carriers Securities Student loans			CAB CAB CC, FCA, FDIC, FHLBB, FRS FCC CFTC VA NCUA USDC, FEA FDA HUD ICC USDI HUD DOT USDA ICC SEC HEW
* Unsubstantiated advertising	16 CFR 3.40 (exclusionary rule) 81 FTC 23 (case)				
<b>Sales Approaches</b>					
Door-to-door sales pressures	16 CFR 429 (cooling-off period) (TRR)	Military bases, sales on			DOD
Door openers	Dkt 8879 (case)	Simulated bills			USPS
Sales representative's status		Airline ticket agents Government affiliation Securities			CAB ** SEC
Method of selecting customer	2 TRR §§7837, 7845 (cases)				
Oral promises not in contract					
Commissioned sales representatives		Air charters Airline ticket agents Banks Commodity transactions Home loans			CAB CAB FDIC CFTC VA
Nondisclosure, fictitious seller's name		Air carriers Cable television sponsors Mails			CAB FCC USPS
<b>Auctions</b>					
* Negative option plans	16 CFR 425 (TRR)				
Unsolicited goods	39 USC 3009 (mails)	Mails			USPS
Premiums, prizes with sale	405 US 233 (case)				
<b>Performance Practices</b>					
Theft through deception		Common carriers Mails			ICC USPS
Simulation	15 USC 58 (political and numismatic items) (statute)	Sound recordings			**
Substitution of inferior goods	Dkt 5174, 4325 (cases)				
Sale of damaged, defective goods	Dkt 8911, 5654, 5174 (cases)				
Merchantability, fitness		Animal medicines CB radios Health supplies Home sales Indians, sales to Military bases, sales on Mobile homes			USDA FCC HEW VA USDI DOD VA
Sale of used as new, prior use	e.g., 16 CFR 245.8 (guides) Dkt 8528, 5964, 5708, 5654, 4088 (cases)	Motor vehicle odometers			DOT
* Excessive price		Air carriers, agents Educational institutions Finance charges, interest  Health insurance, federal employee Health services Home loans Household movers Indians, trading with Mobile homes Motor carriers National Park concessions Railroad carriers Securities Student loans Telephone, telegraph Water carriers			CAB VA CC, DOD, FCA, FHLBB, HEW, ICC VA CSC HEW HUD ICC USDI VA ICC USDI ICC SEC HEW FCC FMC, ICC
Unassembled goods					

(continued)

Table 5. continued

PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES	PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES		
Delay, nondelivery, nonexistent product	16 CFR 435 (mail-order sales) (guide)	Air transportation Common carriers Health insurance, federal employee Household movers Motor carriers Water carriers	CAB ICC CSC ICC ICC FMC	15 USC 1667 (Consumer Leasing Act) 15 USC 1691 (Equal Credit Opportunity Act) 16 CFR 433 (holder-in-due-course) (TRR) 16 CFR 444 (creditor remedies) (proposed TRR) 2 TRR \$57837, 7845; Dkt 9019 (check balance) (cases) 742-3313, 742-3315, 742-3317, 742-3318 (consent orders)	Common carriers Credit unions Farm, rural home loans Home loans Military personnel Packers Securities Student loans	ICC NCUA FCA HUD, VA DOD USDA SEC HEW	
*Unauthorized sales		Air transportation Boats Clinical laboratories Commodity transactions Consumer products Fabrics, flammable Health insurance, federal employee Household movers Indians, trading with Interstate land sales Military bases, sales on Motor carriers Poisonous, hazardous substances Refrigerators Securities Tires Water carriers	CAB DOT FDA CFTC CPSC CPSC CSC ICC USD HUD DOD ICC CPSC CPSC SEC DOT ICC	Debt collection	16 CFR 237 (guide) Dkt 8721, 8117, 7537, 5835, 4832 (cases) Dkt 8990, C-2602, C-2600 (venue) (cases) Dkt 9072-9074 (repossession) (complaints)	Government affiliation Mail threats Military personnel Telephone threats and harassment Unordered merchandise	** USPS DOD FCC USPS
Layaway plans, deposits		Air charters Commodity transactions Home loans Overbooking, air carrier Securities	CAB CFTC HUD, VA CAB SEC	Confidential information	15 USC 1681 (Fair Credit Reporting Act)	Air carriers Banks  Common carriers Credit unions Packers	CAB CC, FDIC, FHLBB, FRS ICC NCUA USDA
Disposal of goods left in possession		Common carriers	ICC				
Repairs and services	295 F.2d 302, 2 TRR \$57837, 7845; 3 TRR \$519, 283, 19, 425, Dkt 8816 (cases)	Common carriers Electronic products	ICC FDA				
<b>Paper Transactions</b>							
Signature by deception	2 TRR \$7845 (cases)						
Future service contracts	16 CFR 443 (health spas) (proposed TRR) 2 TRR \$7845 (cases)	Air charters Military personnel	CAB DOD				
Adhesion contracts, liability waivers, warranty disclaimers		Air carriers, agents (property) Credit cards Interstate land sales Military personnel Mobile homes Poisons, hazardous substances Railroad carriers (property) Seeds	CAB FRS HUD DOD HUD CPSC ICC USDA	Real estate sales	Dkt 9017 (cases)	FHA standards Interstate land sales Public lands Veterans	HUD HUD ** VA
Warranties, rights, remedies	15 USC 2301 (warranties) (statute) 16 CFR 239 (guides) 2 TRR \$7845 (cases)	Air carriers CB radios Credit transactions Home loans Home sales Household movers Mobile homes	CAB FCC FRS HUD VA ICC VA	Landlord-tenant, mobile home parks			
Installment sales		Military personnel	DOD	Home improvement sales		Veterans	VA
Credit	15 USC 1601 (Truth in Lending and Fair Credit Billing Acts)	Air carriers Banks	CAB CC, FCA, FDIC, FHLBB, FRS	Automobile sales	16 CFR 455 (used cars) (proposed TRR) Used cars	New cars Odometers	DOT DOT DOT
				Mobile homes	16 CFR 441 (proposed TRR)	Generally Veterans	HUD VA
				Hearing aids	16 CFR 440 (proposed TRR)	Generally	FOA
				Funeral practices	16 CFR 453 (proposed TRR) Dkt 9071 (case)	Cremation urns	DOD
				Nursing homes		Veterans	VA

(continued)

Table 5. continued

PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES	
<b>SPECIFIC CONSUMERS</b>			
Children,* minors, incompetents	291 US 394; 64 FTC 168, 297, Dkt 8925 (cases) 762-3054 (consent order)		
Non-English speaking	16 CFR 429 (cooling-off period)(TRR)		
*Indians	Contracts with Products made by Trading with	USDI USDI USDI	
*Other groups	Disabled Elderly Low Income Military personnel Students Veterans	HEW HEW USDA,FRS DOD HEW, VA VA	
<b>OPPORTUNITY SCHEMES</b>			
Referral sales	75 FTC 319; 71 FTC 84; 67 FTC 1152; 66 FTC 36, 522 (cases)		

PRACTICE	FEDERAL TRADE COMMISSION	OTHER AGENCIES	
Pyramid sales	Dkt 8888, 8872, 8834 (cases)	Generally	SEC
Lotteries, prizes, contests	16 CFR 419 (guide) 82 FTC 218; 79 FTC 599; 78 FTC 606; 73 FTC 287; 57 FTC 306, 948, 974 (cases)	Banks Broadcasters Mails	CC, FDIC, FHLBB FCC USPS
Business, employment opportunities, franchises	16 CFR 436 (franchises) (proposed TRR) Dkt 8821, 8815, 6273, 3924, 2952; 87 FTC 819; 82 FTC 1292; 80 FTC 819 (cases)	Commodity transactions Gold/silver coins, bullion Securities	CFTC CFTC SEC
Employment agencies			
Vocational schools	16 CFR 438 (proposed TRR) Dkt 9029, 9026, 8963 (cases)	Civil service schools Student loans Veterans	CSC HEW VA
Charitable solicitations		Air carriers Red Cross, affiliation with U.S. Government, purportedly for use by Unordered merchandise	CAB ** ** USPS

\* Denotes practices not prohibited at the state level.

\*\* Practices not regulated by any particular federal agency.



## A. PROHIBITED FEDERAL PRACTICES

### I. General Practices

Various forms of federal legislation prohibit deceptive and other unfair practices. But, unlike the state level, no federal law or regulation proscribes unconscionable conduct or practices lacking in good faith in a blanket fashion.

The Federal Trade Commission Act prohibits unfair or deceptive acts and practices that affect interstate commerce. Since virtually all sales practices, except those of certain purely local businesses, affect commerce, the FTC has jurisdiction over almost all forms of consumer fraud. However, the FTC Act specifically exempts from its coverage banks, air carriers, common carriers, and packers - industries regulated by other agencies.

The Commission implements its general mandate to proscribe unfair and deceptive acts by defining, in guides, rules, and cases, specific prohibited practices. Except when narrowed by the FTC, these specific prohibited practices apply to all consumer transactions affecting commerce. Thus, unless otherwise noted, all FTC practices delineated in the Prohibited Federal Practices Chart, Table #5, have such applicability.

In addition, Congress has delegated to the FTC special powers to deal with certain product-specific abuses. For example, the FTC has stronger remedies to deal with false advertising of food, drugs, cosmetics, and medical devices than with other forms of advertising.

Congress also delegates the power to proscribe generally deceptive or unfair practices to other federal agencies, but only in certain specific contexts. A number of agencies prohibit deceptive acts involving the sale of particular products such as fruits, vegetables, and alcohol. Other agencies prohibit unfair or deceptive practices by industries not covered by the FTC Act - banks, packers and carriers.

Still other agencies ban the deceptive use of certain instrumentalities. The Federal Communications Commission has responsibility to prevent deceptive use of radio, television, or wire communications; the United States Postal Service is similarly charged regarding deceptive use of the mails; the Department of Defense seeks to prevent unfair or deceptive acts on military bases.

## 2. Specific Practices--Advertising, Representations

The Federal Trade Commission regulates all specific advertising or representational practices included in the Prohibited State Practices Chart, Table #1, with one exception. The FTC does not duplicate the states' traditional weights and measures and labeling responsibilities. Even so, the FTC's enforcement of the Fair Packaging and Labeling Act and labeling acts for wool, fur, and textile products approximates even these functions.

Other advertising practices are regulated by the FTC, but not by the states, and will be described in some detail. These include image advertising, deceptive endorsements and testimonials, deceptive demonstrations, and unsubstantiated advertising.

### Image Advertising

Image advertising does not promote the seller's products or services, but instead attempts to improve the image of the company by focusing upon its activities and policies. Image advertising may be used to sell products on the theory that improving the seller's image may make it a more desirable company with which to do business.

Sellers may be encouraged to disseminate deceptive image advertising, hoping to avoid prosecution by claiming the advertising is protected by the First Amendment right of free speech. While the law has clearly established that deceptive commercial advertising is not so privileged, corporations may claim that their image advertising is not commercial, but instead is protected political expression.

The FTC staff has proposed an enforcement policy that would challenge deceptive image advertising that has commercial appeal. It would apply four criteria to determine whether advertising has primarily a commercial appeal, and is thus not protected by the First Amendment of the U.S. Constitution:

- Do the advertising claims relate to the seller instead of views about general subjects or conditions?
- Do logos, tag lines, and other elements typically found in the seller's product advertisements appear in the advertisement?
- Is the seller's brand name used in the advertisement?
- Is the seller's dominant purpose economic?

These are staff guidelines and do not have the effect of law. A 1976 U.S. Supreme Court case, Virginia Board of Pharmacy,<sup>2/</sup> decided after the promulgation of that enforcement policy, has further clouded the distinction between protected speech and unprivileged commercial advertising.

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2. Va. Bd. of Pharmacy v. Va. Citizens Consumers Council, 96 S. Ct. 1817 (1976).

## Deceptive Endorsements, Testimonials

The FTC has adopted certain principles and proposed other guidelines to determine when endorsements and testimonials are deceptive:

- Endorsements must reflect the honest views of the endorser; the advertiser may not reword or otherwise distort the endorser's opinion. (proposed)
- Endorsers must be bona fide users of the product or subscribe to the views presented. (proposed)
- Endorsements must show "typical" performance of the product unless otherwise disclosed. (proposed)
- Advertisements which represent endorsements of "actual consumers" must reveal if they are actually professional actors appearing for compensation. (proposed)
- Endorsements concerning the effectiveness of drug products may not be made by lay persons. (proposed)
- Expert endorsements must be by bona fide experts exercising their expertise. (adopted)
- Connections between endorsers and sellers which might materially affect the weight or credibility of endorsement must be fully disclosed. (proposed)

## Deceptive Demonstrations, Pictorial Misrepresentations

Deceptive demonstrations include tests or other demonstrations that purport to, but do not, prove a product feature. The U.S. Supreme Court has held that it is equally deceptive to use a demonstration purporting to represent actual proof of a product feature when it uses an undisclosed mock-up or prop, even if the demonstration would work without the prop. For example, even if a shaving cream softens sandpaper, it is deceptive to demonstrate this fact with an undisclosed mockup that looks more like sandpaper before television cameras than does sandpaper itself.

FTC law holds these and other pictorial misrepresentations to be as illegal as deceptive writing or speech. The Federal Communications Commission goes one step further and prohibits subliminal advertising, regardless of the truth of the subliminal message.

While states may have jurisdiction over these practices, they have not seen fit to regulate this area. In particular, states defer regulation of television advertising to the federal level, to the FTC and FCC.

## Nondisclosure of Full Terms of Transaction

State legislation prohibits only certain limited practices where sellers fail to disclose the full terms of a sales transaction. The Federal Trade Commission, in recent years, has taken a much stronger stand requiring all material facts to be disclosed for certain types of sales.

Proposed and final rules set up detailed disclosure requirements for important facts concerning the sale of gasoline, light bulbs, clothing, amplifiers, air conditioners, food, protein supplements and other products. The Energy Policy and Conservation Act requires dissemination of energy consumption information for all products except automobiles.<sup>3/</sup> Caselaw prescribes other disclosures. Numerous other federal agencies require disclosure of material information in regulated consumer transactions. (See C, Agency-by-Agency Analysis )

These rulings are indicative of a growing trend by the FTC to require sellers to clearly and conspicuously tell buyers what they need to know before making a purchase. Failure to provide such disclosures is unfair or deceptive.

## Unsubstantiated Advertising

In 1972, the FTC recognized unsubstantiated claims as a new category of prohibited advertising practices. Such claims are improper, even if they ultimately prove to be accurate. Advertisers must possess an adequate basis to support such claims at the time they are made.

The FTC has just adopted a procedural rule that precludes the introduction at trial of materials not previously submitted in response to an FTC substantiation request. Companies will thereby be forced to defend their claims with evidence in their possession at the time claims are made.

While the reasonableness of offered substantiation is determined on a case-by-case basis, the criteria considered are:

- The specificity of the claim.
- The nature of the product offered.
- The consequence if the claim is false.
- Consumer reliance on the claim.
- The accessibility of substantiation data.

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3. The Federal Energy Administration is also involved, as it promulgates the standards relevant to FTC enforcement activity. The Department of Commerce has instituted a voluntary energy efficiency labeling program of its own.

## Other Federal Agencies

Other federal agencies do not regulate specific advertising practices nearly as comprehensively as the FTC and, with a few exceptions, only evidence concern in five areas. These are: the nature of the manufacturer or seller; labeling and packaging; safety misrepresentations; nondisclosure of the full terms of the transaction; and various practices having to do with approval, affiliation, and government endorsement, inspection, or grading.

### Misrepresentations, Failure to Disclose Government Inspection, Grade, or Insurance

Enough federal agencies regulate nondisclosure or misrepresentation concerning government inspection, grading, or insurance, to justify the creation of a separate category. Examples of such practices are misrepresentations relating to Department of Agriculture grading and inspection services, and failure to disclose that a bank or credit union is federally insured.<sup>4/</sup>

### **3. Specific Practices--Sales Approaches**

While the FTC comprehensively regulates advertising practices, its regulation of sales approaches is more limited in scope. Individual cases have challenged certain forms of particularly abusive home solicitation sales. The Commission, in addition, has also established a three-day cooling-off period for door-to-door sales by the promulgation of a trade regulation rule that preempts weaker state statutes and serves as a model for much state legislation. The FTC also enforces federal law prohibiting the mailing of unsolicited goods and regulates negative option plans, a potentially fraudulent sales approach not dealt with by the states.

### Negative Option Plans

In negative option plans, consumers are obligated to purchase all offered merchandise unless they refuse the offer in writing in the proper manner, in a timely fashion. Common examples are record and book-of-the-month clubs.

Abuses include enrolling consumers who do not realize how the plan works and setting overly difficult cancellation requirements. Introductory offers may fail to disclose that minimum purchases are required or that an extra charge is made for postage. Introductory items may arrive months after consumers enroll. Sellers may refuse to cancel membership and continue to send merchandise. Some plans even require consumers to accept all purchases and mail back unwanted goods at the buyer's expense.

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4. Among the agencies enforcing such requirements are the Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and National Credit Union Administration.

Other plans give consumers inadequate time to cancel or impose unnecessarily stringent cancellation requirements.

The Commission has adopted a trade regulation rule that prohibits these practices and requires full disclosure of terms relating to the plan. Sellers must also mail a notice of the goods' impending arrival and a form permitting refusal of the selection.

Other federal agencies' regulation of sales approaches is even more limited. The Civil Aeronautics Board and Federal Deposit Insurance Corporation have implemented some interesting rules limiting abuses by commissioned sellers in the industries they regulate. For example, air carriers which dishonor reservations due to overbooking are subject to stronger sanctions than those provided in state laws dealing with deposits. The United States Postal Service prohibits mail solicitations that simulate bills, mail-order sales using fictitious names, and the mailing of unsolicited goods.

#### 4. Specific Practices--Performance Practices

The FTC and other federal agencies prohibit many of the same performance practices proscribed by state legislation. But the only federal counterpart to the state criminal offenses of theft through deception and simulation are statutes dealing with mail fraud and the sale of sound recordings bearing forged or counterfeit labels.

The UCC concept of merchantability is not incorporated as such in federal statutes or regulations, but several agencies regulating particular industries require their products to be of good quality. For example, the Department of Defense prohibits the sale of low-quality goods and services on military bases.

Several regulated industries, such as air carriers, railroads, and household movers, are also subject to performance standards not usually found at the state level, except as to such regulated industries as utilities.

#### Excessive Price

Many regulated industries are subject to maximum rates or changes set by the governing agency. Prohibitions against overcharges are unique to these industries, and, except for the concept of unconscionability, consumer protection laws do not generally proscribe excessive prices. Examples of agencies fixing rates are the Civil Aeronautics Board and Interstate Commerce Commission.

#### Unauthorized Sales

In addition to fixing prices, agencies such as the CAB and ICC also prohibit unauthorized sales. While authorization may be based on a number of factors, one of them is a seller's propensity for fraud.

## 5. Specific Practices--Paper Transactions

Federal regulation of "paper transactions" closely resembles that of the states. Scattered legislation deals with signature by deception and certain future service and adhesion contracts. Special areas of federal concern are credit, debt collection, use of confidential information, and warranties.

The most important pieces of credit legislation are the Truth in Lending Act (mandating full disclosure of credit terms and costs), the Equal Credit Opportunity Act (prohibiting discrimination in the granting of credit), the Fair Credit Billing Act (preventing unfair and inaccurate credit billing practices), and the Consumer Leasing Act (requiring full disclosure of lease and credit options for automobile and other sales).

The Board of Governors of the Federal Reserve System is responsible for interpreting and implementing these Acts through regulations. Enforcement authority is divided among numerous agencies, each charged with regulation of particular industries. All creditors not falling within the jurisdiction of any other agency are subject to FTC enforcement. Unlike state statutes, these federal credit acts do not control credit costs. Only certain narrow federal statutes dealing with specific government-insured loans regulate such costs.

FTC involvement in the credit area is not limited to enforcement of the above Acts. It has also limited the holder-in-due-course doctrine, prohibited sellers' retention of consumer surpluses in revolving charge accounts (credit balances), and has proposed rules limiting certain abusive creditor remedies. The Department of Defense regulates numerous aspects of credit transactions involving military personnel.

The FTC is also an important source of debt collection standards, including improper venue and repossession procedures in addition to other abusive collection practices. Debtor harassment through use of the mails and the telephone is proscribed by the U.S. Postal Service and the Federal Communications Commission respectively. Other federal legislation bars debt collectors from impersonating government officials. Unfair debt collection practices employed against military personnel are monitored by the Department of Defense.

The Fair Credit Reporting Act regulates credit reporting agency use of confidential information about consumers. The intent is to insure that only accurate and proper information about consumers is retained and disseminated. Enforcement is entrusted to agencies regulating particular industries and to the Federal Trade Commission for the remaining sellers.

An important and recent federal initiative in the warranty area, the Magnuson-Moss Warranty Act, requires full disclosure of the nature of the seller's offered written warranty.

As with state legislation, merchants retain the right to provide whatever type of warranty they wish, provided the consumer is accurately apprised as to the scope of such coverage.

## 6. Industry Specific Practices

The FTC has proposed, but not yet adopted, extensive regulations dealing with four of the nine specific industries isolated in the Prohibited State Practices Chart, Table #1--automobile sales, mobile homes, hearing aids, and funerals. Its decision to initiate these proceedings rested on evidence of widespread abuses and the perceived propriety of the FTC, as opposed to state or other federal agencies, to assume primary responsibility for consumer fraud enforcement in these industries. The Commission has also devoted substantial resources to litigation against a fifth industry-specific practice, massive land fraud schemes.

The FTC has deferred to local enforcement authorities the regulation of landlord-tenant and home improvement abuses, and, at least temporarily, to the Department of Health, Education, and Welfare as regards nursing home problems. While federal legislation makes it difficult for the FTC to preempt state insurance regulation, the Commission has initiated an investigation of life insurance sales practices.

Other federal agencies also police consumer abuses in the nine specific industries listed in the state charts, with the exception of landlord-tenant problems. The Veterans Administration is concerned with real estate sales, home improvements, mobile homes, and nursing homes, to the extent that they involve VA benefits. The Department of Transportation, Department of Housing and Urban Development, and Food and Drug Administration have promulgated extensive regulations concerning automobiles, mobile homes, and hearing aids (effective August 1977), respectively. FID also regulates various aspects of interstate land sales and mortgage loan transactions. The Department of Defense protects its personnel from certain deceptive practices relating to insurance sales. Of course these and other federal agencies also regulate business practices of other specific industries, but these nine have been singled out for possessing the dual characteristics of significant consumer impact and potential for abuse.



## 7. Specific Consumers

Major federal initiatives are aimed at protecting three special groups of consumers: children, Indians, and non-English speaking persons. To a lesser extent, some federal protection is afforded such classes of persons as military personnel, the elderly, the disabled, students, and the poor.

### Children

The FTC has long held that children comprise a distinct class of consumers who are in need of special treatment, requiring sellers dealing with children to be held to a particularly stringent standard of conduct. Recent FTC guidelines define children as individuals under 12 years of age.

So far, the FTC has attacked deceptive practices geared to children on a case-by-case basis. But certain standards can be found. The Commission has ruled that even though parents may make purchases, children play a significant role in influencing these purchases. Thus advertising that deceives children is illegal even if parents are not similarly misled. The Commission has also recently accepted a consent agreement finding it inherently unfair to direct to children advertising for children's vitamins since they are unable to judge the merits of such purchases.

The Consumer Product Safety Commission is responsible for enforcing the use of child-resistant containers for ingestible household substances and refrigerator doors which can be opened from the inside, should a child be trapped.

### Indians

The Department of the Interior, finding Indians living on reservations particularly vulnerable consumers, offers them special protections against fraud. Contracts with Indians must be approved by the U.S. Government. In addition, they must be in writing and include a definite date and certain required information. Indian traders must be licensed and are prohibited from charging unfair prices or selling goods of unmerchantable quality.

### Non-English Speaking

An example of federal protections for non-English speaking consumers is the FTC requirement that the consumer notice prescribed by the three-day cooling-off period rule be in the same language, e.g., Spanish, as the one used to make the sale.

## Other Groups

The Department of Defense safeguards the interests of military personnel by regulating private commercial solicitation on military bases and by establishing standards of fairness applicable to extensions of credit to members of the military. The elderly and disabled are afforded some protections by the Department of Health, Education, and Welfare, in conjunction with its health care programs. Similarly, students with loans made possible or insured by HEW, or under VA grants, receive consumer protection from government standards for schools and lenders participating in these programs. Nominal protections for persons of low income include bars against abusive food stamp practices and denials of credit based solely on the fact that a person receives public financial assistance.

### **8. Opportunity Schemes**

The FTC, more than any other federal agency or the states, targets for prosecution fraudulent opportunity schemes. Referral and pyramid sales, lotteries and contests, and various business and employment opportunity schemes are common subjects of FTC Act enforcement. In addition, the Commission has expended as many resources prosecuting vocational schools as virtually any other type of seller over recent years. Extensive rules have been proposed for vocational school and franchise sales abuses. Other agencies interested in consumer protection aspects of vocational schools include the Department of Health, Education, and Welfare and the Veterans Administration.

The Securities and Exchange Commission comprehensively regulates pyramid sales and the sale of securities. The Commodity Futures Trading Commission does the same for commodity transactions and the sale of gold and silver bullion or coins. Various banking agencies, the U.S. Postal Service, and the Federal Communications Commission regulate involvement with lotteries and other games of chance.

## B. FEDERAL ENFORCEMENT STRATEGIES

### Federal Agency Jurisdiction

Federal consumer fraud enforcement is characterized by a crazy quilt pattern of federal regulation. The Federal Trade Commission has primary responsibility, but 27 other agencies have specialized functions in preventing particular forms of consumer fraud.

A number of agencies' fraud responsibilities fill a void left by the Federal Trade Commission's lack of jurisdiction over air carriers, common carriers, banks, and packers. Congress specifically exempted these industries from the FTC Act, fearing that FTC involvement would both duplicate and interfere with existing comprehensive regulatory schemes. Critics claim that these industries have captured their regulators and that their immunity from FTC prosecution just exacerbates the inadequacy of federal control.

Consequently, the Civil Aeronautics Board, Interstate Commerce Commission, and Department of Agriculture are the only agencies regulating air carrier, common carrier, and meat packer abuses, respectively. The Federal Reserve System is the major federal regulator of banks, but the Comptroller of the Currency, Farm Credit Administration, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and National Credit Union Administration also enforce banking laws.

Some 18 other federal agencies share jurisdiction with the Federal Trade Commission in specific consumer fraud areas, so that either agency can legally police fraud within these areas. Agreements usually develop between these specialized agencies and the FTC, specifying which agency will take the lead in prosecuting certain forms of fraud. These other agencies can be categorized by the nature of their fraud functions.

The Department of Justice and local United States Attorneys' Offices prosecute most actions for criminal violations of federal fraud statutes. Other agencies will often investigate cases and refer them to the Department of Justice if criminal prosecution or civil enforcement seems appropriate. The Department has little expertise in consumer fraud but extensive experience bringing criminal and civil cases.

The fraud functions of the United States Postal Service and Federal Communications Commission develop from their regulation of communication channels. The FCC has jurisdiction for fraud dissemination through use of the telephone, radio, television, and wires. The FTC also has jurisdiction to curtail fraud over these instrumentalities, and extensively monitors television advertising. The FCC, despite the special leverage the threat of license termination gives it over broadcasters,

does little in the area and defers mostly to the FTC. The USPS, on the other hand, actively pursues fraud schemes using the mails, and there is little way of predicting whether the USPS or the FTC will eventually handle any particular matter.

Other federal agencies' fraud involvement stems from their provision of services to special sectors of the public. For example, the Veterans Administration subsidizes veterans' purchases of homes, mobile homes, home improvements, and education. The VA therefore acquires jurisdiction to insure that government money spent on these sales is not wasted on worthless or deceptively sold items. The Department of Housing and Urban Development regulates certain housing and mobile home sales whose purchase involves government subsidies. The Department of Defense closely controls activities on military bases, and the Department of Health, Education, and Welfare monitors fraud in such programs as federally insured loans for students attending vocational schools. The Civil Service Commission fosters special protections for its client group, government employees; the Department of the Interior does the same for American Indians.

None of the agencies serving special sectors of the public devote significant resources to prohibiting consumer fraud, and the FTC has turned its attention to serious abuses in areas purportedly regulated by these agencies. While HEW, the VA, and other such agencies are in a unique position to prevent abuses through their control of the purse strings used in consumer purchases, their efforts are usually geared to encouraging the spending of such funds, not to determining if the money is being wasted.

The Food and Drug Administration, Department of Agriculture, and Consumer Product Safety Commission enter the consumer fraud area through their product quality and safety functions. Much of the potential overlap between FTC and FDA regulation of drug sale practices has been resolved by the FDA handling sales practices aimed at doctors, and the FTC advertising geared to consumers. In addition, the FDA regulates product labels and the FTC product advertising. For example, the FDA determines what should be on the label of an over-the-counter drug. The FTC decides how much of that label information must be included in advertising the drug. Other jurisdictional overlaps have been handled less clearly. For example, both the FDA and FTC are conducting simultaneous rulemaking proceedings concerning hearing aid abuses.

FTC and CPSC enforcement efforts have similar potential for duplication. The FTC, before the creation of the CPSC, was the primary federal agency enforcing safety standards for consumer products. The FTC now refers many product safety matters to the CPSC, but retains others. For example, the FTC is presently conducting a rulemaking proceeding concerning flammable plastics.

A number of other agencies enter the consumer fraud arena through regulation of certain products. The Department of Transportation's involvement with motor vehicles includes not only safety but odometer rollbacks and other sales abuses as well. Simultaneously, the FTC is proceeding with a rule concerning used car sales abuses. Regulation of alcohol and tobacco by the Department of the Treasury, trademarks and voluntary packaging and energy labeling standards by the Department of Commerce, and involvement by the Federal Energy Administration in energy labeling, all track similar FTC enforcement efforts.

The Securities and Exchange Commission and the Commodity Futures Trading Commission police investment markets, not consumer transactions. But the FTC's definition of its consumer protection jurisdiction has always included a significant involvement in fraudulent opportunity schemes. Thus, while SEC and CFTC regulations are generally limited to the trading of securities and commodity futures, respectively, enforcement of related abuses naturally coincides with fraudulent sales of franchises and business opportunities regulated by the FTC. In addition, both the FTC and SEC regulate pyramid schemes.

In summary, federal regulation of consumer fraud exhibits a complex and overlapping patchwork of numerous agency enforcement efforts. The FTC has primary responsibility; some agencies have exclusive jurisdiction over industries they regulate; most other agencies have concurrent jurisdiction with the FTC for enforcing frauds involving their special areas of concern. Sometimes the FTC and other agencies will reach agreements as to their respective jurisdictions; other times their actions may be essentially duplicative.

The present system has obvious inefficiencies. There simultaneously exists the danger that a given practice will not be regulated by any agency, but fall between the cracks in the system. The FTC may defer to the specialized expertise of an agency, but that agency, not having a consumer protection tradition, may inadequately perform its enforcement responsibility. On the other hand, the present system allows the federal government the flexibility of having either the FTC police a practice, using its consumer fraud prosecution expertise, or having a specialized agency handle the problem, drawing on its narrower expertise regulating a particular industry or subsidizing particular consumer purchases.

## Agency Remedies

With the exception of the FTC, most federal agencies' consumer fraud remedies are limited in scope, flexibility, and effectiveness. The most common administrative remedies are revocation or suspension of licenses, permission to do business, government approval, and participation in federally funded programs. As with state license revocations, these remedies are rarely invoked for consumer fraud abuses and their deterrent impact is therefore minimized.

Agencies are also commonly empowered to enter cease and desist orders or orders compelling compliance. In rare cases, a few agencies are authorized to impose fines or order restitution administratively. Dangerous or improperly labeled or packaged goods may be denied entry into the United States and sometimes destroyed. Notice and an opportunity to be heard must be provided to suspected offenders prior to most agency actions.

Federal agencies may also seek, usually through referral to the Department of Justice, various civil remedies, including injunctions against illegal activities, seizure and condemnation of dangerous or deceptively labeled products, enforcement of administrative decisions, and monetary fines.

The Department of Justice may also seek criminal fines, prison terms, or both, for certain fraudulent practices, through prosecution by the U.S. Attorney General or a U.S. Attorney. Maximum sentences are usually one to three years, although they range from 90 days to 20 years.<sup>5/</sup> Criminal fines range from \$100 to \$50,000, but are most commonly \$1,000 to \$5,000. Criminal prosecution does not preclude civil or administrative actions for the same law violation.

Statutes providing individual consumers with private remedies are the exception, not the rule. Existing private remedies permit injunctions and the recovery of actual, and in some cases statutory or punitive, damages. Some statutes permit private parties to judicially enforce administrative orders where such parties are the orders' beneficiaries. Attorney's fees to successful plaintiffs are often authorized. In some instances, those instituting private actions risk being ordered to pay the defendant's attorney's fees.

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5. Under federal law, crimes are classified according to the severity of the sentence which may be imposed upon conviction. Accordingly, crimes subject to imprisonment for more than one year are denoted felonies, while lesser terms apply to misdemeanors. Offenses subject to prison terms of six months or less or fines under \$500 are classified as "petty offenses."

An example of a particularly strong private right of action is the federal statute prohibiting odometer rollbacks, which provides for treble damage awards or \$1,500, whichever is greater, plus costs and attorney's fees.<sup>6/</sup> The Truth in Lending Act and other credit statutes also provide strong private rights of action. The patent laws provide an unusual private action, allowing any individual to sue for \$500 an offense for patent misrepresentations. Half the award goes to the private plaintiff, while the remainder is payable to the federal treasury.

Other private remedies may be available even if not explicitly authorized by statute. The Securities and Exchange Act is an example of a statute for which the U.S. Supreme Court has found a private right of action to be implied even though the statute on its face only allows agency enforcement of newly legislated rights and obligations.

In spite of all the foregoing, the predominant pattern remains one in which Congress and federal agencies extensively regulate consumer fraud and then refuse to allow aggrieved consumers to enforce these rights individually. For example, the Department of Defense's extensive regulation of credit includes no individual means of redress for military personnel.

Finally, isolated statutory provisions create "remedies" which do not fit into any of the preceding categories. Certain transactions are voidable where laws have been violated, such as for failure to provide a property report in interstate land sales or a notice summarizing the consumer's right to cancel door-to-door sales within three days. Certain contract provisions waiving legal rights can be declared void and without effect.

#### FTC Remedies

The FTC's broad mandate to prohibit unfair and deceptive acts gives it the prime consumer fraud enforcement responsibility at the federal level. The Commission has also been delegated the most flexible and intricate set of remedies to carry out that function. Different remedies are available in three situations: when seller acts deceptively, but without fraudulent intent or notice of the practice's illegality; when a seller dishonestly or fraudulently misleads the buyer; and when a seller has notice of the illegality of his actions.

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6. This legislation also permits the chief state law enforcement officer to sue to enjoin violations or for the amounts to which individuals are entitled, a unique federal consumer fraud remedy.

If the seller acts without notice of the practice's illegality and without dishonesty or fraud, the Commission can only bring an action before an FTC administrative hearing officer to obtain a cease and desist order. The hearing officer considers the evidence in an adjudicatory proceeding and determines if the seller has acted unfairly or deceptively.

Applicable Commission-adopted guidelines will influence his legal judgements. (See the Prohibited Federal Practices Chart, Table #5, for a listing of important guides.) These guides set forth Commission interpretations, often general and vague, of what actions are unfair or deceptive. They are not binding and the respondent company can challenge the guides or their applicability to its actions.

If the respondent's actions are adjudged to violate the FTC Act's standards, the hearing officer will issue a cease and desist order. The ruling and the accompanying order can be appealed to the Commission, to a United States Court of Appeals, and finally to the U.S. Supreme Court. Orders are not final and binding on a respondent until all levels of appeal are exhausted or the time within which the next appeal may be lodged has expired.

This delay in the effective date of orders can lead to FTC action being totally futile. For example, if a merchant is willing to bear the litigation expenses, he can run a fraudulent advertising campaign for five years or more while the case is being litigated and appealed. If he loses the final decision, the only result is that he is then ordered not to continue using by this time completely obsolete advertising.

Because of the potential for this abuse of Commission procedures, Congress in 1973 gave the FTC authority to go to court to seek preliminary injunctions against unfair or deceptive practices. Then, during the pendency of the case, the respondent is enjoined from continuing such practices. The slowness of Commission procedures then has an opposite effect on the parties involved, as the injunction remains in force pending the final decision. But the Commission, in the three years following its new injunctive powers, has used them very sparingly, not wishing to give federal courts the opportunity to interpret, as a matter of first impression, whether practices are unfair or deceptive. The Commission prefers to create its own standards, subject only to judicial review as to the reasonableness of its final determinations.

Cease and desist orders may work fairly well with well-intentioned businessmen who do not realize the illegality of their actions. They will usually enter into consent agreements promising not to engage in the same practices again, thus avoiding long and costly adjudicative proceedings.



Subsequent violations of consent agreements or final orders can be enforced in civil actions with penalties of \$10,000 per violation. While a cease and desist order may deter the respondent and honest businessmen from repeating the practice the order prohibits, it cannot deter other fraudulent sellers or compensate injured consumers.

In 1975, Congress again amended the FTC Act, giving the Commission stronger enforcement remedies. If the seller acts dishonestly or fraudulently, the FTC, after issuing a final order finding such practice unfair or deceptive, may seek consumer redress in a federal court. Consumer redress can include rescission or reformation of contracts, refund of money or return of property, and payment of damages to injured consumers. No exemplary or punitive damages are allowed.

While this new remedy acts to compensate consumers injured by dishonest or fraudulent practices, it does not act as a deterrent, since only actual losses must be returned. Also, the Commission takes action only against a small number of sellers and then is willing to settle for partial repayment, further limiting the deterrent effect.

The FTC Improvement Act also allows the Commission to seek consumer redress if sellers violate the Commission trade regulation rules and thus should have been on notice that their actions were illegal. Rules define with specificity what acts are unfair or deceptive and also set forth certain requirements necessary to prevent such unfair or deceptive practices.

Old rules are still effective, but new proposed rules must be promulgated pursuant to lengthy and complex procedures. This complexity is demonstrated by the fact that in the two years since the FTC Improvement Act's passage, no new trade regulation rules have been adopted, although about a dozen have been proposed. Once the Commission adopts a rule and court review is exhausted, they become binding and cannot be challenged by respondents. The only issue at trial is whether the rule has been violated, not whether the rule itself is proper.

Allowing consumer redress for rule violations permits the Commission to compensate consumers without having to prove that a practice is dishonest or fraudulent, a tougher standard than the FTC Act's standard of unfairness or deception. Nevertheless, consumer reimbursement, even if easier to obtain, is not an effective deterrent to other sellers.

The FTC Improvement Act does provide a deterrent for sellers who are on notice that certain practices are illegal. The Commission can seek civil penalties of \$10,000 per violation in federal court for initial violations of the FTC Act. Adequate notice is shown if a Commission rule is violated or if the seller's practice has been prohibited by previous Commission decisions and the seller had knowledge of those decisions.

While the FTC Improvement Act provides for consumer compensation and civil penalties in actions brought by the Commission, no federal statute provides a private right of action under the FTC Act. With a few cases to the contrary, the prevailing judicial opinion is that a private right of action cannot be implied as it has been with federal securities legislation. Consequently, unlike most state UDAP statutes and several federal fraud acts, the FTC Act can only be enforced by the Commission and not by aggrieved consumers.

Even with the recent strengthening of FTC enforcement powers, the FTC cannot be viewed as a viable enforcement agency. It lacks credibility in handling individual consumer complaints and has never seriously sought the resources necessary to make it a credible nationwide enforcement agency. The FTC's role seems to have become that of a lawgiver with only a minor devotion to law enforcement. The growth of local and state consumer protection agencies is likely to foreclose expansion of FTC law enforcement resources.

### C. AGENCY-BY-AGENCY ANALYSIS

This section summarizes federal consumer fraud law through an agency-by-agency analysis which illustrates not only the scope of such law but also the degree to which duplicative, conflicting, and symbiotic regulatory relationships are found among agencies in some areas.<sup>7/</sup> It also includes a description of the few relevant federal statutes which do not substantively relate to any of the 28 agencies.<sup>8/</sup>

The 28 agencies are alphabetically arranged; the name of each agency is followed by a date which represents either the date on which it was created or commenced operations. Most are either cabinet level departments or independent agencies; some are actually components of other agencies. Thirteen other important agencies were examined but found to fall outside the scope of this survey.<sup>9/</sup>

The federal law included may be considered to address any deceptive act or practice likely to adversely affect consumers in the transactions through which they procure products, services, and credit. The law relates to both economic harm and physical injury, on the theory that the consumer's ability to select the safest purchase may also be thwarted by the employment of deceptive practices, leading to "damage." Therefore, safety labeling and packaging requirements fall within the scope of this undertaking.<sup>10/</sup> The described law is found primarily in the United States Code and the Code of Federal Regulations.

The summaries which follow emphasize the nature of prohibited practices as well as the types of remedies available in appropriate situations. The latter are primarily administrative, civil, criminal,<sup>11/</sup> and private in nature.<sup>12/</sup>

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7. See B, Federal Enforcement Strategies, as it relates to federal agency jurisdiction. The temptation to sort agencies into seemingly appropriate clusters, such as those concerned primarily with transportation services, credit, or food products, was resisted as a gross oversimplification of a jurisdictionally complex area of the law.

8. These are described under 29, Other Prohibited Practices.

9. The 13 agencies are briefly described in Appendix A.

10. Examples of agencies involved with such matters are the Consumer Product Safety Commission, Food and Drug Administration, and Department of Transportation.

11. Unless otherwise stated, all criminal penalties alluded to include possible fines and imprisonment, occasionally more severe for subsequent offenses or those involving intent to defraud.

12. All such remedies are generally discussed in B, Federal Enforcement Strategies.

## AGENCY ANALYSIS

1. Department of Agriculture
2. Civil Aeronautics Board
3. Civil Service Commission
4. Department of Commerce
5. Commodity Futures Trading Commission
6. Comptroller of the Currency
7. Consumer Product Safety Commission
8. Department of Defense
9. Farm Credit Administration
10. Federal Communications Commission
11. Federal Deposit Insurance Corporation
12. Federal Energy Administration
13. Federal Home Loan Bank Board
14. Federal Maritime Commission
15. Federal Reserve System
16. Federal Trade Commission
17. Food and Drug Administration
18. Department of Health, Education, and Welfare
19. Department of Housing and Urban Development
20. Department of the Interior
21. Interstate Commerce Commission
22. Department of Justice
23. National Credit Union Administration
24. Securities and Exchange Commission
25. Department of Transportation
26. Department of the Treasury
27. United States Postal Service
28. Veterans Administration
29. Other Prohibited Practices

## 1. DEPARTMENT OF AGRICULTURE (1862)

The Department of Agriculture (USDA) is a highly decentralized cabinet level department that performs a wide variety of functions. The USDA's Agricultural Marketing Service grades, inspects, and certifies agricultural products to insure quality in the nation's food supply. The USDA also provides technological and other aid to farmers, conserves forest and land resources, facilitates the obtaining of rural credit, and fosters rural development.

The USDA administers a number of different statutes dealing with specific product areas, including meat, poultry, eggs, grain, tobacco, and seeds. These acts commonly regulate labeling, advertising, and marketing of covered products, providing various remedies for violations. Misrepresentation concerning any of the USDA's grading services carries a criminal penalty.

Statutes covering meat, poultry, eggs, and their products prohibit adulteration and false packaging and labeling. Included are such specific labeling practices as dietary misrepresentations, improper imitation of other products, failure to conspicuously disclose certain label information, and deceptive or unauthorized use of USDA stamps and labels. In case of violations, the USDA can administratively withhold its inspection services or detain products pending civil condemnation proceedings, seek in civil court to enjoin violations or seize and condemn the products in question, or request the Department of Justice to criminally prosecute.

Other statutes deal with fresh and frozen fruits and vegetables and prohibit unfair or deceptive acts and practices, including false labeling and representations. Remedies available are quite different from those for similar violations concerning USDA's statutes covering meat, poultry, and egg products, and include license revocation or suspension and restitution. Injured parties may sue privately to enforce unpaid restitution orders entered in their favor.

The USDA also enforces various statutes proscribing false or deceptive practices concerning the inspection and grading of tobacco and the sale of turpentine and resin spirits. Only criminal sanctions are provided for enforcement of these laws.

The USDA's Food and Nutrition Service administers various food assistance programs targeted at alleviating hunger and malnutrition by providing food stamps and donating food to those in need. USDA regulations prohibit retail food sellers from utilizing schemes intended to prevent individuals from using their food stamps at competitors' stores.

Finally, the USDA enforces compliance by packers with the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts, with all administrative powers usually exercised by the USDA.

## 2. CIVIL AERONAUTICS BOARD (1938)

The Civil Aeronautics Board (CAB) is an independent regulatory agency responsible for promoting and regulating the economic activities of all U.S. airlines providing domestic and international service, and foreign airlines, to the extent they operate within the United States.<sup>13/</sup> Intrastate carriers and air taxis are exempt from most CAB regulation.

The CAB licenses air carriers, approves all fares, and provides for competition among carriers. It also proscribes airlines' unfair or deceptive practices in scheduling, advertising, passenger booking, and consumer complaint handling. These prohibited practices include misrepresentations of affiliation with other air carriers, deceptive advertising concerning on-time performance claims, and property liability disclaimers. The CAB regulates air carriers' oral confirmation of space on scheduled flights and sets out a system for compensating passengers who are denied boarding because of airline overbooking.<sup>14/</sup>

Other CAB regulations prohibit various practices by charter air carriers or chartering organizations, including:

- Misrepresentations suggesting charter airlines are scheduled carriers;
- Failure to insure passengers against injury, death, or property loss;
- Solicitation of individuals for charter flights, unless an agreement has been signed with a sponsoring organization;
- Failure to deposit advance payments received into an escrow account;
- Payment of excessive commissions to agents, or any commission if the agent is paid by the charterer for performing the same service;

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13. Safety and operational aspects of air transport services are the province of the Federal Aviation Administration, a subdivision of the Department of Transportation.

14. Passengers holding confirmed reservations denied boarding because a flight has been oversold receive compensation equal to 100% of the ticket value, from a minimum of \$25 to a maximum of \$200. The passenger may still use the original ticket or submit it for a refund. No compensation is payable if the carrier arranges alternate transportation which gets the passenger to his destination within two hours (four in the case of international travel) of the original arrival time, provided the passenger is willing to accept such alternate transportation. The airlines must provide a written explanation of a passenger's rights at the time boarding is denied.

- Failure to provide alternate transportation or an immediate refund for undue delay not due to weather, or incidental expenses or meals and lodging in certain cases.
- Overcharging or falsely designating part of a charge as charitable in nature,
- Failure to equally prorate costs among all passengers; and
- Failure to disclose in contracts that prices may increase if the aircraft is not filled or to separately disclose each component of the total cost.

The CAB also regulates certain ticket agent activities. Agents may not charge rates that exceed those filed with the CAB, offer transportation at reduced rates, or offer rebates. A ticket agent may not sell space on a flight without the air carrier's assurance that it will be honored. In the event a flight cannot be made, the agent must provide a prompt refund and may not force the purchaser to buy more expensive transportation. The CAB also prohibits agents from making misrepresentations concerning fares, insurance, routes, scheduling, baggage handling, and claims for loss.

Administrative sanctions available to the CAB for most of the described violations include cease and desist orders, orders compelling compliance, and revocation or suspension of licenses. Civil proceedings may be instituted to enforce administrative orders or to seek a penalty of up to \$1,000 per violation. Criminal fines are authorized where ticket agents offer air transportation at reduced rates or with rebates.

The CAB also enforces, with all its usual administrative powers, air carriers' compliance with the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts.

### 3. CIVIL SERVICE COMMISSION (1883)

The Civil Service Commission (CSC), as the "central personnel agency" of the Executive Branch of the U.S. Government, is involved with the recruitment, examination, training, appointment, and promotion of individuals to government positions. The CSC also manages employee benefits which affect millions of federal workers. It regulates federal health benefit plans by threatening the withdrawal of CSC approval for plans illegally providing health insurance, charging improper fees, imposing waiting periods, or denying payment for covered benefits.

The CSC also solicits consumer complaints concerning "civil service" correspondence schools which offer courses purporting to prepare buyers to pass civil service examinations. But, the CSC

lacks legal authority to impose any sanctions for deceptive sales of "civil service" courses and must refer such matters to other agencies.

#### 4. DEPARTMENT OF COMMERCE (1913)

The Department of Commerce (USDC) is a cabinet level department that fosters, promotes, and develops the domestic and foreign commerce of the United States, as well as the nation's general economic development and technological advancement. These functions involve the USDC in a number of consumer-related activities, including the promulgation of product standards, inspection and grading of products, and monitoring of certain commercial practices.<sup>15/</sup>

The USDC can request manufacturers, packers, and distributors to voluntarily participate in the development of and comply with packaging and labeling standards. Upon failure of such voluntary action for one year, the USDC may request Congress for enforcement authority. Other voluntary programs involve energy efficiency labeling<sup>16/</sup> and inspection, quality, quantity, and packaging of seafood products.

The USDC also administers statutes governing labeling and deceptive representations concerning the quality or degree of fineness of gold and silver products.<sup>17/</sup> False representations of U.S. Government quality certification may result in administrative seizure and forfeiture and unusually severe criminal penalties. Lesser criminal fines and prison terms are provided for use of other deceptive representations. Those purchasing falsely marked or labeled gold or silver products (including subsequent purchasers) may sue privately to enjoin further violations and recover the attorney's fees incurred.<sup>18/</sup>

Barrels containing fruits and vegetables must meet minimum size requirements prescribed by the USDC. The severity of penalties for violations varies with the type of produce involved,

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15. The National Bureau of Standards is focal to the USDC's consumer protection function, establishing specifications for weights and standards and performance criteria for many consumer products. The Bureau also performs all labeling and packaging functions of the USDC, thus assisting consumers in making meaningful value comparisons between products.

16. Reference should also be made to the Federal Energy Administration and Federal Trade Commission, which are both involved with mandatory energy efficiency labeling.

17. Similar matters are also the subject of regulations issued and enforced by the Federal Trade Commission.

18. However, a successful defendant may also recover attorney's fees from the customer or subsequent purchaser filing such an action.



not by the seriousness of the fraudulent practice. Packing or selling apples in undersized barrels is subject to a civil penalty of \$1.00 for each such barrel offered or sold. Identical offenses involving lime barrels may result in a flat criminal fine of \$100, while a \$500 criminal fine and up to six months in prison might be imposed for the use of deceptive barrels containing other fruits or vegetables.

The Patent and Trademark Office (PTO) of the USDC administers federal trademark and patent laws and regulations, which, in addition to protecting the interests of holders of patents and trademarks, protect consumers from confusion and possible deception in product brand identification. Persons injured by trademarks which are fraudulently procured may sue privately for consequential damages. Any individual can also seek civil penalties of \$500 per offense for misrepresentations that an item is patented, the subject of a pending patent application, or made or sold under the patent of another. Plaintiffs in such actions retain one-half the amount awarded; the balance goes to the United States. Criminal fines are provided for individuals who falsely represent their qualifications to assist inventors and others in the preparation of and application for patents before the PTO. The USDC also proscribes imported goods from bearing marks falsely suggesting they were manufactured in the United States or other false places of origin.<sup>19/</sup>

Finally, the USDC assisted in the creation of the National Business Council for Consumer Affairs, which has identified seven "problem areas" leading to consumer dissatisfaction with business and promulgated voluntary guidelines.

##### 5. COMMODITY FUTURES TRADING COMMISSION (1975)

The Commodity Futures Trading Commission (CFTC) is the newest independent regulatory agency in the Executive Branch. The CFTC possesses the same authority over commodity futures<sup>20/</sup> markets that the Securities and Exchange Commission has over stocks and other securities.

The CFTC protects commodity market users from fraud and abusive practices including price manipulation and the dissemination of misleading information affecting commodity prices. The

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19. A discussion of the remedies available for such violations is included under the Department of the Treasury.

20. Commodity futures traders speculate concerning future prices of such commodities as sugar, coffee, soybeans, and gold. For example, an investor can purchase a contract for delivery at some future date of a specified quantity of a particular commodity. If the market price for that commodity at that later date is higher than the contract price, the investor makes a profit.

CFTC Act proscribes use of the mails or other instrumentalities of interstate commerce to abet fraudulent commodity transactions or to misrepresent CFTC approval of specific commodity options or the accuracy of required disclosure statements.

The CFTC safeguards investors by registering exchanges, brokers, and agents and requiring lengthy disclosures prior to all commodity transactions. Those disclosures must explain that the investor may sustain a total loss, how commodity prices are determined if options are exercised, and the extent to which commodity prices must change for the investor to realize a profit after all fees and costs are deducted. The disclosure statement must also list all of these fees and costs and explain how they are computed. Agents and brokers must mail customers written confirmation of commodity transactions within 24 hours, and segregate and separately account for customers' funds, securities, and property.

Available CFTC remedies for violations include refusal to register exchanges, brokers, and agents, and the administrative award of reparations to their customers. Civil injunctions and criminal prosecutions are also authorized.

#### 6. COMPTROLLER OF THE CURRENCY (1863)

The Office of the Comptroller of the Currency (CC) is a bureau of the Department of the Treasury (other offices are described under the Department of the Treasury). The CC charters and supervises the approximately 5,000 national banks and commercial banks in the District of Columbia. The CC audits and examines these banks periodically to assure sound management and solvency and executes all laws relating to the issuance and regulation of currency.

Banks subject to CC regulation may not charge interest rates exceeding those permitted by the law of the state where they are located, certify checks not covered by deposits, or advertise or sell lottery tickets. Where extensions of credit are to be secured by real estate or mobile homes situated in designated flood hazard areas, these banks must first disclose such hazard in writing to the prospective borrower.

Sanctions for violations include cease and desist orders, civil forfeiture of banks' franchises, and personal liability of bank directors for consequential damages. Excessive interest rates are deemed forfeited and debtors may sue privately to recover twice the interest paid. Improperly certified checks are valid obligations against the certifying banks.

The CC also enforces regulated banks' compliance with the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts with all its administrative powers.

## 7. CONSUMER PRODUCT SAFETY COMMISSION (1973)

The Consumer Product Safety Commission (CPSC) is an independent regulatory agency charged with substantially reducing injuries associated with consumer products. Congress has directed the CPSC to:

- Protect the public from unreasonable risks of injury associated with consumer products;
- Assist consumers in evaluating products' comparative safety;
- Develop uniform safety standards and minimize conflicting state and local regulations; and
- Promote relevant research and investigation into causes and prevention of product-related deaths, illnesses, and injuries.

The CPSC bars particularly hazardous products from the marketplace and enforces mandatory safety standards governing less hazardous consumer products, including safety-related packaging and labeling requirements. In all, the CPSC regulates more than 10,000 consumer products. The CPSC has no jurisdiction over foods, drugs, tobacco, and motor vehicles, products regulated by other agencies.

The Consumer Product Safety Act bans the manufacture, import, or sale of certain consumer products and requires that others conform with applicable safety standards. Sellers must use prescribed safety labels and certify in writing that products conform to applicable safety standards. The CPSC and the U.S. Attorney General can enforce the Act by bringing civil actions to enjoin violative conduct, seize and condemn unsafe products, and fine offending sellers \$2,000 per violation or as much as \$500,000 for a series of related transactions. Criminal sanctions are fines up to \$50,000 and imprisonment up to one year. Injured individuals may sue for damages and attorney's fees. Any person may sue to enforce a safety rule, and receive attorney's fees.

The CPSC also administers the Flammable Fabrics Act, which prohibits the manufacture, import, or sale of fabric not conforming to flammability safety standards or fabric misrepresenting conformity to such standards. In contrast to the Consumer Product Safety Act, available remedies are identical to those applicable to violations of the FTC Act. (See Federal Trade Commission) In addition, violative products may be seized and condemned and criminal fines of \$5,000 and sentences up to one year can be levied. No private rights of action are created.

The Poison Prevention Packaging and Federal Hazardous Substances Acts, also administered by the CPSC, proscribe:

- Introduction of misbranded or banned hazardous substances into interstate commerce;

- False guarantees that hazardous substances are not misbranded or banned;
- Failure to prominently label containers with required statements and safety information;
- Alteration or destruction of required labels or deceptive disclaimers of label statements;
- Use of containers which falsely appear to be intended for foods, drugs, or cosmetics; and
- Failure to use child-resistant containers or prescribed warning statements for ingestible household substances.

Violations under both acts are subject only to civil injunctions or seizure and condemnation and nominal criminal penalties.

Finally, the Refrigerator Safety Act prohibits the entry into interstate commerce of refrigerators not equipped with devices enabling the door to be opened from the inside.

#### 8. DEPARTMENT OF DEFENSE (1949)

The Department of Defense (DOD) was established as a cabinet level department to preserve and protect the national security of the United States. Some 2 million active duty and 2-1/2 million reserve personnel serve in the DOD's four major components, the Army, Navy, Marine Corps, and Air Force. The DOD is not a regulatory agency, but it polices consumer transactions involving military personnel by regulating private commercial solicitation on military installations and establishing minimum standards of fairness applicable to loans and credit sales.

Merchants soliciting on military bases must be licensed under applicable local laws, not employ any manipulative, deceptive, or fraudulent devices or schemes, refrain from unfair or deceptive purchase inducements, not misrepresent DOD sponsorship or endorsement, nor sell low quality goods or services. Insurance agents may solicit by appointment only; policies issued must be fair and comply with applicable insurance laws. Violations of DOD solicitation directives may lead to suspension, denial, or revocation of permission to solicit business on military bases and to the reporting of offending merchants to local law enforcement authorities.

The DOD also regulates credit transactions involving members of the military, but its only sanction for creditor misconduct is that the debtor's commanding officer will not "process" the creditor's debt claim. "Processing" debts can involve significant

pressure on the military debtor to pay, and is a useful collection device for creditors.21/

But commanding officers will only "process" debt claims if a creditor files a "Certificate of Compliance" with appropriate federal and state credit laws and the DOD's "Standards of Fairness," and the accuracy of that certificate is not challenged.

Among the practices prohibited by the DOD's "Standards of Fairness" are the following:

- Imposition of excessive finance charges, late fees, penalties for early repayment, and attorney's fees recoverable on default;
- Use of balloon payment plans and devices which cut off consumer defenses against assignees;
- Failure to provide debtors with copies of credit insurance policies purchased within 30 days;
- Failure to fully comply with the Truth in Lending Act;
- Failure, upon the consumer's request at any time prior to actual delivery, to cancel most contracts without charge;
- Failure to follow prescribed repossession procedures concerning such matters as advance notice, right of redemption, and public sale;
- Communications with the Armed Forces concerning members' indebtednesses that do not comply with local law relating to employer contacts in comparable situations; and
- Making false or overstated claims against military personnel.

## 9. FARM CREDIT ADMINISTRATION

The Farm Credit Administration (FCA), a small independent regulatory agency, charters, examines, and coordinates member banks and associations of the cooperative Farm Credit System. The System provides low-cost credit to farmers and their cooperatives, and facilitates rural home purchases. The Farm Credit System uses Federal Land Banks, which make long-term loans on farm or rural real estate; Federal Intermediate Credit Banks, which provide short and intermediate term loans to institutions financing farmers, ranchers, and rural homeowners; and Banks for Cooperatives, which make loans directly to agricultural cooperatives.

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21. Penalties for the nonpayment of "just" debts by military personnel can be quite severe, including such disciplinary action as discharge from the service and the freezing of promotions.

The FCA may administratively revoke or modify charters of member organizations for various consumer fraud practices, including charging interest in excess of FCA-approved rates, making guarantees concerning federal tax exemptions, and failing to promptly notify individuals of adverse actions taken on loan applications. The FCA enforces member institutions' compliance with the Truth in Lending and Equal Credit Opportunity Acts with all of its usual remedial powers. In addition, deceptive use of the words "Federal Intermediate Credit Bank" as part of a business name may result in criminal penalties or civil injunctions.

#### 10. FEDERAL COMMUNICATIONS COMMISSION (1934)

The Federal Communications Commission (FCC) is an independent agency regulating three major categories of interstate and foreign communications:

- Broadcast services, including radio and television;
- Nonbroadcast radio services, including citizen band radios; and
- Common carrier services, including the telephone and telegraph.

The FCC extensively regulates broadcast services, assigning band frequencies, power, hours of operation, and call letters, licensing stations and operators, and overseeing the technical aspects of broadcasting.<sup>22/</sup>

Some of the FCC's broadcast regulation impacts on consumer fraud. The FCC prohibits the use of radio or television to obtain money or property by means of false or fraudulent representations, to advertise deceptively or through the use of subliminal techniques, to conduct deceptive or "rigged" contests, or to advertise lotteries or gift enterprise schemes. These practices may lead to cease and desist orders and the suspension or revocation of broadcast licenses. Continued violations, after receipt of "written notice of apparent liability" from the FCC, can draw civil fines of \$1,000 for each day the violation occurs, up to \$10,000 a year, and criminal penalties. Many of the described practices are also subject to injunctions upon suit by the U.S. Attorney General at the FCC's request. Affected individuals may privately enforce certain FCC administrative orders, and in certain instances sue for damages and attorney's fees. Advertisers of cigarettes or little cigars are subject only to civil injunctions and criminal fines.

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22. The FCC does not license cable television systems, which occurs at the local level, but does regulate such systems once they become operational. The FCC does not regulate closed circuit television.

Special requirements apply to cable and subscription television broadcasts. Cable systems must disclose whether broadcast matter has been paid for by a third party. Subscription television stations may not broadcast any commercial advertising. Both practices may result in cease and desist orders, civil fines in the amounts applicable to regular broadcast violations, injunctions, and criminal fines.

Telephone and telegraph companies must furnish their services upon request fairly and at reasonable rates. The FCC also proscribes use of the telephone or telegraph to make false or fraudulent representations, harass, or threaten persons called (e.g., debt collectors' harassing telephone calls). To remedy these practices, the FCC can issue cease and desist orders and individuals may request the FCC or a court to award damages and attorney's fees. Private parties may also sue to enforce FCC orders in their favor. The U.S. Attorney General may bring injunctive actions, sue for civil fines of \$500 per offense, plus \$25 for each day the offense continues, and for criminal penalties. The latter are particularly severe where telephone or telegraph service is used to transmit threats to injure the person, property, or reputation of any person. Telephone companies themselves are required to police and possibly discontinue service to customers who use the telephone to defraud or harass others.

The FCC also regulates CB radios, requiring all units sold to be capable of receiving the full range of available frequencies and to satisfy other technical requirements. Sellers of CB radios must furnish all buyers with copies of the FCC's rules governing such units. Violators are subject to cease and desist orders, civil compliance actions, criminal penalties, and private actions by damaged individuals to enforce FCC orders.

#### 11. FEDERAL DEPOSIT INSURANCE CORPORATION (1933)

Organized in the wake of the Great Depression, the Federal Deposit Insurance Corporation (FDIC) is an independent regulatory agency established to restore public confidence in the nation's banks and to prevent large scale depositor losses. The FDIC provides federal bank deposit insurance coverage, up to a limit of \$40,000 per depositor, for national banks, state bank members of the Federal Reserve System, and state banks applying for such insurance and meeting specified qualifications. The FDIC also assists financially troubled banks and facilitates bank mergers which will reduce risks of financial failure.

The FDIC regulates various business practices of FDIC-insured banks not subject to regulation by the Federal Reserve System. These banks must display the official FDIC membership insignia and disclose FDIC membership whenever advertising interest rates. They are also barred from deceptive advertising concerning interest rates and any advertising or sale of lottery tickets. Sanctions include administrative cease and desist orders, termination of insured status, forced removal of bank officials, and,

with the exception of lottery infractions, civil fines of \$100 for each day a violation occurs. Criminal penalties are provided where bank officers or employees accept fees or gifts for procuring loans or other services, and such banks' directors and officers may be held personally liable for damages in civil proceedings. The FDIC also enforces compliance by these banks with the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts through the use of its regular administrative powers.

## 12. FEDERAL ENERGY ADMINISTRATION (1974)

The Federal Energy Administration (FEA) was established as an independent agency to insure that the country's energy supply is conserved, continues to meet energy demands, and is distributed to the public fairly, efficiently, and at reasonable prices. The FEA also participates in energy efficiency testing and labeling programs for most consumer products.<sup>23/</sup> The Federal Trade Commission promulgates labeling rules for covered products; the FEA establishes the related energy efficiency standards. Prohibited practices include misrepresentation of tested products' energy consumption levels, manufacture or distribution of covered products without required energy efficiency labels, removal or obliteration of such labels, and advertising such products in catalogs without disclosing the information required in the labels themselves.

The FTC, but not the FEA, is empowered to enjoin violations as seek civil fines of \$100 per violation. Individuals may file private actions against manufacturers, labelers, or federal agencies not performing their responsibilities under the law, and recover costs, expert witness fees, and attorney's fees.

## 13. FEDERAL HOME LOAN BANK BOARD (1932)

The Federal Home Loan Bank Board (FHLBB) is an independent regulatory agency that supervises the operations of savings and loan associations, the major private source of capital for home building, purchasing, and rehabilitation. The FHLBB has three major components. The Federal Home Loan Bank System provides reserve credit and makes loans to member institutions.<sup>24/</sup> The Federal Savings and Loan Insurance Corporation (FSLIC) increases the money supply available for home mortgages by insuring savings accounts, up to \$40,000 per saver, maintained with federal or approved state-chartered savings and loan associations or other home financing institutions.<sup>25/</sup> The Federal Home Loan Mortgage Corporation operates a secondary market in conventional mortgages.

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23. Automobiles are excluded; the program includes such consumer products as refrigerators, freezers, dishwashers, clothes washers and dryers, room air conditioners, televisions, and furnaces.

24. In this respect, the Federal Home Loan Bank System parallels the functions of the Federal Reserve System.

25. The functions of the FSLIC are very much like those performed by the Federal Deposit Insurance Corporation.



Banks which are members of the FSLIC are prohibited from engaging in a number of deceptive sales practices, which include:

- Deceptively advertising their services, contractual terms, investments, financial condition, the manner in which accounts are insured;
- Failure to disclose FSLIC membership when advertising interest rates;
- Charging of membership or other improper fees relating to savings accounts;
- Failure to print savings certificate provisions in easily read type or to include a written description of early withdrawal penalties;
- In the case of home mortgages, charging costs, inclusive of all charges, which exceed legal maximum interest rates;
- Advertising or selling lottery tickets; and
- Failure to include the words "Federal Savings and Loan Association" in corporate titles.

Violations may result in administrative cease and desist orders, suspension or termination of insured status, or forced removal of bank officials. The FHLBB may deny insured status to applicant banks that advertise prospective insurance of accounts without approval. The described administrative powers of the FHLBB also apply to enforcement of the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts, as they relate to FSLIC member banks.

In addition, criminal sanctions are provided for the following practices:

- Use of business names or misrepresentations which falsely suggest that an entity is a Federal Home Loan Bank, is otherwise associated with the FHLBB, or that accounts are insured by the FSLIC or the U.S. Government;
- Making misrepresentations concerning the insurance of savers' accounts; and
- Making false statements concerning the financial condition of the FSLIC.

#### 14. FEDERAL MARITIME COMMISSION (1961)

The Federal Maritime Commission (FMC) is an independent regulatory agency that establishes rates, licenses cargo carriers, and prohibits various improper activities in ocean and Great Lakes

transportation of passengers and cargo.<sup>26/</sup> Maritime carriers may not charge fares in excess of rates filed with the FMC, nor engage in unfair practices relating to tickets and receipts, property handling, or baggage. The FMC is empowered to administratively enforce reasonable rates and order full reparation for losses suffered. The FMC or injured parties may civilly enforce such administrative orders, and the agency may invoke civil penalties of up to \$1,000 for each day a violation continues.

The FMC also proscribes advertising or providing passage on vessels not certified as financially responsible to indemnify passengers for injury or death incident to such voyages. The FMC may order full reparation for losses suffered; injured parties may enforce these orders. The FMC may also request the U.S. Customs Service (of the Department of the Treasury) to refuse such vessels clearance to depart from shore, and seek civil penalties up to \$5,000, plus \$200 for each passage sold, and criminal fines up to \$5,000.

#### 15. FEDERAL RESERVE SYSTEM (1913)

The Federal Reserve System (FRS), the "central bank" of the United States, which consists of the Board of Governors, the Federal Open Market Committee, 12 Federal Reserve Banks (and their 25 branches), and some 5,800 member banks, performs various regulatory and supervisory banking functions to maintain the banking industry in a sound condition. The FRS transfers funds, handles U.S. Government deposits and securities, and acts as the lender of last resort. In addition, the FRS is responsible for the promulgation of regulations implementing several consumer protection statutes. Enforcement responsibilities under these statutes are divided among numerous agencies,<sup>27/</sup> with the FRS enforcing compliance by state-chartered member banks.

Truth in Lending Act (TILA). The TILA attempts to provide consumers with meaningful and timely information concerning credit

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26. Cf. Interstate Commerce Commission, which regulates inland waterway and coastal shipping.

27. These include the Department of Agriculture (packers and stockyards); Civil Aeronautics Board (air carriers); Comptroller of the Currency (national banks); Farm Credit Administration (Federal Land Banks, Land Bank Associations, Intermediate Credit Banks, and Productive Credit Associations) (no FCRA responsibility); Federal Deposit Insurance Corporation (banks insured by the FDIC that are not members of the FRS), Federal Home Loan Bank Board (banks subject to laws administered by the FHLBB); Interstate Commerce Commission (common carriers) (no TILA responsibility); National Credit Union Administration (federal credit unions); Securities and Exchange Commission (securities brokers and dealers) (only ECOA responsibility); Small Business Administration (small business investment companies) (only ECOA responsibility); and Federal Trade Commission (all other enforcement).

costs. Written disclosure of credit terms in a clear and uniform manner for all consumer credit transactions allows consumers to compare various credit costs available from different sources and avoid the uninformed use of credit.<sup>28/</sup> Creditors must disclose the "annual percentage rate," "finance charge," default charges, prepayment penalties, the nature of security interests taken, costs of credit insurance, and, where a security interest on real estate is involved, the borrower's right to cancel within three business days. The TILA also requires that periodic statements, including required disclosures, be mailed to consumers using credit card and revolving charge accounts in sufficient time to allow avoidance of finance charges. The TILA also regulates the advertising of credit terms.

Violations of these requirements may be met with all the administrative powers otherwise exercised by the various enforcing agencies. Criminal penalties are also available. Borrowers may institute private lawsuits for nonadvertising violations and recover damages equal to twice the amount of the finance charge, with a \$100 minimum and \$1,000 maximum award, and attorney's fees. Provision is also made for private class actions seeking maximum damages of the lesser of \$500,000 or 1% of the net worth of the creditor. Borrowers not properly notified of their right to cancel transactions secured by real estate may rescind such contracts as late as three years later.

The TILA also prohibits the issuance of unsolicited credit cards and, unless accepted, recipients may not be held liable for any charges made with such cards. The TILA also limits cardholder liability for lost or stolen cards to the lesser of \$50 or the amount actually charged prior to notification of loss.

Fair Credit Reporting Act (FCRA). The FCRA regulates the activities of "credit reporting agencies" to insure that only accurate, relevant, and recent information concerning consumers is used to judge their eligibility for credit, insurance, and employment. Credit reporting agencies may not circulate false or obsolete information and must operate in a fair and equitable manner, only providing consumer reports for appropriate purposes and to proper parties. The FCRA requires that:

- Creditors provide consumers with the identify of the credit reporting agency whose report was used to deny credit;
- Credit reporting agencies provide the "nature and substance" of a person's credit file upon request;<sup>29/</sup>

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28. This uniform disclosure law prevents many deceptive, unfair, or fraudulent credit practices. In addition, consumers, when reviewing mandated disclosures, have the opportunity to review other contract provisions commonly associated with fraud, e.g., "as is" waivers of warranty protections, since such disclosures are often accompanied by terms not covered by the TILA.

29. The FCRA does not require that the consumer inspect or receive a copy of the actual file.

- Disputed information be reinvestigated and, if found to be inaccurate or unverifiable, corrected, notifying earlier recipients of the correction;<sup>30/</sup> and
- If reinvestigation fails to resolve the dispute, the consumer's version be added to the file for inclusion in reports.

Unlike its responsibilities under other described statutes, the FRS does not promulgate regulations to implement the FCRA, but only administratively enforces compliance by its state member banks. The FCRA also provides criminal penalties for violations of its requirements. Individuals may file private actions seeking actual damages and attorney's fees; punitive damages are recoverable if noncompliance can be shown to have been willful.

Equal Credit Opportunity Act (ECOA).. The ECOA was enacted to insure that credit is made available fairly, impartially, and without discrimination, thus providing equal access to credit to all who possess an equal ability to pay. Originally limited to discrimination on the basis of sex or marital status only, a recent amendment has expanded the ECOA to include discrimination based on race, color, religion, national origin, age, or the fact that a person derives income from a public assistance program. The ECOA also requires prompt notification to consumers of actions taken on credit applications, notice of their rights under the Act, and disclosure of the specific reasons for denials, if requested. The promulgation of regulations and enforcement of the ECOA is similar to the TILA, except that no criminal penalties are provided. Individuals may initiate private lawsuits seeking actual and punitive damages and injunctions, plus attorney's fees.

Fair Credit Billing Act (FCBA) and Consumer Leasing Act (CLA). The FCBA, actually an amendment to the TILA, is intended to protect consumers against inaccurate and unfair billing practices by credit card companies and those offering revolving charge accounts. It creates procedures for the prompt resolution of billing disputes and the notification of consumers of their rights under the FCBA. It also prohibits retaliatory measures, such as acceleration of customers' indebtedness or closing of their accounts, while the dispute resolution process is still pending.

The CLA, effective March 23, 1977, also amends the TILA, requiring the disclosure of terms governing consumers' leasing of personal property. Apartment rentals are excluded, leaving automobile leasing as the primary target of regulation. The CLA seeks to:

- Protect consumers from inadequate and misleading information;

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30. Consumer reporting agencies are not forced to verify information in their files unless requested to do so by a consumer.

- Limit consumers' ultimate liability in connection with "consumer leases;" and
- Facilitate the comparison of leasing costs with those associated with credit buying, a common alternative to leasing.

The substantive requirements of the CLA parallel those of the TILA governing credit extensions, i.e., timely written disclosure of prescribed terms in a uniform fashion and adherence to specified requirements regarding the advertising of leasing terms. The CLA also limits lessees' liability on the expiration or termination of consumer leases.

The promulgation of regulations and enforcement of the CLA and FCBA are the same as for the TILA, since the former are both only amendments to the latter. The FCBA additionally provides that a creditor's failure to acknowledge timely notification of a claimed billing error within 30 days triggers a forfeiture of any right to collect the amount indicated by the customer to be in error, irrespective of the accuracy of such contention, up to \$50 per transaction. In a departure from the TILA, private legal actions arising out of deceptive advertising may be commenced under the CLA, provided a lessee suffers some actual damage.

The FRS also prohibits member state banks from engaging in unfair or deceptive practices affecting consumers, enforcing violations with cease and desist orders and termination of FDIC-insured status. Specifically prohibited is misleading advertising concerning interest rates, such as failing to clearly disclose all required information or that a penalty may be imposed for early withdrawal.

Civil actions may seek to enjoin tying arrangements by member state banks, and individuals suffering losses may privately enjoin such arrangements and recover treble damages and attorney's fees. Member banks certifying checks not covered by deposits are subject to termination of their membership in the FRS and criminal penalties, and the checks are valid obligations against such banks. Misrepresentation that an entity is a member of the Federal Reserve System may be civilly enjoined and criminally prosecuted.

## 16. FEDERAL TRADE COMMISSION (1914)

The Federal Trade Commission (FTC) is an independent law enforcement agency with a broad mandate to prevent unfair or deceptive trade practices and unfair methods of competition. Congress has delegated to the FTC the federal government's major consumer fraud responsibility through its enforcement of the Federal Trade Commission Act and a number of special consumer protection statutes.

The Federal Trade Commission Act generally prohibits unfair or deceptive practices affecting interstate commerce except for bank, common carrier, air carrier, and packer practices, which are regulated by other agencies. The Prohibited Federal Practices Chart, Table #5, delineates many of the specific practices the FTC has found violative of that Act. The FTC enforces the Act with flexible and intricate remedies discussed in B, Federal Enforcement Strategies.

The FTC also administers a number of specialized consumer protection statutes. Violations of statutes regulating the labeling and advertising of textiles, woollens, and fur products are subject to the same remedies as the FTC Act, criminal penalties, and, in some instances, confiscation and condemnation. The Protection Act, creating certain protections against the sale of imitation political and numismatic items, is enforced with normal FTC remedies, civil seizure and forfeiture, and private lawsuits seeking injunctions, damages, and attorney's fees. Another special statute requires written disclosure of consumer product warranty information. Normal FTC remedies and private lawsuits enforce the latter act.

The Fair Packaging and Labeling Act prohibits deceptive filling of packages and deceptive labeling as to pricing, size, contents, or quantity. The FTC administers the statute for all consumer commodities other than foods, drugs, medical devices, or cosmetics, which are regulated by the Food and Drug Administration. The FTC also polices false advertising of foods, drugs, medical devices, and cosmetics, with criminal sanctions in addition to normal FTC remedies. Another statute treats the mailing of and billing for unordered merchandise as unfair and deceptive practices under the FTC Act.<sup>31/</sup> The Federal Energy Administration establishes consumer product energy efficiency standards for labeling; the FTC prescribes relevant rules and enforces the law's labeling requirements.

Finally, the FTC is charged with general enforcement of the Truth in Lending, Fair Credit Reporting, Equal Credit Opportunity, Fair Credit Billing, and Consumer Leasing Acts, to the extent that such Acts are not already enforced by other specialized agencies. The FTC uses its normal remedies to administer these Acts.

#### 17. FOOD AND DRUG ADMINISTRATION (1931)

The Food and Drug Administration (FDA) is one of six operating agencies within the Public Health Service, a major component of the Department of Health, Education, and Welfare. It

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31. See United States Postal Service, for a more complete description of this law.

administers various statutes dealing with the heavily regulated areas of foods, drugs, cosmetics, and medical devices.<sup>32/</sup>

The Food, Drug, and Cosmetic Act requires that foods, drugs, medical devices, and cosmetics be safe and properly labeled, that foods be wholesome, and that drugs be effective. Foods, drugs, medical devices, and cosmetics may not be adulterated or deceptively labeled or packaged. Labels must contain prescribed information as to quantity, ingredients, and nutrition,<sup>33/</sup> in a specified format. Food labels may not include false representations suggesting the product has met FDA standards, is a nutritionally superior product, or has a special dietary or health value. Drug labels must include adequate directions for use and appropriate warnings, e.g., that the drug is habit forming or deteriorative in nature. The FDA also prohibits deceptive or unauthorized use or destruction of FDA stamps or labels.

Administrative remedies available for violations include denial of importation into the United States (through the cooperation of the U.S. Customs Service of the Department of the Treasury), civil injunctions, seizure and condemnation, and criminal penalties.<sup>34/</sup>

The FDA also administers several statutes which are duplicative of other laws. One such statute proscribes false labeling as to the place where a food product was produced or grown, and provides only a minimal criminal fine for violations, though the Food, Drug, and Cosmetic Act authorizes harsher penalties for like violations. The Department of Agriculture also regulates this practice. Another statute enforced by the FDA concerns the misbranding of apple barrels, and is virtually identical to one administered by the Department of Commerce.

The FDA establishes federal radiation emission standards for electronic products and requires manufacturers to affix permanent labels to such products, noting compliance with applicable standards and, for microwave ovens, also providing required safety information. Should products fail to comply with standards,

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32. The Department of Agriculture regulates the meat, poultry, and egg industries. The Federal Trade Commission polices false advertising of over-the-counter drugs; the FDA only regulates prescription drug advertising addressed to physicians. Foods, drugs, cosmetics, and medical devices manufactured and sold solely within one state are normally subject only to state regulation.

33. Nutritional labeling is optional for most foods. But, if a nutrient is added or a nutritional claim is made in advertising or labeling, labels must include full nutritional information.

34. Where the FDA recommends criminal prosecution, prospective defendants must first be given notice and an opportunity to appear at an informal hearing.

manufacturers must voluntarily repair or replace them, or refund the purchase price. Nonconforming products may be denied entry at the customhouse, and manufacturers may be civilly enjoined and fined as much as \$300,000 per related series of violations. No criminal penalty is provided.

The FDA licenses clinical laboratories and prohibits them from misrepresenting the procedures they are authorized to perform. Available remedies include civil injunctions, criminal penalties, and revocation, suspension, or limitation of licenses.

#### 18. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (1953)

The Department of Health, Education, and Welfare (HEW) is a cabinet level department which administers, through a large number of agencies and offices, more than 300 programs, for which it receives a budget which is larger than that allocated to any other federal department. Some 90% of that budget goes to grants, loans, and other assistance to individuals, states, localities, private research groups, and institutions of learning. Many of HEW's programs are targeted to serve particularly vulnerable groups, such as children, the aged, the disabled, and the poor; other programs, such as many in the health field, benefit the general public.

Several HEW programs deal with consumer fraud issues, including HEW-funded federal health insurance for the aged and disabled (Medicare). Providers of patient services may not hinder a patient's free selection of health services, improperly charge for covered items or services, or provide unnecessary, harmful, or inferior health services or supplies. Violators risk termination of their program participation. Misrepresentations involving requests for HEW reimbursement or concerning the operations of any facility in order to qualify as a hospital, nursing facility, or home health agency may result in criminal prosecution.

HEW also administers several loan programs created to assist students in attending colleges and trade and technical schools. These programs either subsidize learning institution lenders or provide federal loan insurance on student loans made by private lenders. In either case, lenders are prohibited from charging excessive interest, imposing improper charges, failing to include prescribed terms in loan agreements, and improperly assigning loans to other parties. Educational institutions are also prohibited from passing on student loan costs in the form of higher tuition or other charges, or utilizing unfair refund policies for unearned tuition and other charges. Participating vocational schools must also make a reasonable determination, prior to enrollment, that a person has the ability to benefit from the offered instruction. The only available sanctions are termination of federal subsidies, insurance, or participation in the student loan programs.



**CONTINUED**

**2 OF 3**

19. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (1965)

A cabinet level department, the Department of Housing and Urban Development (HUD) bears principal responsibility for meeting the nation's housing needs and improving and developing its communities. A number of HUD-administered programs and statutes provide protections to consumers in the sale or leasing of land and dwellings.<sup>35/</sup>

HUD's Federal Housing Administration (FHA) insures private lending institutions against losses on mortgage and property improvement loans, including those for mobile homes, condominiums, and subsidized housing. As a condition to the extension of FHA insurance, lenders must satisfy HUD requirements concerning interest rates and other terms of the loan agreement and sellers must offer property meeting FHA standards. HUD may compel builders' compliance with HUD's standard warranty for FHA-insured homes and may have necessary repairs performed, billing the costs to the builder.

HUD also protects buyers of undeveloped lots in other states against fraudulent and deceptive sales practices. Sellers must file comprehensive registration statements with HUD and provide less detailed property reports to prospective purchasers, before an agreement is signed, to allow them to evaluate the land's habitability, e.g., the availability of water, sewage facilities, and utilities. Property reports, to be used for promotional purposes, must be used in their entirety, with all portions receiving equal emphasis and disclosure; such use must also supercede the effective data of the supporting registration statement.

HUD also proscribes false advertising and deceptive sales practices or schemes to defraud in the sale or leasing of lots, including misrepresentations of HUD approval of any offering or registration statement. Printed advertisements must advise consumers to read property reports and state that HUD has not evaluated same. Waivers of the law's provisions are without effect.

Remedies for violations include cease and desist orders, civil injunctions, and criminal penalties. Registration statements may be suspended if incomplete or inaccurate or where sellers engage in deceptive sales or leasing practices. If effective registration statements contain untrue statements or omissions of material facts, if property reports are used improperly, or if other deceptive practices are employed, persons acquiring lots may sue developers or agents for money damages for the purchase price of the lot and reasonable costs of improvements, but not for attorney's

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35. Other HUD programs provide rental subsidies, assist neighborhood rehabilitation and urban preservation, and provide flood insurance. HUD also enforces laws preventing discrimination in the sale or rental of housing.

fees. Purchasers not receiving property reports in advance may cancel such transactions.<sup>36/</sup>

HUD also requires that persons obtaining residential mortgage loans be provided, within three days of the loan application, with useful and timely information concerning the nature, procedures, and costs of real estate closing or settlement,<sup>37/</sup> including cost estimates and a copy of a HUD booklet describing settlement costs.<sup>38/</sup> Borrowers may inspect disclosures contained in a HUD "uniform settlement statement" one day before settlement.

A criminal statute prohibits paid referrals or the payment of commissions for real estate services rendered in connection with residential mortgage loans. Persons illegally referred may sue for damages equal to three times the amount of the illegal fee and attorney's fees. Similarly, if a seller conditions a sale on the buyer's purchase of title insurance from a particular company, the buyer may recover three times the title insurance charges. Moreover, lenders may not charge for the preparation of settlement documents or Truth in Lending Act disclosure statements, nor require inordinate deposits into escrow accounts.

HUD also promulgates and enforces mobile home construction and safety standards, and prohibits the manufacture, sale, or lease of nonconforming mobile homes. Failure to certify such conformity in writing or falsely certifying compliance may result in injunctions and civil penalties as high as \$1,000 per violation, or \$1,000,000 for a related series of violations, and criminal penalties. Contractual waivers of the law's requirements are void.

Finally, civil injunctions and criminal penalties may be sought for misrepresentations falsely suggesting HUD affiliation or authorization, that HUD requires or recommends repairs or improvements, or false advertising or representations suggesting HUD endorsement, authorization, or inspection, of housing, businesses, or products.

## 20. DEPARTMENT OF THE INTERIOR (1849)

The Department of the Interior (USDI), a cabinet level department, is "custodian" of the nation's public lands and resources. It appraises, manages, conserves, and develops public land, park, mineral, water, wildlife, and power resources, and seeks to protect the environment.

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36. If a property report is provided less than 48 hours before signing, the purchaser has three days in which to cancel, and the agreement must so state.

37. Closing or settlement is the formal process by which the ownership of real property passes from the seller to the buyer.

38. HUD is considering alternate proposals that would provide consumers with booklets at the time sales contracts are executed, instead of the later date of loan application.

The USDI administers statutes which protect Indians living in American Indian Reservation communities from consumer fraud. The USDI licenses outside merchants trading with Indians on reservations; unlicensed activity may result in civil penalties up to \$500 and forfeiture of merchandise offered for sale. Charging unfair prices and selling unmerchandiseable goods are grounds for license revocation. The USDI and the Commissioner of Indian Affairs must approve all agreements, and contract assignments, with Indians. These agreements must be in writing, state a definite time for performance, and include certain prescribed information. Copies must be provided to each party. Agreements which lack prescribed information may not be assigned. The USDI may disapprove or void violative contracts and assignments of such contracts, and seek civil recovery in appropriate amounts.

The USDI's Indian Arts and Crafts Board promotes the economic welfare of Indians through the development of their arts and crafts. The Board issues stamps and trademarks signifying that silver and turquoise products, woven fabrics, and handicrafts are Indian made. Improper use or imitation of these stamps or trademarks and misrepresentations concerning the genuineness of Indian products or the particular tribe or group producing them are criminal offenses.

The USDI, in its management of National Park areas, encourages private food and accommodation concessions, but judges the reasonableness of concessioners' prices by comparing them with prices for similar facilities outside the parks. The USDI may refuse to renew contracts of concessioners who have charged unreasonable prices.

## 21. INTERSTATE COMMERCE COMMISSION (1887)

The Interstate Commerce Commission (ICC), the oldest independent regulatory agency, has jurisdiction over interstate surface transportation services, including railroads, trucks, buses, inland waterway and coastal water carriers,<sup>39/</sup> express delivery companies, household movers, and freight forwarders. The ICC certifies various carriers, and requires passenger fares, property rates, and services to be fair, reasonable, and publicly disclosed. Carriers must maintain sufficient insurance to protect their customers against death, bodily injury, or property loss due to carriers' negligence.

The ICC grants permission to motor carriers to transport passengers or property on public highways, at given fares, and, in the case of common carriers, only on regular routes between fixed terminals. Motor carriers are prohibited from engaging in unfair practices concerning ticketing, the carrying of property or baggage, and transportation facilities. The ICC also licenses brokers selling or arranging motor transportation services and requires them to be bonded. Motor carriers and brokers violating these requirements

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39. Cf. Federal Maritime Commission, which regulates ocean and Great Lakes transportation.

are subject to cease and desist orders, administratively imposed fines ranging from \$100 to \$500, and license or certification revocation or suspension, but not criminal penalties. In cases of improper charges, the ICC may enforce reasonable fares or rates.

Railroad carriers must conspicuously post scheduling and price information, and may not disclaim liability for property losses suffered in transport. They are also held to a reasonable standard for passenger service. The ICC's remedial powers include cease and desist orders and restitution at the administrative level, and, for failure to post required information, civil penalties of \$500 an offense, plus \$25 for each day the practice persists. Damaged individuals may sue privately to recoup their losses and reasonable attorney's fees.

The ICC prohibits water carriers within its jurisdiction from charging improper fares or rates, with certification revocation as the sanction. Injured persons may elect to seek damages and attorney's fees in civil actions or administrative proceedings before the ICC.

All common carriers which transport goods are prohibited from:

- Falsely representing that a shipper has weighed, loaded, or counted goods;
- Falsely describing goods shipped;
- Engaging in fraudulent practices relating to bills of lading; and
- Failing to deliver goods on demand in the absence of a lawful excuse.

Such practices, if committed with fraudulent intent, are subject to criminal penalties. False statements concerning shippers' actions are void.

The ICC also extensively regulates all aspects of the household goods moving industry. Movers must disclose, before an "order for service" is signed, a written price estimate based on personal inspection of the household, a report of the mover's prior performance, and a copy of the ICC booklet, Summary of Information for Shippers of Household Goods. "Orders for service" must contain the estimated cost of the move, the agreed pickup and delivery dates, an itemization of all charges for special services, and must be signed by both parties. Copies must be provided to shippers. Pickups and deliveries must take place when agreed. Various safeguards concerning proper weighing of the goods are also established, such as weighing trucks before and after loading in the presence of shippers if requested. Movers must unload shipments upon payment of the estimated price, plus no more than an additional 10% in the case of an underestimate. Consumers have 15 days to pay additional amounts due. Movers must respond promptly to damage claims, and maintain sufficient insurance to assure payment of claims for which they are liable.

The ICC also enforces common carriers' compliance with the Fair Credit Reporting and Equal Credit Opportunity Acts, through the use of its usual administrative powers.

## 22. DEPARTMENT OF JUSTICE (1870)

The Department of Justice (USDJ), a cabinet level department headed by the U.S. Attorney General, is the principal law enforcement arm of the U.S. Government. The USDJ's law enforcement functions are conducted by six divisions, Antitrust, Criminal, Civil, Civil Rights, Land and Water Resources, and Tax, and 94 local U.S. Attorneys' offices, with the assistance of several offices, such as the Federal Bureau of Investigation.

The USDJ enforces a wide variety of federal consumer fraud statutes, including many primarily administered by other agencies. In many of these instances, only the USDJ is empowered to institute civil or criminal actions in federal courts, while the responsible agency is limited to investigating violations and recommending action to the USDJ. Specific civil and criminal remedies are found in appropriate statutes. The USDJ also enforces several statutes not administered by other agencies. (See 29, infra)

## 23. NATIONAL CREDIT UNION ADMINISTRATION (1970)

The National Credit Union Administration (NCUA) is an independent regulatory agency which governs all federally-chartered credit unions.<sup>40/</sup> The NCUA:

- Grants charters to new federal credit unions;
- Supervises established federal credit unions to insure sound operation;
- Periodically examines credit unions' financial condition and operating practices; and
- Insures member accounts for up to \$40,000 in all federal credit unions and in state-chartered credit unions electing to acquire such coverage.

Federal credit unions may not charge interest in excess of 1% per month on the unpaid balance of a loan, including all incidental

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40. A credit union is a privately-owned nonprofit cooperative association organized to aid its members in improving their economic situation through regular savings while establishing a source of credit at reasonable rates of interest. Federally-chartered credit unions may be formed by any group of seven or more persons with a common bond of occupation, association, or residence.

charges. The NCUA prohibits false advertising or other misrepresentations concerning services offered, contracts, investments, financial condition, and any aspect of credit union insurance. Advertisements, and a sign at each credit union office, must state that member accounts are insured by the NCUA. Credit unions must notify prospective borrowers in writing where real estate or mobile homes securing loans are situated in federally designated flood hazard areas.

The NCUA's available administrative sanctions are revocation or suspension of charters and placement in involuntary liquidation. Individuals charged illegal interest rates may file private actions to recover the interest paid. Misrepresentations concerning federal credit union insurance are subject to criminal penalties and civil injunctions.

In addition, the NCUA enforces, with all its administrative powers, federal credit unions' compliance with the Truth in Lending, Fair Credit Reporting, and Equal Credit Opportunity Acts.

#### 24. SECURITIES AND EXCHANGE COMMISSION (1934)

As an independent regulatory agency, the Securities and Exchange Commission (SEC) regulates the issuance and trading of securities (stocks and bonds) by issuers of securities, exchanges, brokers, dealers, and investment advisers. The SEC protects potential investors against fraud in the buying and selling of securities by requiring the filing of registration statements containing extensive financial and other information and the furnishing to prospective investors of prospectuses, or "offering circulars," which disclose financial information derived from registration statements. Neither registration statements nor prospectuses may include misrepresentations or omissions of material facts. Other misrepresentations and fraudulent acts in the issuance and sale of securities are generically prohibited.

The SEC registers brokers and other securities dealers and prohibits the charging of unreasonable prices and the misappropriation of customers' funds or securities. Brokers, dealers, and investment advisers are also generally prohibited from engaging in unfair acts or practices or failing to disclose whether they are acting as a principal or the customer's agent.

Administrative sanctions for violations of the above requirements include suspension or expulsion of members from exchanges or associations; denial, suspension, or revocation of SEC registration; suspension of public offerings and trading in securities; and censure of individuals and temporary or permanent bars against employment by registered firms. The Government may also seek civil injunctions and criminal penalties. Individuals may sue to recover damages suffered as a result of inaccurate or incomplete disclosures in prospectuses or registration statements.

The SEC also enforces securities dealers' and brokers' compliance with the Equal Credit Opportunity Act, with all its administrative powers.

## 25. DEPARTMENT OF TRANSPORTATION (1967)

The Department of Transportation (DOT) is a cabinet level department created to assure the development and maintenance of a safe, efficient, and effective transportation system in the United States. Two of its eight operating components, the National Highway Traffic Safety Administration (NHTSA) and, in peacetime, the United States Coast Guard,<sup>41/</sup> administer laws relevant to consumer fraud.

The NHTSA attempts to reduce highway deaths, injuries, and financial losses associated with traffic accidents by developing federal motor vehicle performance and safety standards and enforcing federal safety laws. Sales of new motor vehicles not conforming to NHTSA safety standards may be enjoined and civil penalties up to \$1,000 per violation, and \$800,000 for any related series of violations, may be imposed against manufacturers. Similar remedies may be sought where manufacturers fail to provide notice of subsequently discovered safety defects and to remedy them without charge.

New vehicles must be permanently labeled to certify conformity with safety standards, include vehicle identification numbers, and bear stickers disclosing certain other information.<sup>42/</sup> Tires must meet maximum load standards and be labeled to disclose their composition, load capabilities, and the manufacturers' names. Criminal fines are authorized for violations; willful removal, alteration, or obliteration of required labels prior to delivery may additionally lead to imprisonment. In addition, prospective purchasers have the right to obtain performance and technical data from manufacturers.

Resetting or altering odometer mileage readings is prohibited and accurate readings must be disclosed in a standard written format before the sale of any motor vehicle, new or used, including disclosure that the reading is incorrect if the mileage traveled is unknown. The NHTSA may impound vehicles up to 72 hours for suspected violations. The U.S. Department of Justice may enjoin violations and seek civil penalties up to \$1,000 per violation, or \$400,000 for a series of violations, and criminal penalties including fines as high as \$50,000. Individuals may file private actions to recover damages equal to three times the actual damages or \$1,500,

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41. The U.S. Coast Guard is technically a branch of the Armed Forces, i.e., part of the Department of Defense.

42. These stickers may not contain misrepresentations; they must include such information as the dealer's name, the method of transportation used in making delivery, the manufacturer's suggested retail price, and manufacturer charges to the dealer for transportation.



whichever is greater, plus attorney's fees. In a novel departure from most federal consumer protection legislation, this statute also authorizes state attorneys general to enjoin violations and to sue for damages recoverable by individuals.

Automobile dealers must provide consumers with comparative automobile insurance cost information concerning different makes and models and their particular susceptibility to damage in accidents, or face injunctions and civil penalties up to \$1,000 per violation, or \$400,000 for a related series of violations. The NHTSA also regulates the sale of retread tires, with comparable penalties for violations, except that a series of related violations is subject to a penalty of up to \$800,000.

The U.S. Coast Guard, in its attempt to save lives and property on the high seas and navigable waters of the United States, enforces federal boating safety laws. As in the case of motor vehicles, boats must conform to prescribed safety standards and display accurate labels attesting to that fact. Those failing to adhere to such standards or affixing deceptive labels are subject to administrative or civil fines as high as \$2,000 per violation, or \$100,000 for any related series of violations, as well as injunctions. Failure to affix, removal, or alteration of labels are subject only to administrative or civil fines of \$500 per violation.

## 26. DEPARTMENT OF THE TREASURY (1789)

The Department of the Treasury (USDT), the cabinet level department that manages federal finances,<sup>43</sup> collects taxes and duties; issues currency, coins, Government securities, and postage stamps; and supervises national banks. Of the USDT's numerous components, the three which regulate consumer fraud practices are the Comptroller of the Currency,<sup>44</sup> U.S. Customs Service, and Bureau of Alcohol, Tobacco, and Firearms (BATF).

The U.S. Customs Service involves itself in consumer fraud issues through its enforcement of import and export laws at all U.S. ports of entry, and by cooperating with and enforcing the regulations of other federal agencies as they relate to international trade. The Customs Service denies entry into the country of articles bearing any misrepresentations, including false descriptions of their true country of origin, or not conspicuously marked as to their place of manufacture. An additional 10% duty may also be

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43. The U.S. Secret Service, a division of the USDT, protects public officials, such as the President, candidates for office, and visiting foreign officials.

44. The Office of the Comptroller of the Currency, which administers laws regulating all national banks, is separately discussed under the heading Comptroller of the Currency.

charged for the latter violation as a condition of entry. Concealment, removal, or alteration of such markings is criminally punishable. In addition, individuals damaged or likely to be damaged by any misrepresentations may file private actions.

The BATF investigates serious criminal offenses involving illegal possession and use of firearms or explosives and traffic in illicit liquor. The BATF also taxes and regulates the alcoholic beverage industry, prohibiting deceptive advertising and labeling, deceptive practices relating to the quantity, age, manufacture, or indorsement of alcoholic beverages, alteration or removal of any mark, brand, or label, and failure to adequately disclose required information on each product. Violations may lead to BATF revocation or suspension of permits, civil injunctions, and criminal fines. Failure to properly mark packages containing alcoholic beverage products may also lead to imprisonment and seizure of imported products.

#### 27. UNITED STATES POSTAL SERVICE (1971)

The United States Postal Service (USPS), an independent establishment of the Executive Branch and the successor to the Post Office Department, provides mail and parcel delivery and related services. It includes the Postal Inspection Service, which has three basic responsibilities:

- The investigation of all violations of some 85 federal statutes relating to the USPS;
- The protection of mail, postal funds, and property; and
- The internal audit of all USPS financial and nonfinancial operations.

By authority of the Mail Fraud Statutes, the Postal Inspection Service investigates for prosecution individuals who use the mails, even peripherally, in schemes to defraud the public, including the use of false names or addresses in the execution of such schemes. Among the fraudulent promotions which are generally violative of these laws are land fraud schemes offering for sale nonexistent or grossly misrepresented homesites, lots in resort or vacation paradises, and oil-bearing property; franchise offers promising lucrative return to the franchise holder; work-at-home schemes; advance fee schemes, which collect commissions in advance from businessmen in need of capital loans which never materialize; investment schemes; pyramid sales schemes; and mail-order sales schemes. Prosecution, where warranted by evidence procured in the investigation, is handled by the Department of Justice. Although the law permits the USPS to seize and dispose of mail involved in schemes to defraud, the USPS, as a matter of agency policy, seeks instead to obtain judicial search warrants.

The Postal False Representation Statute empowers the USPS to withhold delivery of mail to operators engaged in conducting schemes

or devices for obtaining money or property through the mails by means of false representations. Mail subject to a False Representation order is returned to its sender. The statute also authorizes the USPS to refuse payment of postal money orders presented by such operators. A companion statute enables the USPS to seek temporary court orders halting the delivery of such mail pending the conclusion of the False Representation Administrative Hearing.

Other federal statutes and postal regulations prohibit or restrict the mailing of simulated bills or statements of account in soliciting orders for goods or services, narcotics, explosives, firearms, obscene matter, dangerous items, matter relating to games of chance, and certain other contraband. While the law permits the USPS to administratively seize and dispose of such mailed matter as false billing and contest materials, the agency again opts, as a policy matter, to seek criminal search warrants. Except in the case of undeliverable mail, first class and priority mail may not be opened by the USPS without a court order.

Recipients of unordered merchandise are entitled to treat such items as gifts and use or dispose of them without obligation, and the unordered merchandise must be accompanied by a clear and conspicuous statement to that effect. The mailing of dunning communications and bills for unordered merchandise are prohibited. The mailing of such merchandise or prohibited communications constitutes an unfair trade practice in violation of the FTC Act.

Not all the mail-order sales transactions which give rise to complaints to the USPS are fraudulent. In many cases, misunderstandings between the parties, vendor oversight, or poor business practices are involved. A high number of such complaints are resolved by the USPS through its Consumer Protection Program, by contact with the party complained of without need of further investigation or prosecution.

## 28. VETERANS ADMINISTRATION (1930)

The Veterans Administration (VA) is an independent agency which provides compensation and a wide range of benefits for veterans and their dependents, and coordinates other federal programs affecting veterans. The VA's administration of health care, educational assistance, and home loan guarantee programs entails significant involvement in potential consumer fraud. 45/

The VA provides educational assistance benefits for attendance by eligible persons in high school, college, vocational

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45. Other VA benefits include payments for military-related death or disability, pensions for death or total and permanent disability not related to military service, life insurance programs for veterans and service personnel, and benefits for vocational rehabilitation and burial expenses.

schools, and on-the-job apprenticeship training programs. Participating educational institutions must offer VA-approved courses which provide a specific vocational objective. The VA prohibits deceptive advertising, sales, or enrollment practices,<sup>46/</sup> charging veterans higher tuition than nonveterans, and maintaining unfair refund policies for early withdrawal. Correspondence schools must additionally disclose terms relating to termination and refund and certain other information, furnish copies of signed enrollment agreements, and tender full refunds to veterans deciding not to enroll within ten days or retain only the lesser of \$50 or 10% of the tuition if termination occurs thereafter. Violations may result in VA disapproval of institutions. Submission of false claims to the VA may also lead to criminal prosecution, if institutions accept the improper payments.

The best known VA benefit is home loan guarantees, commonly known as "G.I. Loans," where the VA guarantees or insures repayment of loans made by private lenders (or makes direct loans in certain areas) for the purchase of homes, condominiums, and mobile homes or for home repairs and improvements. Sellers of housing or mobile homes to veterans may not engage in unfair marketing practices, sell housing with substantial defects, or breach contract terms. New homes and mobile homes must have one year warranties of substantial conformity with VA-approved plans and specifications. Deposits on new homes financed by G.I. Loans must be deposited into escrow accounts. Sellers' failure to follow these guidelines may lead to termination of their participation in the program. Disapproval of particular transactions may result when sellers offer property or mobile homes which are unsuitable for dwelling, excessively priced, or beyond veterans' means, and for offering property repairs, alterations, or improvements which do not substantially protect or improve basic livability or utility.

Lenders participating in the G.I. Loan program must charge VA-approved interest rates, may not impose unapproved charges, such as commission or brokerage fees or early payment penalties, may not willfully engage in any practice detrimental to borrowers, and must delay foreclosure and other penalties in the event of default due to borrowers' unemployment resulting from the closing of federal installations. Lenders violating these requirements may lose the privilege of making VA-insured or guaranteed loans to veterans.

In the health care area, private nursing homes being paid by the VA to care for veterans must meet VA physical and professional standards as a condition to their continued eligibility to provide such services.

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46. The VA works cooperatively with the Federal Trade Commission in investigating and evaluating such deceptive practices.

## 29. OTHER PROHIBITED PRACTICES

This subsection will describe several federal statutes which relate to consumer fraud not administered by regulatory agencies.

One remarkable and little-known statute allows any person who believes he is or is likely to be damaged by any misrepresentation concerning goods or services entering interstate commerce to file a private civil action in his own behalf in federal court. Some courts, however, have found that this right applies only to injured competitors, and not to consumers.

Several federal criminal statutes proscribe such misrepresentations of government affiliation as false indications of approval by or association with federal agencies and manufacturing, selling, or using federally approved insignias, emblems, slogans, and seals, or those associated with veterans' organizations. Criminal penalties range from a nominal misdemeanor fine of up to \$250 and/or six months imprisonment, for fraudulent use of the Red Cross insignia, to \$5,000 and/or five years imprisonment for misrepresenting that donated money or property is for the use of the United States.

Deception of prospective purchasers of public lands by locators and solicitation of political contributions from persons known to be eligible for or receiving federal relief are criminal offenses carrying relatively nominal fines and prison terms, up to a maximum of \$1,000 and one year. Selling phonograph records or sound recordings bearing forged or counterfeited labels may result in criminal fines as high as \$25,000 and imprisonment for up to one year (\$50,000 and two years for subsequent offenses).

## CONTENTS-PART V

Part V:	Foreign Approaches . . . . .	195
A.	Bargaining in Good Faith . . . . .	197
B.	Standard Form Contracts. . . . .	198
C.	Unconscionability. . . . .	201
D.	Activity at the United Nations . . . . .	202

## FOREIGN APPROACHES

Foreign countries have designed innovative strategies for coping with consumer fraud that may serve as models for American jurisdictions. This section will describe three of these: 1) requirements that bargaining be in good faith; 2) regulation of standard form contracts; and 3) different approaches to unconscionability. In addition, related United Nations activity will be discussed.

Sellers expose consumers to a barrage of sales talk, puffing, persuasion, special "deals," and other inducements to convince them to purchase offered goods or services. By the time the contract is produced for the consumer's signature, the consumer has already been "sold," and often barely notices the terms of the contract. The buyer assumes the contract embodies the terms he agreed upon with the sales representative, and if he tries to verify this, the contract's legal language, length, small print, and complexity hide any discrepancies.

In the United States, unless fraud can be proved, consumers generally are legally bound to the terms in the written contract, irrespective of conflicting prior oral agreements with the sales representative. Even if the consumer discovers the discrepancy, most other merchants use the same contract terms, leaving the consumer with no real choice.

A number of countries have used a variety of approaches to ameliorate the consumer's plight under these circumstances.

### A. BARGAINING IN GOOD FAITH

#### Germany

The German law of contracts has adopted a special rule to deal with the problem of overreaching in the negotiating stage of a transaction.<sup>1/</sup> The concept, developed from an 1861 article by Jherling, states: "Once parties enter into negotiations for a contract,... a relationship of trust and confidence comes into existence, irrespective of whether they succeed or fail...Furthermore, the parties are bound to take such precautionary measures as are necessary for the protection of each other's person or property."<sup>2/</sup> This doctrine, anchored in German law principles of good faith and fair dealing, is known as culpa in contrahendo.

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1. This discussion of the German doctrine of culpa in contrahendo is based on an article by Kessler and Fine, Culpa in Contrahendo, Bargaining in good faith, and freedom of contract: a comparative study, 77 Harv. L. Rev. 401 (1964).

2. Id. at 404.

Under this rule, "Each party is bound to disclose such matters as are clearly of importance for the other party's decision, provided the latter is unable to procure the information himself and the nondisclosing party is aware of the fact."<sup>3/</sup> In addition, disclosure of erroneous information violates the doctrine.

German law gives the seller fiduciary duties in the sale of certain products such as insurance. Also, regardless of the product being sold, the seller must act as a fiduciary when the buyer indicates he is relying on the seller as an expert, or when the seller knows the buyer is physically handicapped and cannot understand the contents of the contract. For example, if a consumer asks the seller about the quality of a house's structure, the seller must disclose all material information he possesses.

If the seller violates any duty imposed by the doctrine of culpa in contrahendo, German courts will restore the buyer to the position he would have been in if there has been no violation of the doctrine. German law recognizes that, in many cases, if the seller had made a full disclosure, the buyer would not have entered into the transaction at all. The courts will then rescind the contract and order all payments refunded.

### Israel

In 1973, Israel departed from its former reliance on English contract law. In a radical revision, it adopted the doctrine of culpa in contrahendo.<sup>4/</sup> Section 12 of Israel's new contract law provides that in negotiating a contract, "a person shall act in customary manner and in good faith...A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or the making of the contract..." This section legally imposes a special relationship between the parties from the earliest stages of bargaining.

## **B. STANDARD FORM CONTRACTS**

### Sweden

An Act Prohibiting Improper Contract Terms, adopted by Sweden in 1971, provides that if the price or any other aspect of the terms of a contract are "improper," a special consumer court or the Consumer Ombudsmen can enjoin their future use. The Act applies once a seller tenders a contract to a consumer for the consumer's acceptance.<sup>5/</sup> Since the Act's passage, it has been utilized to declare numerous contract provisions void.

3. Id. at 404, 405.

4. Shalev, Legislation, General Comments on Contracts (General Part) Law, 1973, 9 Israel L.Rev. 274 (1974).

5. Sheldon, Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control, 22 Am.J.Comp.L. 17,34 (1974).



Some of these improper contract terms include:

- Seller has unlimited time to reject buyer's offer;
- Consumer must accept goods irrespective of their delivery delay;
- Seller decides if goods are defective and if buyer caused defect;
- Seller unilaterally sets final contract price;
- Buyer must bring legal action in a distant forum; and
- Seller has a right to claim excessive collateral.

Sweden, in its Marketing Practices Act (1971), also prohibits presale representations that conflict with "good commercial standards or otherwise."

### Israel

In 1964 Israel adopted a Standard Contracts Law which provides both for administrative agency and judicial review of standard contracts.<sup>6/</sup> The statute lists the types of restrictive terms subject to the Act. A business may request that a special board created to review standard form contracts rule on the restrictive terms in its contracts. The board determines whether the restrictive terms are "prejudicial" to consumers or give sellers an "unfair advantage." Upon board approval, the contract is immune from further administrative agency or judicial attack for five years. On the other hand, the board can refuse to approve the restrictive terms, and can declare the contract void in whole or in part. This declaration has a retroactive effect, invalidating contracts consummated prior to the board's decision.

In addition, courts are empowered to examine the validity of restrictive terms contained in any standard contract which comes before it in the court of legal proceedings. The court can invalidate the contract if the agreement has the capacity to prejudice consumers generally, even if the consumer in the case before it is not prejudiced.

In 1969, the law was amended so that, in addition to businesses, the Attorney General and consumer representatives can apply to the Board for determinations as to whether contract terms violate the Standard Contracts Law.<sup>7/</sup>

### Germany

In 1955, the German courts began to restrict enforcement of standard form contract provisions, recognizing that they are not based upon the will or purpose of any particular party, but are instead prepared by standard form makers for mass distribution.<sup>8/</sup> Since the consumer ordinarily does not know what terms are included in the contract, the court can determine that the consumer has agreed only to those terms with which he should "fairly and justly reckon."

6. Hecht, Legislation--The Israel Law on Standard Contracts, 4 Israel L. Rev. 586(1968).

7. Shaldev, The Validity of Clauses Excluding or Limiting Liability, Israel Reports to the Ninth International Conference on Comparative Law.

8. Dawson, Unconscionable Coercion: The German Version, 89 Harv. L.Rev. 1041, 1108 (1976).

Section 138(1) of the Civil Code holds unfair and unjust provisions unforeseeable by the disadvantaged party or contrary to good morals.

The German courts' developing law on standard form contracts accomplishes one of the objectives of the United States Uniform Commercial Code's unconscionability section - preventing unfair surprise. For example, a German contract clause is invalid if located in an unexpected place or arranged in such a way as to confuse its meaning.<sup>9/</sup>

A 1964 German court decision imposed a fiduciary relationship upon drafters of standard form contracts, stating that "(t)he draftsmen of forms that are intended for and are put to widespread use assume thereby the role of makers of law for a large, undifferentiated mass of users. They therefore have special responsibility to ensure that any abnormal consequences they produce are both (1) fully understood and (2) not unfairly one-sided in favor of those who would project the results on others."<sup>10/</sup>

One commentator described the uniqueness of this German doctrine:

The most notable feature of the whole approach to standardized form contracts is that it dispenses with inquiries into the degree to which the particular signer's assent had been impaired. Whether the individual was coerced, had read the form or not, lacked bargaining power, or was 'unaware' must be disregarded.<sup>11/</sup>

#### Canada

Some of the Canadian provinces have taken a different approach to standard form contracts; they have required all contracts for the sale of farm machinery to contain certain clauses designed to insure the machinery's continuing fitness for consumer use. For example, the Saskatchewan Agricultural Implementation Act (1968) requires every sale of farm implements to be accompanied by a form in which the following terms are provided in an intelligible manner:

- A warranty by the seller and provincial distributor that the goods are well made and will perform well the work for which they are intended;
- A statement of the particular kind of work for which the implements are intended;
- Notice that, if the buyer cannot make the goods work well within a ten-day trial period, the seller will correct the problem within eight days or the buyer can cancel the sale;

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9. Id. at 1110.

10. Id. at 1111.

11. Id. at 1113.

- A guarantee that the goods will be durable for one year if used in suitable conditions and with proper care; and
- A guarantee that all necessary repair parts for the implement will be available from the general provincial distributor for ten years from the date of sale.

This Canadian approach should be compared with that of the United States. Under the Uniform Commercial Code, the seller can sell goods "as is," meaning, without any assurance that the goods will work in any fashion. Even if not sold "as is," the UCC allows standard form contracts to contain important limitations on the seller's obligations. For example, the warranty of fitness for a particular purpose, required in the Saskatchewan statute, is seldom contained in American standard form contracts, and the UCC implies it only in special circumstances.

The Magnuson-Moss Warranty Act, a recently enacted United States statute, only mandates that the seller disclose the kind of warranty he is providing. Unlike the Canadian provincial laws, goods do not have to measure up to certain standards; the seller determines the type of warranty protection provided.

### C. UNCONSCIONABILITY

The United States Uniform Commercial Code, at Section 2-302, provides that if a court determines as a matter of law that a contract is unconscionable, the court may refuse to enforce the contract or limit the contract's application in such a way as to avoid any unconscionable result. Because the UCC does not define unconscionability, courts have interpreted and applied the concept in various ways. A debate has raged among legal scholars as to what unconscionability means, what it should mean, and whether the doctrine has any utility. The experience of other countries may therefore prove instructive.

### Germany

The German Code includes two provisions which have been used in a way comparable to the UCC's unconscionability doctrine. Section (1) of article 138 of the German Code provides: "A transaction that offends good morals is void." Section (2) provides: "Void in particular is a transaction whereby one person, with exploitation of the necessity, thoughtlessness or inexperience of another, is promised or acquires, for himself or for a third party, economic advantages whose value exceeds the value of his own performance to such a degree that, under the circumstances, there is a striking disproportion between them."

To show a violation of section (2), one need not prove that the seller had a plan to obtain an excessive advantage. The buyer must only show that the seller knew he was receiving an excessive advantage and that the consumer was disadvantaged by his own necessity, thoughtlessness or inexperience. German courts have also found violations of section (2) if the consumer has a serious mental or physical impairment. If a case does not quite fit section (2), the buyer can try to come within the broader scope of the "good morals" provision of section (1). German courts look at each transaction to determine whether "an exchange of values was 'strikingly' unequal" in relationship to the price used in a similar market in comparable transactions.<sup>12/</sup>

#### D. ACTIVITY AT THE UNITED NATIONS

The United Nations' involvement in consumer protection has increased with the developing awareness of worldwide patterns of abusive and deceptive trade practices and the role of multinational corporations in consumer fraud.

Consumer groups around the world, represented by the International Organization of Consumers Union (IOCU), as well as delegates from many countries, are now urging international responsibility for consumer protection. These groups are especially concerned with consumer fraud and abusive trade practices that cause the unavailability of basic commodities such as food and fuel.

They see the problem as a worldwide one with the multinational corporations as principal actors, victimizing unsophisticated consumers in developing nations. These consumers receive their first contact with modern consumer advertising, goods, and sales techniques as multinationals dump goods on them that are defective or which the buyers do not need or cannot afford. Important questions emerge from these international concerns: Do such practices provide useful analogies for consumer fraud practices within the United States? What responsibilities do American lawmakers and enforcement officials have concerning the consumer fraud activities of American-based multinational corporations in foreign countries?

To provide the vehicle for United Nations action to protect consumers, the IOCU has drafted, with the support of several delegations, a proposal which will be urged for adoption in the future. The proposal calls for a model United Nations Code of Consumer Protection. The Secretary General would first issue a report on the present state of

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<sup>12.</sup> See Note 8, supra.

consumer protection in member nations, describing the existence and content of laws regarding: misrepresentation, fraud and deceit in labeling and packaging, conditions for sale, credit practices and advertising; opportunities for redress through judicial or administrative processes; and enforcement techniques, including penalties.

Second, a model code of practices would be prepared by the United Nations' Economic and Social Council based upon the Secretary General's research report. The model code would include provisions with respect to: labeling, advertising and promotion practices; rights and obligations of seller and buyer; and enforcement.

A second model code would also be prepared, providing special standards for the sale of necessities, analogous to the World Health Organization's standards for food. Suggested topics for standards are housing materials, textiles, and appliances.

Once the codes are drafted, the proposal calls for the General Assembly to recommend adoption of the codes by member States and for the establishment of a Consumer Protection Agency "to monitor the effectiveness of the Code and report back to the Economic Council with recommendations as to desirable changes and to assist the Member States in fulfillment of their objectives."

While the United Nations has taken no action on these proposals, it has begun to consider the issues. The General Assembly in 1974 established a Commission on Transnational Corporations to "formulate, adopt, and implement an international code of conduct for transnational corporations." This code is to include regulation of transnational corporations' activities in host countries in such a way as to eliminate "restrictive business practices." In January 1977, the Commission decided to consider consumer protection as a separate major issue relevant to the creation of this code of conduct.

The Economic and Social Council, also in January 1977, decided for the first time to include consideration of consumer protection as an agenda item.

## CONCLUSIONS

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The survey of consumer fraud laws leads to the following conclusions:

- The doctrine of caveat emptor is a 19th century creation, responding to the growth of speculative markets and the growing influence of commercial interests. Earlier legal concepts, grounded on the notion of a sound price for a sound product, offered defrauded consumers far greater protections. None of the 20th century's legislative innovations have returned the consumer to this position where he is entitled to pay only a just price for the goods or services he receives.
- States prohibit both general practices and specific ones, in a patchwork system of regulation. Courts may be reluctant to apply general standards when other specific statutes regulate a practice less comprehensively. On the other hand, without specific regulations or other guidelines courts may not enforce such general standards at all. An important issue, then, for state consumer fraud law, is how much reliance should be placed on broad, expansive standards and how much on specific, well-defined requirements.
- State laws dealing with consumer fraud in specific industries seem to be reflex reactions to particular abuses uncovered in those industries. The laws themselves are often duplicative of more general legislation, and do little more than proscribe certain forms of fraud. But individual regulation can also provide prophylactic requirements tailored to the characteristics of specific industries, thus providing a unique enforcement approach that more general statutes applying to various forms of consumer transactions cannot replicate.
- State law gives little consideration to special standards for particularly vulnerable consumers, such as children, non-English speakers and illiterates. This is in sharp contrast to the plethora of statutes dealing with particular practices or industries.
- Often consumer fraud statutes and enforcement agencies will also deal with fraudulent opportunity schemes, even though this form of fraud may not strictly involve consumer transactions. The extensiveness of legislation, regulation and caselaw in this area demonstrates that opportunity schemes are an important source of governmental concern.
- There is significant diversity among the states as to the form of laws and coverage of particular practices. Almost all states have adopted laws covering certain practices, but these are rarely uniform. Other statutes are enacted by only a minority of states.

- Existing legislation demonstrates a greater governmental concern for identifying and prohibiting various consumer fraud practices than in devising effective enforcement mechanisms.
- Different state sanctions accomplish different state goals. Criminal sentences deter and punish serious misconduct; civil penalties may be more suited to less serious misconduct; injunctions prevent particular sellers from continuing their illegal practices; restitution compensates victims of fraud. Enforcement officials, often equipped with only one such sanction, may find themselves with inadequate enforcement authority to meet state goals in individual cases.
- State consumer fraud enforcement strategies are not limited to sanctions for fraudulent conduct. Labeling, disclosure, licensing, bonding, substantiation, and other requirements attempt to prevent, not just regulate fraud. They give merchants specific standards of conduct and ease government's enforcement problems. Thus prophylactic requirements offer an important alternative enforcement approach to statutes that just prohibit specific forms of fraud. Nevertheless, while licensing and bonding are widely used, more innovative approaches are infrequently included in legislation.
- Almost all consumer fraud laws are enforced by the states. Injured consumers can only complain to various government agencies, relying on government officials' decisions whether to prosecute matters and how vigorously to pursue them. Available remedies usually do not reimburse individual consumers, but only serve to deter future misconduct. Nevertheless, only a minority of statutes provide aggrieved individuals with private rights of action that allow them to vindicate their rights and receive compensation for their damages without having to rely on state agency action.
- Even when private actions are authorized, basic economic considerations deter consumers with small monetary claims from bringing costly individual suits. In order to encourage such litigation, some consumer fraud legislation authorizes procedural innovations such as class actions and small claims courts or unorthodox remedies such as treble, punitive, or statutory damages and the awarding of attorney's fees. But these techniques are not widespread.
- Multiple, punitive, and statutory damage awards serve two other functions. Normal damage awards may not fully compensate injured consumers because of proof problems and failure to award consequential damages. Higher awards serve to better approximate the consumer's actual loss. High monetary awards are also intended to deter seller misconduct, not just compensate injured parties. Reliance need not be placed on state action, as deterrence is created by individual action.



- Other statutes, mindful of the difficulties consumers face relying on state action or litigating for themselves, create certain requirements for sellers or rights for buyers that facilitate private self-help actions. Warranties for goods, cooling off periods for door-to-door sales, refund and other contract requirements for future service contracts are examples.
- State UDAP statutes, providing private rights of action and flexible state remedies for broad categories of deceptive practices, are important state tools for combating consumer fraud. But there are significant differences among statutes demonstrating disagreements among the states as to the best enforcement approach.
- UDAP statute rulemaking authority allows the promulgation of detailed regulations for all areas of consumer fraud, informing consumers and merchants whether particular acts violate the law and easing proof problems for prosecutors and judges. But many states do not have rulemaking authority under their UDAP statute and others have not used it.
- With few exceptions, local enforcement of consumer fraud is limited to district attorney prosecution of state criminal laws, traditional weights and measures functions, and licensing of door-to-door sellers. But New Jersey's counties, New York City, and a number of other local jurisdictions delegate important consumer fraud functions to local agencies.
- Federal regulation of consumer fraud is a crazy quilt of overlapping and conflicting jurisdictions. While the Federal Trade Commission has primary responsibility, 27 other agencies preempt FTC action or have parallel consumer fraud responsibilities.
- Federal fraud remedies are often less flexible and comprehensive than state powers under UDAP acts. The Federal Trade Commission has recently been given more flexible powers more in keeping with state UDAP statutes. But its rulemaking authority includes complex and time-consuming procedural requirements not found in state statutes.
- Federal consumer fraud legislation rarely authorizes private rights of action. The FTC Act, unlike most state UDAP statutes, does not provide for individual actions. Existing private actions under federal law are limited both in scope and in the remedies available.
- Foreign approaches to consumer fraud problems offer some divergent enforcement strategies. Consumer courts, government review of the fairness of standard form contracts, and notions of "bargaining in good faith" are examples of innovations found in foreign countries, but not in the United States.

**APPENDIX A.**

**OTHER FEDERAL AGENCIES**

## APPENDIX A. OTHER FEDERAL AGENCIES

The survey of federal law conducted for Part IV considered every major department and agency in the Executive Branch.\* Many agencies do not possess significant consumer fraud responsibilities. The most important of these are:

1. Commission on Civil Rights (1964). The CCR is solely a fact-finding agency and possesses no enforcement authority. It conducts hearings, investigations, and research into the denial of equal protection of the laws because of race, color, religion, sex, or national origin, in such areas as employment, housing, and education. Its findings and recommendations are submitted to the President and Congress; individual complaints are referred to agencies possessing appropriate enforcement authority.
2. Energy Research and Development Administration (1975). The ERDA consolidates federal research and development concerning the efficient and reliable use of energy from all sources, with an emphasis on fostering U.S. independence from foreign energy sources. Its research also focuses upon the improvement of energy efficiency characteristics in buildings, heating and cooling equipment, and household appliances.
3. Environmental Protection Agency (1970). The EPA promulgates and enforces environmental standards controlling air, water, solid waste, pesticide, noise, and radiation pollution. It advises other federal agencies as to the environmental impact of their undertakings, and cooperates with state and local governments.
4. Equal Employment Opportunity Commission (1965). The EEOC seeks to assure equal opportunity without regard to race, color, religion, sex, or national origin, in hiring, promotion, wages, training, termination, and all other conditions of employment. The agency's jurisdiction includes most private employers and unions, state and local government agencies, and public and private educational institutions; it does not include federal agencies (which are regulated by the Civil Service Commission).

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\*Several agencies in the Legislative Branch were also researched; none was deemed relevant to this survey. Examples of such agencies are the General Accounting Office, Government Printing Office, and Library of Congress. Quasi-official agencies, such as the Smithsonian Institution and the American National Red Cross, were also considered outside the scope of this report.

5. Federal Power Commission (1930). The FPC regulates the wholesale aspects of interstate electric power and natural gas rates and service. The FPC has no direct authority over the prices charged to consumers (which are generally regulated at the state level).

6. General Services Administration (1949). The GSA purchases and distributes supplies used by the U.S. Government, stockpiles materials for national emergencies, and disposes of surplus items owned by the Government. It also oversees the construction and operation of government buildings, publishes the Federal Register (which contains all proposed and final agency regulations), distributes federal consumer information, and operates the federal data processing program.

7. Department of Labor (1913). As a cabinet level department, the DOL promotes and develops the welfare of and opportunities for wage earners. The scores of labor laws administered guarantee decent working conditions, fair wages, nondiscrimination, workers' compensation, and unemployment insurance benefits. A statute it administers which is relevant to consumer fraud is the wage garnishment law, which sets limits upon the amount of earnings which may be garnished and prohibits retaliatory termination of employees.

8. National Labor Relations Board (1935). The NLRB administers laws relating to labor disputes, preventing and remedying unfair labor practices, particularly protecting the right of employees to organize and to bargain collectively.

9. Office of Consumer Affairs. While the OCA is an office in the Department of Health, Education, and Welfare, its director is also the Special Assistant to the President for Consumer Affairs. The OCA:

- Coordinates the implementation of federal consumer protection activities and seeks to improve federal agency consumer complaint handling;
- Provides assistance to state and local governments in the promotion of consumer interests;
- Works with business to develop voluntary industry consumer programs;
- Conducts investigations, surveys, and research designed to point up consumer problems and concerns;
- Handles individual consumer complaints, writing letters to merchants or referring cases to appropriate federal or state agencies; and
- Fosters consumer education and disseminates information.

The OCA also prepares a semimonthly publication, Consumer News, which describes matters of national concern to consumers, particularly federal agency activity.

10. Pension Benefit Guaranty Corporation (1974). The PBGC is a self-financing government corporation governed by a Board of Directors consisting of the Secretaries of Labor (Chairperson), Commerce, and the Treasury. It guarantees basic pension benefits in covered private plans if they terminate without sufficient assets. Most private benefit plans are required to subscribe to a PBGC termination insurance program. The PBGC also advises consumers who are considering establishing Individual Retirement Accounts.

11. Small Business Administration (1953). The SBA was created to aid, counsel, and protect the interests of small business. The SBA offers:

- Financial assistance, in the form of guaranteed direct or lender participation loans;
- Procurement assistance, to assure that small business obtains a "fair share" of government contracts;
- Management assistance; and
- Advocacy on behalf of small business interests before other federal agencies and Congress.

The SBA also licenses, regulates, and makes loans to small business investment companies, and enforces the Equal Credit Opportunity Act as to such entities.

12. Department of State (1789). The oldest cabinet level department in the Executive Branch, the DOS formulates and executes the foreign policy of the United States, including the negotiation of treaties and agreements with other nations. The foreign policy determinations of the DOS can affect the availability and price of many products. The DOS also issues U.S. citizens passports for travel to foreign countries.

13. United States International Trade Commission (1974). Originally created in 1916 as the United States Tariff Commission, the USITC conducts investigations, public hearings, and research concerning international trade and tariffs, and advises the President, Congress, and other federal agencies on such matters. The USITC investigates whether unfair methods of competition or unfair acts are committed in the importation of foreign articles or their sale in the United States, to the detriment of domestic industry. In such instances, the USITC may act to exclude such articles or issue cease and desist orders proscribing such methods or acts. Other broad investigatory powers concern customs laws, volume of imports, and competition between foreign and domestic industry.

In appropriate situations, findings by the USITC may lead to import relief action by the President or Department of the Treasury, e.g., the USDT may impose a duty on imports as an "antidumping" measure.

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