2019
REVIEW OF
CONSUMER PROTECTION
LAW DEVELOPMENTS (SECOND)

ANTITRUST LAW SECTION
AMERICAN BAR ASSOCIATION
FOREWORD

The American Bar Association Antitrust Law Section is proud to continue its long-standing tradition of scholarship and service for the practitioner with an electronic update to two chapters of Second Edition of Consumer Protection Law Developments (CPLD 2nd). This update should be used as a supplement to CPLD 2nd, which is available for purchase at the online Antitrust Book Store on the American Bar Association website (americanbar.org). This update is being made available at no cost to Antitrust Law Section members at the Antitrust Book Store.

The two chapters included in this update report on important developments since CPLD 2nd was published in 2016: “State Consumer Protection Laws” and “Promotions and Specialized Product Marketing.” For instance, the Connecticut Supreme Court held that families of victims of the 2012 Sandy Hook Elementary School mass shooting had pleaded viable claims under the state’s consumer protection statute against the manufacturer, distributor and seller of the assault rifle used in the shooting. In Vermont, a new state law went into effect in 2019 that requires increased transparency of third party data brokers when collecting, buying or reselling consumer data. In North Dakota, a 2019 law restricts the use of automatic renewal clauses in consumer contracts.

At this time, there are no plans to update other chapters of CPLD 2nd. Going forward, CPLD will be re-organized into separate publications focused on federal consumer protection law, state consumer protection law, and privacy issues. Complete, fully-updated new editions on each of these topics will be available. In the interim, this update should provide a valuable resource to our members in this rapidly evolving area of the law.

Thanks go to the dozens of individuals who worked diligently to gather, analyze, and synthesize a large amount of information. The contributors to the State Consumer Protection Laws chapter in almost all cases practice in the state about which they wrote or in a border state. The contributors include lawyers who work for government consumer agencies, who primarily represent plaintiffs, and who primarily represent businesses. Two contributors went on to judicial appointments: one to a federal appellate court and one to a state appellate court. The expertise and diligence of the contributors greatly enhanced the quality of this update. The contributors to the chapter on State Consumer Protection Laws are:
Likewise, the attorneys who wrote for the Promotions and Specialized Product Marketing chapter have special expertise in that field. The contributors to the chapter on Promotions and Specialized Product Marketing are:

Helen Chen
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We thank the editors of the chapters on State Consumer Protection Laws and Promotions and Specialized Product Marketing: Erv Switzer and Gonzalo Mon. We also thank John Drake, a colleague of Erv Switzer’s at Greensfelder, Hemker & Gale, P.C., who functioned as an associate editor of the State Consumer Protection Laws chapter. Also contributing greatly to this update were Arthur Burke, who reviewed the entire publication, and the Section’s Officers and Council members who reviewed and edited the completed manuscript.

It is our hope that consumer protection practitioners will find this update a valuable tool and supplement to CPLD 2nd. We also look forward to soon offering CPLD in its new format.

February 2020

Brian R. Henry
Chair, Antitrust Law Section
American Bar Association
2019-20
CHAPTER III

PROMOTIONS AND SPECIALIZED PRODUCT MARKETING

B. Sweepstakes and Contests

1. Structuring a Sweepstakes or Contest

a. Sweepstakes

States continue to regulate the sweepstakes café business model, with several more acting to prohibit sweepstakes machines, sweepstakes cafés, or both. States that have recently passed laws placing additional limitations on sweepstakes cafés include: California, Colorado, Connecticut, Georgia, Kentucky, Louisiana, Massachusetts, and New York.

Scrutiny of sweepstakes, and whether they are in fact illegal lotteries, has expanded to marathons and similar races. In 2015, the Department of Justice filed a complaint against the World Triathlon Corporation (WTC), alleging that WTC’s practice of requiring applicants to pay for a chance to compete in the Ironman World Championship constituted an illegal lottery. Prospective participants paid $50 to enter a random drawing that awarded winners the right to participate in the Ironman World Championship. Participants could also pay an additional $50 to increase the odds of selection through membership in WTC’s Passport Club. Because this practice involved an award of a prize, by chance, for consideration, it met the elements of an illegal lottery. Ultimately, WTC agreed to forfeit $2,761,910, representing lottery proceeds...

8. N.Y. Penal Law § 156.40.
10. Id.
11. Id.
collected since October 24, 2012. The New York Road Runners, organizer of the New York City Marathon, was sued in a class action on similar grounds on January 21, 2016. In settlement of that lawsuit, the Road Runners agreed to credit future entry fees for participants who had previously paid in to the challenged scheme and to either 1) cease the practice for three years or 2) apply for a state lottery license.

In October 2016, the radio station water-drinking contest “Hold Your Wee for a Wii,” which allegedly led to a contestant’s death in 2007, was re-examined by the FCC as part of radio station owner Entercom’s license renewal application; the FCC issued a Hearing Designation Order to consider the issue. It is rare for the FCC to focus a license renewal on dangerous behavior instead of leaving its resolution to civil courts, but at that time the Commission was taking a more activist position on consumer protection issues. The station ultimately chose to voluntarily give up its broadcast license.

3. Advertising Sweepstakes and Other Consumer Protection Considerations

a. Disclosing Material Terms

Responding to changing technology, the FCC now allows broadcasters to disclose sweepstakes and contest rules on their website instead of reading them on the air. This is a change from FCC’s traditional reading of the “Contest Rule,” which required broadcasters advertising a price promotion to include all “material terms” on-air and

14. Id.
run the contest substantially as announced or advertised.\textsuperscript{18} In order to post rules online, the promotion sponsor must: 1) have a publicly accessible website; 2) periodically identify the website; 3) include a conspicuous link to the rules on the website homepage; 4) keep the terms on the website for at least 30 days after the contest’s conclusion; 5) ensure the website information matches terms given over the air; and 6) broadcast to consumers on-air a notification that includes any change in terms and directs participants to the website for details.\textsuperscript{19}

b. Deceptive and Misleading Advertising of Sweepstakes and Contests

Regulators and states remain active in pursuing deceptive advertising of sweepstakes. Mail-based sweepstakes in particular have been the subject of recent enforcement at the state and federal level. In 2015, the FTC won a preliminary injunction against Mail Tree, Inc., which defrauded consumers of more than $28 million by sending letters claiming recipients had won a sweepstakes but needed to pay in order to claim their prize.\textsuperscript{20} The DOJ also charged four of the Mail Tree organizers with mail fraud,\textsuperscript{21} ultimately one defendant pleaded guilty and three others were found guilty.\textsuperscript{22} The Iowa Attorney General’s office took action against Tactical Marketing for similar mailings, entering into a voluntary compliance agreement with the company that required cessation of the marketing to Iowans and refunds for Iowans.\textsuperscript{23} The FTC has also recently pursued repeat offenders in these types of cases who

\textsuperscript{18} 47 C.F.R. § 73.1216.
\textsuperscript{20} Fed. Trade Comm’n v. Mail Tree, 0:15-cv-61034-JIC (S.D. Fl. June 12, 2015).
\textsuperscript{21} Four South Florida Residents Guilty of Conspiring to Commit Sweepstakes Mail Fraud, Dep’t of Justice (July 28, 2017), https://www.justice.gov/usao-sdfl/pr/four-south-florida-residents-guilty-conspiring-commit-sweepstakes-mail-fraud.
\textsuperscript{22} Id.
violated earlier court orders by re-engaging in sweepstake promotion mailings.24

C. Rebates

States have also enforced rebate actions under a theory of escheat. For example, in Illinois, the State Treasurer’s Office regularly audits companies to determine if they have unclaimed property that belongs to Illinois residents.25 In 2016, the Treasurer brought a case against Sprint and its rebate clearinghouse vendor, alleging that they held property that rightfully belonged to Illinois citizens, and that citizens were entitled to receive such property under the Uniform Disposition of Unclaimed Property Act.26 Individuals who had purchased products and services through Sprint were eligible for rebates.27 Any rebate an individual did not claim was given to Sprint’s rebate clearinghouse vendor.28 The Uniform Disposition of Unclaimed Property Act, however, considers property that is not claimed within five years to be property of the state, that can be rightfully returned to its owner.29 The complaint alleged that the unclaimed rebates were such property.30 As part of its settlement, Sprint was required to pay $2.3 million in rebate checks to 32,000 customers who had not cashed them.31

27. Id.
28. Id.
29. Id.
30. Id.
D. Online Marketing

1. Viral Marketing

a. Buzz Marketing

(3) Disclosure of Material Connections

Although the FTC has historically focused its enforcement on advertisers, rather than taking action against individuals, that trend may be changing.

In 2016 and 2017, four consumer groups — Public Citizen, Commercial Alert, the Campaign for a Commercial Free Childhood, and the Center for Digital Democracy — sent a series of joint letters to FTC, encouraging the Commission to investigate and bring enforcement actions related to the use of influencers on Instagram. Together, the letters included examples of over 150 allegedly problematic posts on that platform. The groups urged the FTC to take action to stop this “dangerous trend.”

In a likely response to these letters, in April 2017, the FTC staff sent “educational letters” to more than 90 social media influencers, reminding them of their obligation to disclose any connection they have to the companies whose products they promote. Then, in September 2017, the FTC announced that they had sent new “warning letters” to 21 of those influencers. The warning letters cite specific posts that concerned the FTC staff and explained why those posts might not comply with the Endorsement Guides or the FTC Act. For example, some of the letters noted that the staff believe that tagging a brand is an endorsement of the brand. “Accordingly, if you have a material connection with the marketer of a tagged brand, then your posts should disclose that connection.” Other letters stated that simply thanking a brand is not a sufficient disclosure. And others reminded influencers that disclosures must be easy to find, and that consumers shouldn’t be required to click a link in order to find them.

The FTC also released an updated version of The FTC’s Endorsement Guides: What People are Asking,32 a staff publication that answers questions about the use of endorsements, including in social

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media. The principles remain the same, but the staff answered more than 20 new questions relevant to influencers and marketers on topics like what constitutes an endorsement, what terms endorsers can use to indicate their relationship with the company whose products they endorse, and how those disclosures may appear. For example, the document explains that simply tagging a brand can constitute an endorsement, even if the endorser doesn’t say anything about it. The FTC staff explained that disclosures like “#ambassador” and “thanks, [Brand]” may not be sufficient to communicate a relationship. And although #ad is usually a safe option, that might not work if it appears at the end of a long hashtag, such as #coolstylead. The FTC staff also emphasized that disclosures must be “clear and conspicuous” and presented in such a manner that consumers don’t have to click on a link in order to find them.

(3) FTC Investigations

In 2016, the FTC entered a consent order with Machinima, Inc. regarding undisclosed paid endorsements. According to the complaint, Machinima, an online entertainment network based in California, paid social media influencers to create and post positive video reviews of video games. Machinima provided the influencers with pre-release copies of the games, dictated detailed content specifications and talking points for the videos, and even classified the videos as “work for hire” over which Machinima would retain ownership. When influencers posted the videos to social media, they did not disclose their relationships to the company. Under the settlement, the FTC required Machinima to remind endorsers of their disclosure responsibilities, monitor their activities, and withhold compensation from endorsers who do not comply with the disclosure rules.

35. Id.
In 2017, the FTC settled its first enforcement action against individual social media influencers. This represented a departure from the previous practice of limiting enforcement action to advertisers. Notably, one of the influencers had already been implicated in the Machinima enforcement action discussed above. The complaint was filed against Trevor Martin and Thomas Cassell, social media influencers who posted videos to YouTube, Twitter, and Instagram of themselves playing the CSGO Lotto online game without disclosing that they owned and operated the game or that they were wagering with free currency. Indeed, they posed as independent consumers, posting that they had “found” the website. The FTC filed the complaint not only against Martin and Cassell in their individual capacities, but also against the company, CSGOLotto, Inc., as Martin and Cassell had paid other individuals to post similar gaming videos, in a pattern recalling some of the facts from the Machinima case.

As part of the company’s influencer program, endorsers were prohibited from saying anything negative about the site, and their posts either included no endorsement disclosures, or included “below the fold” disclosures not appearing prominently enough in the social media posts to clearly notify viewers of the endorsement relationship. The settlement required that any connection be disclosed “clearly and conspicuously.” Although this phrase has a long history in advertising law, the CSGO Lotto settlement clarified it to mean “difficult to miss” in this case, ultimately entering a settlement imposing similar policing of endorsers to that required under the FTC consent order. See New York Attorney General Press Release, A.G. Schneiderman Announces Settlement with Machinima and Three Other Companies for False Endorsement, available at https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-machinima-and-three-other-companies-false.

40. Id.
and “easily understandable” by the ordinary consumer. This appears to raise the bar set in the Machinima consent order, which required disclosures to appear “clearly and prominently,” meaning “sufficiently noticeable for an ordinary consumer to read and comprehend them.”

In February 2019, the FTC entered a final settlement with Creaxion Corporation, a marketing company, and Inside Publications, LLC, after paid influencers posted social media endorsements of Creaxion’s client’s product. The defendants together arranged to pay two Olympic gold medalists to endorse a mosquito repellent in the wake of the 2016 Zika virus outbreak, and Inside Publications reposted the endorsements in its Inside Gymnastics magazine. Neither the original posts nor the reposts by Inside Publications contained the required disclosures of the commercial relationship. Under the settlement, the defendants are barred from misrepresenting paid endorsements as independent consumer reviews. Neither the individual influencers nor the maker of the mosquito repellent were targets of this enforcement action.

In June 2019, the FTC joined the FDA to send warning letters to several sellers of tobacco-alternative e-liquids whose products had been endorsed by social media influencers. The social media posts did not disclose the health risks of using the product, or the presence of a commercial relationship between the influencers and the sellers. This area will continue to develop as medical organizations have called upon enforcers to crack down upon the electronic tobacco alternative “vape” industry.

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2. Native Advertising

In December 2015, the FTC released two guidance documents on native advertising: (1) Enforcement Policy Statement on Deceptively Formatted Advertisements (the “Policy Statement”); and (2) Native Advertising: A Guide for Businesses (the “Guide”). The Policy Statement reminds advertisers that although native advertising may be new, the requirement that ads be clearly labeled as such is not. In fact, the FTC provides examples of enforcement dating as far back as 1967.

The Guide starts with the basic principle that an ad can be deceptive if it leaves consumers with the impression that the ad is impartial or from a source other than the advertiser. Notably, an ad can be considered deceptive, even if everything in the ad is true. The Guide includes 17 hypothetical examples of native ads. In each of the examples, the FTC describes a scenario, discusses the potential legal issues, and describes an advertiser’s disclosure obligations. After the examples, the FTC provides additional guidance on how to make the required disclosures. The FTC emphasizes that if it is not otherwise clear that something is an ad, it should be labeled as such. Although there may be instances in which consumers understand that something is an ad absent any label, the FTC suggests that any doubts should be resolved in favor of using a label, such as “Advertisement.

In 2016, the FTC entered a settlement with Lord & Taylor, LLC based on the company’s undisclosed commercial arrangement with Nylon online magazine. To promote its DesignLab clothing line, Lord & Taylor paid Nylon to run an article about the collection, which the advertiser reviewed and pre-approved before publication. The consent


48. In re Lord & Taylor, LLC, FTC File No. 152-3181 (2016). This case also included charges of undisclosed endorsements, with Lord & Taylor giving social media influencers free clothes and monetary payments to share company-approved posts to Instagram.
order settling the FTC’s complaint prohibits Lord & Taylor from misrepresenting that paid commercial advertising is from an independent or objective source. It also prohibits the company from misrepresenting that any endorser is an independent or ordinary consumer, and requires the company to disclose any unexpected material connection between itself and any influencer or endorser. Finally, it establishes a monitoring and review program for the company’s endorsement campaigns.49

In November 2017, the FTC settled claims against three individuals and a network of 19 companies over charges of setting up fake websites with domain names and mastheads mimicking legitimate sources such as Good Housekeeping and Men’s Health.50 The sites included fabricated celebrity and consumer endorsements of the defendants’ weight-loss, muscle-building, and wrinkle-eliminating products, and links to “free” or “risk-free” trials of the defendants’ products.51 Consumers were actually charged full price for the products and fell prey to an undisclosed auto-order system. Under the settlement, the defendants agreed not to represent its advertisements as independent news sources, among other prohibitions.52

In December 2017, the FTC settled claims against Bob Robinson, LLC, based on allegations that the defendants deceptively drew consumers to their online work-from-home scheme by planting their own web links in proximity to articles about working from home on

51. Federal Trade Commission v. Tarr, Inc., No. 17CV2024LABKSC (S.D.Cal. 2017). The defendants also created decoy websites with appropriate disclosures to deceive regulators, while taking steps to ensure that consumers would encounter the noncompliant versions of the sites.
legitimate websites. This case indicates the FTC may be broadening its interpretation of what constitutes native advertising; here, enforcement was triggered by the placement of a website link in or near a legitimate independent article, rather than the publication of a decoy article.

As noted above, in February 2019, the FTC entered a final settlement with Creaxion Corporation and Inside Publications, LLC, amid allegations that the defendants published advertisements for mosquito repellent posing as news articles about the Zika virus outbreak and its impact on the 2016 Summer Olympics. Under the settlement, the defendants must not misrepresent paid ads as independent news articles.

G. Alcohol

1. Federal Restrictions

On May 3, 2017, the Department of the Treasury, Alcohol, and Tobacco Tax and Trade Bureau (“TTB”) denied a petition from a supplement company to advertise that its supplement reduces the health risks of drinking alcohol. Chigurupati Technologies developed a supplement called “NTX” – pronounced “no-tox” – made of potassium sorbate, glycyrrhizin, and a licorice root based anti-inflammatory named mannitol to curb the effects of hangovers and reduce liver and DNA damage. According to Chigurupati Technologies, studies indicated that humans given NTX-infused alcohol showed less liver and DNA damage than humans given plain alcohol. Although the TTB stated that it


56. Id.

57. Id.
permits manufacturers to include “Made with NTX” on their products, manufacturers may not claim that NTX reduces the health risks associated with alcohol. Indeed, the TTB rejected Chigurupati Technologies’ findings and stated that they were unsubstantiated and may “create a misleading impression that consumption of alcohol beverages infused with NTX will protect consumers from certain serious health risks associated with both moderate and heavy levels of alcohol consumption.”

In late 2018, the TTB issued a notice of proposed rulemaking to modernize the labeling and advertising regulations of wine, beer, and liquor. TTB proposed to reorganize 26 CFR parts 4, 5, and 7, which currently govern labeling and advertising for wine, distilled spirits, and malt beverages, respectively, by removing the advertising provisions of those subparts and consolidating them into a new 27 CFR 14. The proposed rule would codify the TTB’s longstanding interpretation that the prohibition on disparaging statements on labels and in advertisements does not include truthful and accurate comparisons with a competitor’s product. In addition, it would identify and provide examples of categories of prohibited statements such as those related to analyses, standards or tests, which, though truthful, are likely to mislead the consumer; cross-commodity terms that mislead customers as to the identity of the alcohol product; and depictions and symbols likely to lead to a consumer misconception of endorsement or supervision by the government. Finally, social media advertising is not addressed in this rulemaking, but TTB indicated regulations may be proposed in future rulemaking initiatives. The extended comment period for this notice ended on June 26, 2019.

58. Id.
60. Id. at 60567-68.
61. Id. at 60577.
62. Id. at 60-57-78.
63. Id. at 60567.
In early 2017, class action plaintiffs brought suit against Asahi Beer U.S.A Inc., alleging that its beer labels deceived consumers into paying a “premium” for a beer they believe was brewed in Japan, not Canada.\(^{65}\) The plaintiffs alleged the labels were deceptive under federal and California law, notwithstanding a printed disclaimer on the bottleneck which stated, “BREWED AND BOTTLED UNDER ASAHI’S SUPERVISION BY MULSON CANADA, TORONTO, CANADA. IMPORTED BY ASAHI BEER U.S.A., INC. TORRANCE, CA PRODUCT OF CANADA.”\(^{66}\) The District Court denied Asahi’s motion to dismiss and held that the labels bearing Japanese elements and characters “could give rise to a reasonable inference or belief the Product was produced in Japan.”\(^{67}\) The case was dismissed and refiled in California state court before the parties reached a settlement in November 2018, wherein Asahi agreed to pay each consumer household which purchased Asahi Beer brewed outside of Japan between April 5, 2013 and December 20, 2018, a maximum of $10.\(^{68}\) In addition, Asahi was required to amend its bottleneck label to display the prominently display the phrase “PRODUCT OF CANADA” in bold letters for three years.\(^{69}\)

In 2017, a United States District Court in California found that a brewery may mislead consumers if a brewery advertises one of its smaller breweries as its main brewery. In *Broomfield v. Craft Brew All., Inc.*,\(^{70}\) a brewery packaged, labeled, and marketed its beer as a Hawaiian-made beer\(^{71}\) although the brewery made the majority of its beer outside of Hawaii and only had one small brewery in that state.\(^{72}\) The Court refused to dismiss the misrepresentation claims, stating that it “cannot conclude as a matter of law that the misrepresentations would not

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66. *Id.*
67. *Id.*
69. *Id.*
71. The brewery’s packaging, labeling, and marketing included pictures of Hawaii and encouraged consumers to come visit the Hawaiian brewery. *Id.*
72. *Id.*
mislead a reasonable consumer.” The Court also dismissed the Plaintiff’s request for injunctive relief and denied leave to file, but later granted a motion to reconsider the injunctive relief request in light of new Ninth Circuit precedent. On September 25, 2018, the Court granted the plaintiff’s motion for class certification.

2. State Restrictions

Since 2009, several states including Illinois, California, Virginia, and Massachusetts have moved to restrict or prohibit the sale of caffeinated alcoholic beverages. Although Virginia permits the sale of caffeinated alcoholic drinks, it requires alcohol establishments to display caffeinated alcoholic beverages with alcoholic drinks, rather than non-alcoholic beverages. Massachusetts and California, unlike Virginia, completely prohibit the sale of caffeinated alcoholic beverages.

Some states prohibit or restrict the sale of alcohol below cost. For example, Connecticut permits the sale of alcoholic beverages below cost provided that the retailer does not sell the beverage below 90% of its cost, limits the sale to once a month, and notifies the Department of Consumer Protection of the sale. South Dakota permits the sale of alcohol below cost if the sale is the last time the retailer will sell that particular alcoholic beverage; for example, the beverage company terminates its business. Massachusetts prohibits authorized licensees from selling, advertising, or ordering alcoholic beverages below cost unless the Massachusetts Alcoholic Beverages Control Commission provides written approval. Georgia prohibits the sale of alcohol below cost unless the Commissioner of Revenue authorizes the sale for reasons

73.  Id.
76.  See 235 ILL. COMP. STAT. ANN. 5/6-35 (West 2009); 204 MASS. CODE REGS. 2.19 (2011); CAL. BUS. & PROF. CODE § 25622 (West 2012); 3 VA. ADMIN. CODE 5-50-240 (West 2017).
77.  See 3 VA. ADMIN. CODE 5-50-240 (West 2017).
78.  See 204 MASS. CODE REGS. 2.19 (2011); CAL. BUS. & PROF. CODE § 25622 (West 2012).
79.  See CONN. GEN. STAT. ANN. § 30-68m (West 2014).
related to liquidating inventory, closing out particular brands, or removing outdated products.82

A number of states limit or wholly prohibit the advertising of happy hours. Virginia recently repealed its long-standing prohibition on advertising happy hour drink specials.83 Beginning July 1, 2019, licensed Virginian establishments may advertise drink prices, types and brands, use creative terms (e.g., “Wine Down Wednesday”) in advertisements, and promote drink specials in advertisements on flyers, posters, social media and their websites, subject to other existing alcohol advertising laws and regulations.84 However, licensees are still prohibited from promoting over-consumption and underage drinking, and therefore advertisements for free, two-for-one and “bottomless” drink specials remain illegal.85

On April 30, 2019, New York City Mayor Bill de Blasio issued an Executive Order banning all advertising of alcohol on City property.86 The Order prohibits advertisements at or in bus shelters, newsstands, phone booths, Wi-Fi kiosks or recycling kiosks.87 It applies to any contract entered into or renewed by the City, including franchises and concessions, but existing advertisements in those spaces will be permitted to remain until the duration of their contract term.88

3. Industry Guidelines

The National Football League (“NFL”) lifted its ban on televising liquor and spirit advertisements during game-time for the 2017 NFL Season.89 The ban was first put in place to avoid associating NFL players

82. See GA. CODE ANN. § 3-4-26 (1996); GA. CODE ANN. § 3-4-25.1 (1996).
84. Id.
85. Id.
87. Id.
88. Id.
89. See e.g., Joe Flint & Suzanne Vranica, NFL Adds Liquor to Menu of Advertisers, THE WALL STREET JOURNAL (June 2, 2017),
with hard liquor. The new policy, called the “NFL Season Test,” permits up to four 30-second hard liquor advertisements per game, but allows no more than two advertisements per quarter or during halftime. The policy also allows the networks airing the games to televise two liquor and/or spirit advertisements in their pregame and postgame programs. The advertisements must include a “prominent social responsibility message” and cannot include a football theme or appeal to underage drinkers. Although the change is limited to the 2017 season, the NFL expects the policy to become permanent.

H. Cigarettes

5. Alternative Tobacco Products

a. Background

As technology advances, tobacco manufacturers are able to develop new products that may fall outside the legal landscape, and restrictions, of cigarettes and other traditional tobacco products. Electronic nicotine delivery systems (or “ENDS”), which include products known as “electronic cigarettes,” or “e-cigarettes,” are battery-operated devices through which the consumer inhales nicotine vapor. Despite their mechanical characteristics, the U.S. Circuit Court for the District of Columbia held in 2010 that e-cigarettes not marketed using therapeutic claims may not be categorized as medical “drug-device combinations” requiring FDA approval under the Food, Drug, and Cosmetics Act. Instead, e-cigarettes are considered “customarily marketed tobacco products” which the FDA has broad authority to regulate under the FSPTCA. As a result, the FDA issued a deeming rule effective August 2016.

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Other products classified and regulated as ENDS are vapes, e-liquids, e-cigars, e-pipes, and e-hookahs.
96. Sottera, Inc. v. Food & Drug Administration, 627 F.3d 891 (D.C. Cir. 2010); 21 U.S.C. § 301 et seq.
97. Id. at 898.
8, 2016 classifying ENDS as “tobacco products” and subjecting them to the same laws and regulation governing conventional cigarettes, including banning sales to minors and requiring premarket review and approval.98

In 2018, the FDA issued warning letters to 18 ENDS manufacturers, distributors, and retailers who sold ENDS products with labeling or advertising that resembled child-friendly food products such as juice boxes, candy, or cookies.99 The packaging of the products in question closely mimicked the packaging and branding of popular cereals and candies; one product even came packaged with a lollipop.100 The FDA determined that these products were misbranded as the labeling could mislead children into thinking the products were safe, familiar foods.101 Additionally, the companies had not complied with premarket requirements, despite entering the market after the effective date of the deeming rule.102 The FDA issued many of the warning letters in partnership with the FTC, which underscored the deceptive nature of the labeling and also pointed out that several of the products had scents which were not only identical to those of safe, child-friendly foods, but

that were detectible without opening the packaging. Amid public health concerns surrounding the popularity of ENDS among teens and a recent spike in the number of related child poisonings, it is likely that enforcers will continue this vigorous oversight.

b. Enforcement

The FDA and a number of state enforcers took action against JUUL Laboratories, an ENDS manufacturer representing nearly a third of the market, after it marketed an ENDS device closely resembling a USB flash drive. This action was in response to strenuous urging from several prominent health and medical organizations, who named JUUL as a public health threat in an open letter to the FDA. The JUUL device, being small and easily concealed, found popularity with teenagers. Additionally, the device could be personalized with decorations, including cartoon characters, or disguised as another item, such as a marker. The e-liquid itself also raised red flags with enforcers due to its availability in a variety of fruit- and candy-inspired flavors, which may particularly appeal to children and teens.


The FDA issued warning letters and fines. The Attorney General of Massachusetts issued cease-and-desist demands to JUUL, as well as Direct Eliquid, LLC, and Eonsmoke, LLC, online retailers who sold JUUL and JUUL-compatible products, alleging they violated state law by not shipping products with a requirement that an adult sign for the package. The Attorney General of Connecticut has also launched a probe into the company. In May 2019 North Carolina became the first state to sue JUUL, alleging that the company deceptively downplayed the effects of its product. Lake County, Illinois has since followed North Carolina’s lead in suing the company. Interested observers should watch this area closely for developments. Amid significant scrutiny and increasing reports of ENDS-related hospitalizations of teens and young adults — and even a death — JUUL’s strategic

109. See FDA Press Release, FDA takes new steps to address epidemic of youth e-cigarette use, including a historic action against more than 1,300 retailers and 5 major manufacturers for their roles perpetuating youth access, https://www.fda.gov/news-events/press-announcements/fda-takes-new-steps-address-epidemic-youth-e-cigarette-use-including-historic-action-against-more.


115. The Washington Post, First death reported from lung illness linked to vaping, officials say, available at
cultivation of political contacts indicates it is hoping for a change in the regulatory approach to ENDS products.\textsuperscript{116}

In 2019, the Los Angeles City Attorney filed suit against two ENDS companies, NEwhere, Inc., and VapeCo Distribution LLC (a subsidiary of NEwhere). The suit alleged that the defendants violated age-verification laws and used “popular social media platforms, including Instagram, to glamorize youth vaping through the use of young models, sexualized content, cartoon characters and smoking tricks.”\textsuperscript{117} Within days, the defendants entered a stipulation agreeing to comply with age-verification protocols. The City Attorney simultaneously filed suit against Kandypens, Inc., an online retailer of e-liquids, under similar facts. In response, Kandypens appeared to end e-liquid sales entirely.\textsuperscript{118}

\begin{itemize}
\item \url{https://www.washingtonpost.com/health/2019/08/23/first-death-reported-vaping-related-lung-illness-officials-say/}.
\item \textsuperscript{116} See Politico, Juul tries to make friends in Washington as regulators circle, \url{https://www.politico.com/story/2018/12/08/juul-lobbying-washington-1052219}.
\item \textsuperscript{117} See LA City Attorney Press Release, City Attorney Mike Feuer Seeks Injunctions Against Three Online E-Cig Companies for Allegedly Targeting Minors, available at \url{https://www.lacityattorney.org/single-post/2018/10/31/city-attorney-mike-feuer-seeks injunctions-against-three-online-e-cig-companies-for-allegedly-targeting-minors}.
\end{itemize}
CHAPTER V

STATE CONSUMER PROTECTION LAWS

E. Consumer Protection Laws of Individual States

1. Alabama

a. Scope of the Statutes and Elements of a Cause of Action

To recover under the Alabama Deceptive Trade Practices Act (DTPA), an individual must prove that (1) he or she is a “consumer,” (2) who made a pre-suit demand, and (3) suffered monetary damages as a result of the defendant’s violation of the DTPA.1 The requirement of a pre-suit demand notice was addressed in In re Takata Airbag Products Liability Litigation.2 In that matter, Mazda filed a motion to dismiss the multiple claims asserted against it relating to economic loss and personal injury arising from airbags manufactured by Takata.3 With respect to the claim asserted against Mazda under the DTPA, the plaintiffs argued that, because Federal Rule 23 does not contain a similar pre-suit notice requirement, the state rules requiring the pre-suit demand conflicted with the federal rule and, thus, required the application of the federal rule.4 The district court stated that Federal Rule 23 had no bearing at the particular stage of the litigation and, with no conflict, the pre-suit demand requirement was due to be enforced in federal court.5 And, while the district court found that the pre-suit demand requirement applied, the court held that the plaintiffs had sufficiently alleged the requirement was satisfied.6

1. ALA. CODE §§ 8-19-3(2) (defining consumer as “any natural person who buys goods or services for personal, family or household use”) and 8-19-10(a).
3. Id. at 1330.
4. Id. at 1345.
5. Id.
6. Id.
b. Private Enforcement and Remedies

The DTPA provides for a private right of action in favor a consumer against a person who violates the statute. Before 2015, only the Alabama Attorney General or a district attorney could bring a class action; a consumer could not sue on behalf of a putative class. However, in *Lisk v. Lumber One Wood Preserving, LLC,* the Eleventh Circuit held that the provisions of the DTPA prohibiting a consumer from bringing a class action did not control for an action pending in federal court. Instead, Rule 23 of the Federal Rules of Civil Procedure governed and the DTPA’s provision limiting the authority to the Alabama Attorney General or a district attorney to bring a class action did not displace Federal Rule 23.

In *Lisk,* the plaintiff filed a complaint seeking to represent a class of consumers who purchased Lumber One’s alleged defectively “treated” wood. While the plaintiff’s individual claim did not exceed $75,000, the plaintiff invoked federal jurisdiction under the Class Action Fairness Act. In federal court, Lumber One moved to dismiss the complaint on the basis that the DTPA did not authorize a private class action as well as other independent grounds. The district court granted the motion to dismiss and the plaintiff filed an appeal.

On appeal, the Eleventh Circuit recognized that the DTPA created a private right of action in favor of a consumer against a person who violates the statute. However, for a class action, the DTPA’s language provided that only the Alabama Attorney General or a district attorney had the authority to do so; a private individual could not bring a class action. The Eleventh Circuit framed the issue on appeal as whether Federal Rule 23 applied or, instead, is displaced by the contrary provision of the DTPA.

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7. ALA. CODE § 8-19-10.
8. ALA. CODE § 8-19-10(f).
9. 792 F.3d 1331 (11th Cir. 2015).
10. *Id.* at 1336.
11. *Id.* at 1336-37.
12. *Id.* at 1333.
13. *Id.
14. *Id.
15. *Id.
16. *Id.* at 1334.
17. *Id.
18. *Id.*
In addressing the issue, the Eleventh Circuit relied upon the Supreme Court’s decision in *Shady Grove Orthopedics Associates v. Allstate Insurance Co.* The Eleventh Circuit stated that the Supreme Court addressed a “nearly identical issue” in *Shady Grove,* where the issue was which provision controlled – the provisions of Federal Rule 23 or a New York statute prohibiting class action claims seeking to recover statutory interest on a late paid insurance claim. In *Shady Grove,* the Supreme Court held that Federal Rule 23 governed and the Eleventh Circuit determined that decision compelled the same result in the appeal before it.

In addition, the Eleventh Circuit’s analysis considered the Rules Enabling Act which authorizes the Supreme Court to adopt rules of practice and procedure that apply not only in cases arising under federal law but also in cases in which state law supplies the rule of decision. Under the terms of that statute, a federal rule applies in any federal lawsuit and displaces any conflicting state provisions, so long as the federal rule does not “abridge, enlarge or modify any substantive right.” In *Shady Grove,* the Supreme Court determined that applying Rule 23 to allow a class action for a statutory penalty created by New York law did not abridge, enlarge or modify a substantive right and the Eleventh Circuit, once again, indicated that the *Shady Grove* holding controlled the appeal before it. As a result, for an action pending in federal court, Rule 23 controls, not the DTPA’s prohibition on class actions.

In May 2016, the Alabama legislature enacted S.B. 270, which added new language to § 8-19-10(f) to specify that the prohibition on consumers bringing a DTPA action on behalf of a class “is a substantive limitation and allowing a consumer or other person to bring a class action or other representative action for a violation of this chapter would abridge, enlarge, or modify the substantive rights created by this chapter.” Since that amendment, a district court has held that the *Lisk* analysis remains “fully intact” after the 2016 amendment to the DTPA, finding the substantive rights and obligations remained the same and were “in no way abridged, enlarged or modified by Rule 23.”

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19. 559 U.S. 393 (2010)
20. *Id.* at 1334-35.
21. *Id.* at 1335.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1337.
judgment as to the class claims asserted by the putative plaintiffs under the DTPA.\textsuperscript{28}

While DTPA’s language contains a one-year statute of limitations, district courts have consistently held that the limitations period is subject to Alabama’s discovery rule contained in section 6-2-3 of the Alabama Code, which provides that, in actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which an aggrieved party must have two years within which to prosecute an action. By way of example, the district court, in addressing a motion to dismiss filed by BMW in a putative class action consisting of purchaser of vehicles equipped with Takata airbags, held that allegations of fraudulent concealment by BMW tolled the statute of limitations, at the motion to dismiss stage.\textsuperscript{29}

In another matter, the district court, in addressing a motion to dismiss concerning claims brought by a consumer relating to alleged damages arising from the use of a hair relaxer kit, discussed whether the DTPA’s limitations provision is tolled when Alabama’s discovery rule is satisfied.\textsuperscript{30} While the district court was unable to find Alabama Supreme Court case law holding that the Alabama Legislature built a discovery rule into the one-year limitations provision contained in §8-9-14, Ala. Code 1975, it “gleaned” from dicta that the limitations provision was understood to be tolled when the discovery rule is satisfied.\textsuperscript{31} As a result of the determination that the Alabama legislature built a discovery feature into the DTPA, the district court denied the motion to dismiss on statute of limitations grounds.\textsuperscript{32}

In \textit{Jones v. Coty, Inc.},\textsuperscript{33} two plaintiffs claimed that warnings contained on a hair coloring product were deceptive and misleading because they omitted information about the danger of the product and severity of the risk associated with its use.\textsuperscript{34} One of the plaintiffs testified in her deposition that she did not read any of the writing on the product box (except to confirm the color of the dye) and further conceded that

\begin{itemize}
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} \textit{In re} Takata Airbag Prods. Liability Litig., 2016 WL 6072406, at *12 (S.D. Fla. 2016).
  \item \textsuperscript{30} Carter v. L’Oreal USA, Inc., 2017 WL 3891666, at *6 (S.D. Ala. 2017).
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} 362 F. Supp. 3d 1182 (S.D. Ala. 2018)
  \item \textsuperscript{34} 362 F. Supp. 3d at 1213.
\end{itemize}
she did not review the leaflet inside the product box. The district court found the plaintiff’s admissions to “pose an insuperable obstacle” to her ability to maintain a deceptive/misleading labeling claim under the DTPA.36

For the other plaintiff, who read the safety warnings, instructions, and ingredient list on the product box, as well as the warnings on the color bottle itself, the district court found that a jury question was presented regarding whether that plaintiff’s claimed failure to “read and heed” certain product instructions and safety warnings destroyed any causal link between the allegedly misleading and deceptive warnings and her injury.37 The “read and heed” argument appears to have been based on the Garrison v. Sturm, Ruger & Co. decision, wherein the court stated that, “to submit a negligent failure-to-warn claim to a jury, there must be substantial evidence that the allegedly inadequate warning would have been read and heeded.”

2. Alaska

a. Scope of the Statute and Elements of a Cause of Action

The Alaska Unfair Trade Practices and Consumer Protection Act (Alaska Act) prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in the conduct of trade or commerce.” In Alaska Trustee, LLC v. Ambridge, the Alaska Supreme Court confirmed that a technical violation of the Fair Debt Collection Practices Act (FDCPA) “is inescapably an ‘unfair or deceptive act [or practice]’ under [the Alaska Act].” In Alaska Trustee, LLC, homeowners filed suit

35. Id. at 1214.
36. Id. (citing E.R. Squibb & Sons, Inc. v. Cox, 477 So.2d 963, 971 (Ala. 1985) (“a plaintiff who does not read an allegedly inadequate warning cannot maintain a negligent-failure-to-adequately-warn action unless the nature of the alleged inadequacy is such that it prevents him from reading it.”).
37. Id. at 1215.
39. Id. at 1214.
40. ALASKA STAT. §§ 45.50.471 to 45.50.561.
41. Id. § 45.50.471(a).
42. 372 P.3d 207 (Alaska 2016).
43. Id. at 226 (citing State v. O’Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980)).
against a company in the business of non-judicial foreclosures, alleging that the company violated the FDCPA and the Alaska Act for failing to include the full amount due in the notice of default and foreclosure sale.44 As a preliminary matter, the Alaska Supreme Court affirmed the superior court’s ruling that the company was a “debt collector” under the FDCPA.45 Rejecting the company’s argument that a technical FDCPA violation is not necessarily a violation of the Alaska Act, the court noted that “the FDCPA expressly states that a violation of it ‘shall be deemed an unfair or deceptive act or practice in violation of [the Federal Trade Commission Act],’ the Act the legislature requires us to consider in interpreting [the Alaska Act].”46 The court rejected the company’s argument that application of the Alaska Act to violations of the FDCPA involving real property foreclosures would conflict with prior case law holding that “goods and services” for purposes of the Alaska Act do not include real estate transactions.47 Finally, the court rejected the company’s argument that the homeowners were not entitled to seek injunctive relief under section 45.50.535 of the Alaska Act because the company was not a “seller or lessor” of a consumer service, as “the legislature [did not] intend to limit the [Alaska Act] to ‘consumer’ services, as our prior cases have repeatedly observed.”48

The Alaska Act includes exemptions for (1) “an act or transaction regulated by a statute or regulation administered by the state … unless the statute or regulation does not prohibit the practices declared unlawful in [the Alaska Act],” (2) “an act done by the publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement or did not have a direct financial interest in the sale or distribution of the advertised product or service,”

44. Id. at 209-10.
45. Id. at 211-222
46. Id. at 226.
47. Id. (“The argument here is different: not that nonjudicial foreclosures are ‘goods or services,’ but that violations of the FDCPA in the course of nonjudicial foreclosures are ‘unfair or deceptive acts or practices’ that are brought within the [Alaska Act] by [prior Alaska case law] and the statutory command that we align our interpretation of the [Alaska Act] with federal interpretations of the Federal Trade Commission Act. There are different avenues to coverage under the [Alaska Act], and a violation of the FDCPA is one of them.”).
48. Id. at 227.
and (3) “an act or transaction regulated under [state insurance law] or [the Alaska Banking Code] .” In Cornelison v. TIG Insurance, the Alaska Supreme Court confirmed that the insurance exception to the Alaska Act applies to claims against an employer’s workers’ compensation carrier. In Cornelison, a claimant sued his employer’s workers’ compensation carrier under the Alaska Act and a variety of tort theories, alleging, *inter alia*, that the carrier’s investigators had edited surveillance videos to create a false impression of the claimant’s physical capabilities. The Alaska Supreme Court affirmed the superior court’s decision to award summary judgment to the carrier on the claimant’s Alaska Act claims, holding that the “alleged conduct falls within the insurance industry exemption to the [Alaska Act].”

### b. Private Enforcement and Remedies

In *Hudson v. Citibank (South Dakota) N.A.*, two credit card holders defaulted on their accounts. The issuing bank decided to litigate debt collection actions, and default judgments were entered against both card holders. Subsequently, the card holders filed class action complaints alleging that the bank and its attorney violated the Alaska Act by the manner in which fee awards were obtained in the underlying debt collection actions. The bank moved to submit the Alaska Act claims to individual arbitration in accordance with the card holders’ agreements. The superior court granted the bank’s motion to submit these claims to arbitration, but ruled that the arbitrator had authority to issue statewide injunctive relief. The Alaska Supreme Court affirmed the superior court’s decision to submit the Alaska Act claims to arbitration, holding that the bank did not waive its right to compel arbitration by litigating its debt collection claim, as the initial debt collection claim and subsequent

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49. ALASKA STAT. § 45.50.481.
50. 376 P.3d 1255 (Alaska 2016).
51. Id. at 1268-69.
52. Id. at 1262-63.
53. Id. at 1268-69.
54. 387 P.3d 42 (Alaska 2016).
55. Id. at 44-45.
56. Id. at 45.
57. Id.
58. Id.
59. Id.
Alaska Act claims were not “sufficiently closely related.”

However, it was error to rule that the arbitrator had authority to issue statewide injunctive relief, as “[t]he interpretation of an arbitration agreement is a question for arbitration.”

The Alaska Act provides that “[a] person who suffers an ascertainable loss of money or property as a result of an unfair method of competition or unfair or deceptive act or practice in the conduct of trade or commerce may bring a civil action for recovery within a two-year statute of limitations.”

In Jones v. Westbrook, the Alaska Supreme Court clarified that the mere “threat of future damage” does not constitute an “ascertainable loss” sufficient to commence the two-year limitations period. In Jones, a business owner sued the attorney who handled the self-financed sale of the business on theories of legal malpractice and Alaska Act violations arising out of the attorney’s alleged failure to record a security interest in the collateral. Reversing the superior court’s decision to award summary judgment to the attorney on statute of limitations grounds, the Alaska Supreme Court held that the business owner suffered no “ascertainable loss” in October 2005, when he was first informed that the buyer had missed a payment, but rather in October 2011 when the IRS recorded a security interest in the collateral, “preempting [the business owner’s] ability to fix the alleged mistake in the sale documents[.]”

In a case involving a dispute between a law firm and its former client, the Alaska Supreme Court held that a fraudulent transfer of assets amounted to an unfair or deceptive act or practice for which treble damages were appropriately awarded. In Merdes & Merdes, P.C. v. Leisnoi, Inc., an Alaska Native Corporation pursued litigation against a law firm that had previously represented the corporation in a lands dispute, a successor law firm, and the son of the lawyer who originally provided representation, after the law firm failed to repay attorney’s fees owed to the corporation following its successful appeal of a writ of

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60. Id. at 46-52 (applying 9 U.S.C. § 3).
61. Id. at 53.
62. ALASKA STAT. § 45.50.531(a).
63. ALASKA STAT. § 45.50.531(f).
64. 379 P.3d 963 (Alaska 2016).
65. Id. at 970.
66. Id. at 965-66.
67. Id. at 970.
68. 410 P.3d 398 (Alaska 2017).
The son had attested by affidavit that the law firm “does not have anywhere near enough money to return $643,760 to Leisnoi … It doesn’t have 1/5th of that amount.”

The superior court found that the law firm fraudulently conveyed assets to the successor firm and the son. The successor firm “was capitalized [with the funds owing to Leisnoi] not so it could conduct business, but to attempt to remove the assets with which [Merdes & Merdes] would pay its debt to Leisnoi.” The superior court trebled the amount owed to the corporation pursuant to the Alaska Act, finding the law firm, the successor firm, and the son jointly and severally liable for $1,931,280 in compensatory damages.

On appeal to the Alaska Supreme Court, the appellants argued, *inter alia*, that the dispute over the $643,760 balance “did not arise in a business context” because at the time of the transfer of assets, “Leisnoi was neither client nor consumer” and “Merdes, as a debtor, should not be subject to the UTPA.” The court rejected these arguments, stating that “there is no hard and fast rule that a creditor lacks UTPA protection simply because of its status as a creditor.” Moreover, “Leisnoi’s overpayment, and Merdes’s attempts to avoid returning it, are simply successive stages in the same covered activity rooted in Merdes & Merdes’s provision of legal services to Leisnoi.” The court affirmed trial court’s determination that a fraudulent conveyance is an unfair and deceptive act under AS 45.50.471(a). And the court further held that attorney conduct is not exempt from UTPA liability notwithstanding the fact that attorneys are subject to professional discipline.

3. **Arizona**

a. Scope of the Statute and Elements of a Cause of Action

The Arizona Consumer Fraud Act (CFA) is broader in scope than common law fraud. The CFA prohibits both unfair and deceptive acts

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69. *Id.* at 401-03.
70. *Id.* at 403.
71. *Id.*
72. *Id.* at 411.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 412-13.
and practices. 79 Given its expansive terms and remedial purpose, the CFA is not subject to restrictive interpretation. 80

In determining whether a statement has a tendency or capacity to mislead and is therefore deceptive under the CFA, courts analyze the statement from the perspective of the least sophisticated reader. 81 Courts consider all that is reasonably implied from the statement, not just what was said. 82

The CFA does not require a direct merchant-consumer transaction to support a claim. 83 The broad language of the CFA – prohibiting unlawful practices “in connection with” the sale of merchandise – only requires that a consumer have a relationship to the transaction. 84 Accordingly, consumers may sue drug manufacturers even though their doctors, not the consumers, prescribed the medication; and third-party beneficiaries may sue insurance companies under the CFA. 85

CFA liability arises in connection with the sale or advertisement of “merchandise,” which includes prescription drugs, 86 money lending, 87 and franchises. 88

79. ARIZ. REV. STAT. § 44-1522(A).
82. Id. Utilizing this standard, the Cheatham court denied the defendant’s motion to dismiss because a consumer might reasonably infer that a statement about secure communication links at the company’s own monitoring centers implied that home-based systems also had secure communication links, which could potentially create CFA liability even though the statement did not directly address home-based systems. Cheatham, 161 F. Supp. 3d at 830.
84. Murray, 366 P.3d at 128.
85. Watts, 365 P.3d at 953; Murray, 366 P.3d at 129.
86. Watts, 365 P.3d at 953 (“[P]harmaceutical drugs are objects and goods and thus constitute ‘merchandise’ under the CFA.”).
Arizona statutes define certain advertising and business practices of household goods movers as unlawful practices subject to investigation and enforcement under the CFA.89

Federal courts have no jurisdiction over CFA claims where the claim does not “necessarily depend [ ] upon construction of a substantial question of any federal [law].”90

b. Private Enforcement and Remedies

Plaintiff consumers need not be natural persons to pursue a private action.91

To prevail, consumers must allege and prove (1) a false promise or misrepresentation made in connection with the sale or advertisement of merchandise, and (2) consequent and proximate injury resulting from the promise.92 A consumer’s reliance on the representation need not be reasonable.93

Puffery may be a defense to a CFA action.94

The statute of limitations for private claims under the ACFA is one year from accrual,95 which occurs when the consumer suffers damage

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89. ARIZ. REV. STAT. §§ 44-1611 - 44-1616. In addition, “a household goods mover that violates this article is subject to any other civil or criminal action, remedy and penalty provided by law.” ARIZ. REV. STAT. § 44-1613 (C).


94. Cheatham, 161 F. Supp. 3d at 827 (“Because puffery is a subjective characterization of a product’s value rather than a representation of fact, it cannot give rise to a fraud claim.”).

and knows or should know who and what caused that damage. The determination of when a cause of action accrues is a fact question for the jury.

c. Government Enforcement and Remedies

The Arizona Attorney General is authorized to engage in “extensive precomplaint discovery” when reasonable cause exists to believe that a person has violated the CFA. The State’s investigative powers are not limited based on the number or substance of consumer complaints or other information.

Federal courts have no jurisdiction over CFA claims, including those brought by the state, where the claim does not “necessarily depend upon construction of a substantial question of any federal [law].”

4. Arkansas

a. Scope of the Statute and Elements of a Cause of Action

In Pleasant v. McDaniel, the Arkansas Court of Appeals held that the heightened pleading standard for fraud claims is not applicable to claims under the Arkansas Deceptive Trade Practices Act (ADTPA). Prior to Pleasant, the federal district courts in Arkansas had reached different conclusions regarding whether the particularity requirement of

96. Cheatham, 161 F. Supp. 3d at 826; Schellenbach v. GoDaddy.com, 2017 WL 192920 (D. Ariz. 2017) (“Arizona courts have made clear, however, that the discovery rule applies to determine when ACFA claims accrue and the statute of limitations begins running.”).
97. Cheatham, 161 F. Supp. 3d at 826.
102. Id. at 12. (“Knowledge of the deceptive nature of one's actions, intent to induce action, reliance, and damages are conspicuously missing from the elements of the ADTPA. Simply put, a claim of common-law fraud and a claim under the statutory provisions of the ADTPA are distinctly different.”); see ARK. CODE. ANN. §§ 4-88-101 et seq.
Federal Rule of Civil Procedure 9(b) applied to ADTPA claims. In Jacobs v. Global Tel*link Corp.,\textsuperscript{103} the U.S. District Court for the Western District of Arkansas found that the ADTPA claim was not subject to the heightened pleading standard.\textsuperscript{104} Decisions from the U.S. District Court for the Eastern District of Arkansas, however, found that ADPTA claims must be pled with the particularity required under Rule 9(b).\textsuperscript{105}

The ADTPA does not apply to “[a]ctions or transactions specifically permitted under laws administered by [a] . . . regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests” the attorney general to implement the ADTPA to such actions or transactions.\textsuperscript{106} This section specifically references state insurance, securities, and bank commissioners as well as the Arkansas State Highway Commission.\textsuperscript{107} Prior to 2017, the statute did not include the word “specifically,” which caused courts to differ on whether the provision was to be construed broadly or narrowly. In 2017, however, the ADTPA was amended to add the word “specifically” signaling that the statute should be read narrowly and that exemption only applies to the conduct of regulated actors that is permitted by the agency. The Arkansas Supreme Court subsequently held that, in light of the broad remedial purposes of the ADTPA and the legislature’s amendment of the statute, the “ADTPA’s safe-harbor provision should be applied according to the specific-conduct rule, meaning that it precludes claims only when the actions or transactions at issue have been specifically permitted or authorized under laws administered by a state or federal regulatory body or officer.”\textsuperscript{108}

In 2019, the Arkansas legislature added to the express list of deceptive and unconscionable trade practices “displaying or causing to

\textsuperscript{103} 2016 WL 5953128 (W.D. Ark. 2016).
\textsuperscript{104} 2016 WL 5953128, at *7.
\textsuperscript{106} Ark. Code Ann. § 4-88-101(3). A similar provision exempts “[a]ctions or transactions of a public utility which have been authorized by Arkansas Public Service Commission, a municipal authority, the Federal Energy Regulatory Commission, the Federal Communications Commission, or other regulatory body or officer acting under statutory authority of the United States.” Ark. Code Ann. § 4-88-101(4).
\textsuperscript{107} Ark. Code Ann. § 4-88-101(3).
be displayed a fictitious or misleading name or telephone number on an
Arkansas resident's telephone caller identification service."109

b. Private Enforcement and Remedies

In 2017, the ADTPA was amended to provide that “[a] person who
suffers an actual financial loss as a result of his or her reliance on the use
of a practice declared unlawful by this chapter may bring an action to
recover his or her actual financial loss proximately caused by the offense
or violation, as defined in this chapter.”110 To bring an ADTPA claim, a
private plaintiff must have suffered “actual financial loss.”111
Additionally, after it was amended in 2017, the ADTPA provides that
“[a]ny party in an action brought [by private enforcement] shall have the
right to a jury trial,”112 even though the Arkansas Supreme Court, in a
non-ADTPA case, held that the constitutional right to a jury trial extends
only to common-law actions and not to those actions authorized by the
state’s legislature.113
In Apprentice Information Systems, v. DataScout, LLC,114 the
Arkansas Supreme Court reversed a judgment in favor of an Arkansas
 corporation who provided data storage services to public entities against
a competitor for those same services. The court held that the claimed
prohibited conduct was not actionable under ADTPA, because the
defendant's refusal to provide public data in its possession to the
plaintiff was not a “consumer-oriented practice.”115 The court
distinguished Baptist Health v. Murphy,116 a case against a hospital by
physicians with ownership interests in a competitor who were denied
practice rights by the defendant hospital, because, in Baptist Health, "the

ascertainable amount of money that is equal to the difference between the
amount paid by a person for goods or services and the actual market value
of the goods or services provided to a person.” Id. § 4-88-102(9).
113. Civil Serv. Comm’n of Van Buren v. Matlock, 168 S.W.2d 424, 426
(Ark. 1943).
115. Id. at 539 ("AIS and DataScout were competitors in the market
of selling counties' public data, and there is simply no “consumer-
oriented act” as required for a cause of action under the ADTPA.")
patient-consumers' rights were at the heart of the unconscionable conduct.\textsuperscript{117}

In \textit{G & K Servs. Co. v. Bill's Super Foods, Inc.}, the Eighth Circuit held that a plaintiff may recover attorney’s fees when he prevails on his ADTPA claim even if he is not the prevailing party in the larger litigation.\textsuperscript{118} Additionally, it found that the recovery of attorney’s fees are not mandatory but awarded in the courts’ discretion.\textsuperscript{119}

In 2017, the ADTPA was amended to prohibit private class actions “unless the claim is being asserted for a violation of [usury laws under the] Arkansas Constitution, Amendment 89.”\textsuperscript{120} In addition, to prevail on claim under the ADTPA, the plaintiff must prove individually that he or she suffered damages.\textsuperscript{121}

In \textit{Bank of the Ozarks v. Walker},\textsuperscript{122} the Supreme Court of Arkansas reaffirmed the position it adopted in \textit{Alltel Corp. v. Rosenow}.\textsuperscript{123} Specifically, the court found that not enforcing an arbitration agreement because of lack of mutuality was not a violation of \textit{AT&T Mobility, LLC v. Concepcion},\textsuperscript{124} because Arkansas courts do not treat agreements to arbitrate differently than other contracts.\textsuperscript{125}

c. Government Enforcement and Remedies

In \textit{Pleasant v. State ex rel. McDaniel},\textsuperscript{126} the Court of Appeals of Arkansas held that the attorney general was entitled to attorneys’ fees pursuant to section 4-88-113(e), despite prevailing on only 8 of more than 100 claimed violations of ADTPA.\textsuperscript{127}

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117. \textit{Apprentice Info. Sys.}, 544 S.W.3d at 539.
118. 766 F.3d 797, 802 (8th Cir. 2014).
119. \textit{Id}
120. \textit{ARK. CODE ANN.} § 4-88-113(f) (1) (B).
121. \textit{Id.} § 4-88-113(f) (2).
122. 487 S.W.3d 808, 813 (Ark. 2016).
125. \textit{Id.} at 813.
127. \textit{Id.} at 94.
\end{flushright}
5. California

a. Scope of the Statute and Elements of a Cause of Action

A consumer loan’s interest rate may be unconscionably high under the California Unfair Competition law (UCL),\(^\text{128}\) even if the terms do not violate the state’s usury laws.\(^\text{129}\)

In 2018, the Ninth Circuit held that for an alleged fraudulent omission to be actionable under the CLRA, the omission must be of a fact that the defendant has a duty to disclose, i.e. a fact going to the “central functionality” of the product.\(^\text{130}\)

In 2015, the California Supreme Court held that the federal Organic Foods Act did not preempt UCL claims challenging the labeling of produce as “organic,” reasoning that the statute was designed to “create a clear standard for what production methods qualify as organic” and did not “intend[,] remedial exclusivity for the enforcement mechanisms it provided.”\(^\text{131}\)

b. Private Enforcement and Remedies

Following *AT&T Mobility LLC v. Concepcion*,\(^\text{132}\) the Supreme Court has repeatedly signaled its approval of arbitration in consumer disputes.\(^\text{133}\) But the Ninth Circuit has continued to express skepticism toward arbitration of consumer disputes. In several recent cases, the Ninth Circuit has manifested this skepticism by narrowly applying California law governing contract formation to conclude that consumers never agreed to arbitrate their disputes in the first place.

For instance, in *Knutson v. Sirius XM Radio, Inc.*, the Ninth Circuit held that a Sirius XM subscriber did not assent to an arbitration clause

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128. CAL. BUS. & PROF. CODE §§ 16600 et seq.
129. De La Torre v. CashCall, Inc., 422 P.3d 1004, 1012-13 (Cal. 2018) (finding that statutory prohibition on unconscionable contracts permitted a court to find an interest rate unconscionably high, and thus “illegal” under the UCL).
132. 563 U.S. 333 (2011)
that appeared in a customer agreement he received as part of a mailed “Welcome Kit” a month after he activated the free trial subscription he received when he purchased his vehicle. The court concluded that the plaintiff was unaware that he had entered into any contract with Sirius XM at the time he purchased his vehicle from Toyota. It likewise held that the plaintiff’s continued use of the Sirius XM service after receiving the Welcome Kit did not manifest assent because there was no reason that the plaintiff would have opened or read the Welcome Kit absent any awareness that he had entered into a contractual relationship with Sirius XM.

In Norcia v. Samsung Communications America, the Ninth Circuit held that a consumer who purchased a Samsung cellphone was not bound by an arbitration clause set forth in a brochure included in the product box. Under California law, the court reasoned, the consumer’s inaction after receiving the brochure was insufficient to establish assent to the agreement to arbitrate. The court rejected Samsung’s contention that the brochure was akin to a “shrink-wrap” or an “in-the-box” contract, as the box did not notify the consumer that opening the product box constituted assent. And even if the brochure contained warranty terms that could be enforced against the seller, the court concluded, the receipt of the brochure did not constitute mutual assent to an arbitration clause that could be enforced against the consumer.

In 2016, the California Supreme Court clarified that the threshold question of whether an arbitration agreement bars class arbitration should be decided by the arbitrator, rather than by the court. Although the court acknowledged that “disagreements over whether a particular dispute is within the scope of an arbitration provision are ordinarily the responsibility of a court,” the court held that a dispute about the availability of class arbitration is a procedural question to be decided by the arbitrator, rather than a gateway question of whether a particular dispute is or is not arbitrable.

134. 771 F.3d 559 (9th Cir. 2014).
135. Id. at 566.
136. Id.
137. 845 F.3d 1279 (9th Cir. 2017).
138. 845 F.3d at 1286-87.
139. Id. at 1286-87.
140. Id. at 1287-88.
142. Id. at 370-73.
Finally, in 2017, the California Supreme Court held that California law prohibits arbitration clauses that bar a plaintiff from seeking public injunctive relief and that the Federal Arbitration Act did not preempt this prohibition.\textsuperscript{143} Unlike in Concepcion, the court reasoned, the arbitration clause did not simply ban the use of a particular procedural device; instead, it prohibited a plaintiff from seeking a “substantive statutory remedy” authorized under California law.\textsuperscript{144} Accordingly, the court concluded, the FAA did not require enforcement of this provision to the extent it was inconsistent with generally applicable California contract law.\textsuperscript{145}

In a case resolving a split among district courts in the circuit on standing, the Ninth Circuit held that Article III standing requirements are met if a consumer claims deception based on false advertising or labeling “even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an ‘actual and imminent, not conjectural or hypothetical’ threat of future harm.\textsuperscript{146}

In another standing case, the California Court of Appeal held that a plaintiff has standing under the UCL and CLRA based on an alleged misrepresentation even if that misrepresentation does not relate to the product itself or its attributes. In Hansen v. Newegg.com Americas,\textsuperscript{147} the plaintiff in the putative class action alleged that he was deceived by a “false discount” claim, i.e. a representation that a product was being offered at a discount compared to a “list price” that was grossly overstated. The court held that “the UCL and FAL's standing

\begin{itemize}
\item \textsuperscript{143} McGill v. Citibank, N.A., 393 P.3d 85 (Cal. 2017).
\item \textsuperscript{144} Id. at 97.
\item \textsuperscript{145} Id. at 97-98. Some federal courts have challenged and limited the application of the McGill rule. For example, in McGovern v. U.S. Bank N.A., the U.S. District Court for the Southern District of California held that McGill’s finding that a contractual prohibition on public injunctive relief was invalid and unenforceable under the UCL was preempted by the Federal Arbitration Act, because it interfered with the FAA’s objectives in favor of individual arbitration. 362 F. Supp. 3d 850, 864 (S.D. Cal. 2019). However, the Ninth Circuit, in Blair v. Rent-A-Center, Inc., held that the McGill rule reflected “a generally applicable contract defense derived from long-established California public policy” and, therefore, fell within the saving clause of the FAA. 928 F.3d 819, 828 (9th Cir. 2019). The court also held that the FAA did not preempt the McGill rule. Id. at 830-31.
\item \textsuperscript{146} Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969 (9th Cir. 2018).
\item \textsuperscript{147} 236 Cal. Rptr. 3d 61 (Ct. App. 2018).
\end{itemize}
requirements are satisfied when a consumer has alleged that he or she relied on fictitious former price information in making a purchase, and would not have made the purchase but for the misrepresentation."148

6. Colorado

b. Private Enforcement and Remedies

In order to bring a Colorado Consumer Protection Act (CCPA)149 claim, a plaintiff must show, inter alia, that the defendant engaged in an unfair or deceptive trade practice.150 In Oaster v. Robertson,151 a decision from the U.S. District Court for the District of Colorado, the court refused to hold an architect liable under the CCPA for copyright infringement allegations based on sales of protected designs made via a corporately owned website. The plaintiff failed to establish that the defendant-architect performed any of the allegedly infringing activity in his personal capacity and as such, the court granted summary judgment for the architect. The court also reiterated that the CCPA’s three-year statute of limitations starts to run when a plaintiff knew or should have known (i.e., the discovery rule) of the allegedly problematic conduct.152

Recent decisions from Colorado courts emphasize the need for plaintiffs to plead more than a personal harm to satisfy the CCPA’s public impact requirement.153 In Van Rees v. Unleaded Software, Inc.,154 the Colorado Supreme Court affirmed the dismissal of a bare bones claim that focused on plaintiff’s own economic loss and failed to identify “any harm or potential harm to identifiable segments of the public.”155

148. Id. at 71.
149. COLO. REV. STAT. §§ 6–1–101 et seq.
150. COLO. REV. STAT. § 6–1–115.
152. Id. at 1177 (holding that the statute of limitation period began to run on the date when the developer received a letter from the architect’s counsel notifying the developer that the architect claimed ownership of the copyrighted materials).
153. Obduskey v. Fargo, 2016 WL 4091174, at *4 (D. Colo. 2016) (holding that a plaintiff who only alleged his private wrongs that related to his loan and property failed to satisfy the public impact requirement of the CCPA).
154. 373 P.3d 603 (Colo. 2016).
155. Id. at 609.
In Christenson v. Citimortgage, Inc., the public nature of the defendant’s business, alone, did not establish sufficient public impact. Even though the accused misrepresentations were allegedly made in form letters and 49 state attorneys general had separately sued the defendant along with other mortgage lenders for deceptive practices, the plaintiff failed to meet its burden. The U.S. District Court noted that even if a large number of consumers had received the letters, there was no evidence as to the number of actual consumers harmed by defendants’ alleged practices.

The CCPA’s public impact element may be satisfied, however, when misrepresentations are made on a website that is directed to the general market or a targeted class of actual or potential purchasers. In Electrology Laboratory v. Kunze, a purchaser filed suit against the seller of a company for continuing to use the acquired company’s trademarks on various websites without the purchaser’s consent. Focusing on the length of time and number of websites used to post the false and misleading advertisement, the court found that a significant number of consumers would have been affected by the challenged actions.

Additionally, the public impact element may be satisfied when a company forces a consumer into an unwitting consumer relationship. This occurs when a company effectively takes away a consumer’s choice to interact with that company or not. In Shekarchian v. Maxx Auto Recovery, Inc., a vehicle owner filed suit against an automobile repossession company for requiring the vehicle owner to execute a release of claims against the repossession company before the owner was allowed to examine the car for damage. A Colorado District Court found that every owner who had a vehicle towed to Maxx Auto’s

157. Id. at *4.
158. Id. at *5.
161. Id. at 1163.
163. Id.
impound lot became an unwitting consumer of Maxx Auto. Thus, the public impact requirement was fulfilled.\footnote{Id.}

Per se violations of the CCPA do not automatically establish the requisite causation for a CCPA claim. In \textit{Friedman v. Dollar Thrifty Automotive Group},\footnote{227 F. Supp.3d 1192 (D. Colo. 2017) (rejecting a CCPA claim involving statutory disclosures that had no effect on plaintiff’s actions).} the court reiterated that the challenged practice must cause the complained-of injury.\footnote{Id. at 1204.}

Further, the Supreme Court of Colorado confirmed that the right to civil action under § 6-1-113 of the CCPA is waivable.\footnote{Vallagio at Inverness Residential Condo. Ass’n v. Metro. Homes, 395 P.3d 788, 796 (Colo. 2017) (affirming Court of Appeals’ holding that the plaintiff association’s CCPA claims were subject to prior arbitration agreement).} Failing to find a non-waiver provision in the CCPA, the Court concluded that nothing in the CCPA precluded arbitration of Plaintiff’s CCPA claims.\footnote{Id.}

Finally, the Colorado Supreme Court has denied \textit{certiorari} in the \textit{Shifrin v. People ex. rel. Suthers}, cited in the main volume.\footnote{Shifrin v. People \textit{ex rel.} Suthers, 2015 WL 216599 (Colo. 2015) (denying petition for writ of certiorari).}

c. Government Enforcement and Remedies

When advertising is false, disclaimers cannot be used to eliminate the underlying deception giving rise to a CCPA claim. Recognizing this principle, the Colorado Supreme Court held that disclosure of a deceptively set price does not cure the underlying deception under the CCPA with respect to that price.\footnote{State \textit{ex rel.} Coffman v. Castle Law Grp., 375 P.3d 128, 136 (Colo. 2016) (remanding matter involving inflated charges for foreclosure-related services, which were falsely represented as “actual, necessary and reasonable” costs).}

Additionally, enforcement of an investigative subpoena by the state constitutes “an action” under the CCPA, thereby invoking its fee-shifting provision.\footnote{State \textit{ex rel.} Coffman v. Vaden Law Firm, LLC, 411 P.3d 153, 155 (Colo. App. 2015) (remanding for an award of reasonable attorneys’ fees and costs to the state of Colorado under the CCPA in connection with an investigative subpoena).}
Finally, an award of attorney’s fees, made under the CCPA, is sufficiently penal to constitute a “fine, penalty, or forfeiture” under 11 U.S.C. § 523(a) (7) of the Bankruptcy Code and is not dischargeable. 172

7. Connecticut

a. Scope of the Statute and Elements of a Cause of Action

The Connecticut Supreme Court recently had the opportunity to address the extra-territorial reach of the Connecticut Unfair Trade Practice Act (CUTPA) 173 but instead ruled on alternative grounds. 174 The court did, however, reaffirm that the choice of law principles applicable to CUTPA are the same principles used when determining choice of law for tort claims, namely the “‘most significant relationship’ test set forth in the Restatement (Second)” of Conflict of Laws. 175

(1) Unfair Acts or Practices

At times the Connecticut Supreme Court has indicated that it may reconsider Connecticut’s continued use of the Cigarette Rule for determining whether challenged conduct constitutes an unfair act or practice under CUTPA. 176 Interestingly, the court recently stated the following with regard to the future of the Cigarette Rule: “Because of the likelihood that this court will be required to address this issue in a future case, . . . the legislature may wish to clarify its position with respect to the proper test.” 177 The court took that position despite acknowledging

173. CONN. GEN. STAT. §§ 42-110a et seq.
174. W. Dermatology Consultants v. VitalWorks, Inc., 153 A.3d 574, 561 n.14 (2016) (“We express no opinion as to whether the defendants were engaged in trade or commerce in this state for purposes of CUTPA.”).
175. Id. at 573.
176. See, e.g., Ulbrich v. Groth, 78 A.3d 76, 135-43 (Conn. 2013) (Zarella, J., concurring) (citing cases and concluding that court should “take this opportunity to clarify the applicable standard and finally bring our construction of [CUTPA’s unfair trade practice provision] into alignment with the approach that the [Federal Trade Commission] and the federal courts have taken”).
177. Artie’s Auto Body, Inc. v. The Hartford Fire Ins. Co., 119 A.3d 1139, 1149 n.13 (Conn. 2015) (“Recently, in Ulbrich v. Groth, we declined to
“the federal court’s abandonment of [the Cigarette Rule] in favor of the substantial unjustified injury test and the legislative direction in [CUTPA] that we are to be guided by federal law when construing CUTPA.”

In 2016, a lower court analyzed the Connecticut Supreme Court’s statement in State v. Acordia that “unless an insurance related practice violates CUIPA [the Conn. Unfair Insurance Practices Act] or, arguably, some other statute regulating a specific type of insurance related conduct, it cannot be found to violate any public policy and, therefore, it cannot be found to violate CUTPA.” The court concluded that “the most rational view of the court’s dicta may be that a CUTPA claim involving an unfair insurance practice may be premised on a statute other than CUIPA when the legislature explicitly provides that that statute’s violation constitutes an unfair or deceptive insurance practice, thereby preserving the legislative design that the General Assembly’s statutory enactments occupy the field of defining unfair insurance practices.”

review a claim that we should abandon the cigarette rule in favor of the substantial unjustified injury test because the claim was not preserved. Since Glazer, the legislature has given no indication that it disapproves of our continued use of the cigarette rule as the standard for determining unfairness under CUTPA, notwithstanding the federal court’s abandonment of that rule in favor of the substantial unjustified injury test and the legislative direction in § 42-110b(b) that we are to be guided by federal law when construing CUTPA. . . . Because of the likelihood that this court will be required to address this issue in a future case, however, the legislature may wish to clarify its position with respect to the proper test.”

178. Id. For a comprehensive treatment of the unfairness doctrine under CUTPA, see ROBERT M. LANGER, JOHN T. MORGAN & DAVID L. BELT, CONNECTICUT UNFAIR TRADE PRACTICES, BUSINESS TORTS AND ANTITRUST, § 2.2 (Connecticut Practice Series No. 12, 2018-19 ed.)


181. LaPuma, 2016 WL 5339456, at *5 n.9; but see Durham v. Metro. Grp. Prop. and Cas. Co., 2017 WL 3097590 (D. Conn. 2017) (contrary to the holding in LaPuma, Durham holds that Acordia does not preclude pleading and proving a violation of either the second or third prong of the Cigarette Rule; Alqamus v. Pac. Specialty Ins. Co., 2015 WL 5722722, *2-3 (D. Conn. 2015) (interprets Acordia broadly, and thus does not dismiss the complaint even though the cited sections, C.G.S. §§ 38a-307 and 308 (requiring fire insurance contracts to conform to the terms of the statute) are not contained within CUIPA, or otherwise expressly stated by
b. Private Enforcement and Remedies

In 2015, the Connecticut Supreme Court addressed “whether liability under CUTPA may be extended to an individual who engages in unfair or unscrupulous conduct on behalf of a business entity.”\textsuperscript{182} The Court concluded that it does, holding that the sole owner of two companies could be held personally liable under CUTPA for actions he took on their behalf, where he “directly participated in the wrongful conduct or, by virtue of his ownership, position and day-to-day involvement in [the companies], had the ability to control it,” and “knew or should have known” the actions were wrongful “given the character of the actions at issue.”\textsuperscript{183}

In 2019, the Connecticut Supreme Court issued a decision that profoundly alters CUTPA jurisprudence. In 	extit{Soto v. Bushmaster Firearms International},\textsuperscript{184} a case brought by the families of victims of the 2012 Sandy Hook Elementary School massacre, the court ruled that the plaintiffs had properly pleaded that defendants’ advertising and marketing of the XM15-E2S assault rifle violated CUTPA by alleging that such advertising and marketing was unethical, oppressive, immoral and unscrupulous within the meaning of the second prong of the cigarette rule.\textsuperscript{185} In reaching its decision, \textit{Soto} held that CUTPA was not preempted by provisions of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 through 7903.\textsuperscript{186}

In \textit{Soto}, the Connecticut Supreme Court effectively eliminated what had been a significant limitation upon the standing of private litigants, the General Assembly to constitute unfair or deceptive acts or practices if violated).

\textsuperscript{183}Id. at 588.
\textsuperscript{184}202 A.3d 262 (Conn. 2019).
\textsuperscript{185}Id. at 294-95.
\textsuperscript{186}Id. at 324 (“Once we accept the premise that Congress did not intend to immunize firearms suppliers who engage in truly unethical and irresponsible marketing practices promoting criminal conduct, and given that statutes such as CUTPA are the only means available to address those types of wrongs, it falls to a jury to decide whether the promotional schemes alleged in the present case rise to the level of illegal trade practices and whether fault for the tragedy can be laid at their feet.”).
the commercial relationship test, and in doing so disavowed a prior decision on which lower courts had relied for more than a decade. Additionally, the Soto decision redefined the connection between the Connecticut Product Liability Act and CUTPA. Prior to Soto, CUTPA claims were only permitted in product cases where the plaintiff alleged financial injury arising from an artificially inflated price for the product. In Soto, the court held that the plaintiffs’ claims were not precluded by the Connecticut Product Liability Act, writing: “[T]he defendants’ fail to offer any explanation as to why the allegation that they wrongfully marketed the XM15-E2S by promoting the gun’s use for illegal purposes – offensive, military style assault missions – amounts to a product defect claim. There is no allegation in the present case, for example, that the marketing of the X15-E2S contained inadequate warnings that made the weapon unreasonably dangerous.”

Finally, the Soto court also held definitively for the first time that personal injury damages are an available remedy under CUTPA.

c. Government Enforcement and Remedies

In 2016, a court concluded that it has the authority under CUTPA, at least in a government enforcement action, to order the disgorgement of ill-gotten gains, noting that “Section 42-110m (a) expressly bestows on the court the authority to award ‘such other relief as may be granted in equity’” and concluding that “the availability of relief in the form of disgorgement is consistent with the remedial nature of CUTPA.”

187. Id. at 285-91 (“We need not decide today whether there are other contexts or situations in which parties who do not share a consumer, commercial or competitor relationship with an alleged wrongdoer may be barred, for prudential or policy reasons, from bringing a CUTPA action. What is clear is that none of the rationales that underlie the standing doctrine, either generally or in specific context of unfair trade practice litigation, supports the denial of standing to plaintiffs in this case.”); see also Langer, et al., supra note 178, at §§ 3.6 and 6.2.
189. CONN. GEN. STAT. § 52-572n (a).
191. Soto, 202 A.3d at 295-96; see also Langer, et al., supra note 5, at § 3.10.
192. Soto, 202 A.3d at 300 (“[W]e conclude that, at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA.”); see also Langer, et al., supra note 178, at § 6.7.
8. Delaware

a. Scope of the Statue and Elements of a Cause of Action

Allegations attacking a company’s business model generally do not state a claim under the Delaware Consumer Fraud Act (CFA). Sloppy business practices alone also do not amount to a consumer fraud violation. Neither does a negligent, reckless, wanton, willful or bad faith breach of contract. For a CFA claim based on a promise made within a contract to survive, there must be evidence that the person making the promise did not have the intent to perform the promise at the time the contract was made.

Under the CFA, a seller has a duty to disclose actions it is taking which would undermine its own promotional representations. However, a seller does not have a duty to disclose its business model or motivations in connection with doing business with a buyer. Another decision added to the majority of Delaware courts holding that postsale representations cannot be the basis of a claim under the CFA.

For purposes of determining whether a trade name or trademark creates a likelihood of confusion under the Delaware Uniform Deceptive Trade Practices Act (UDTPA), courts will apply a multi-factored analysis and consider: the degree of similarity between the marks; the similarity of products for which the name is used; the area and manner of concurrent use; the degree of care likely to be exercised by consumers; the strength of the plaintiffs’ mark; whether there has been actual confusion; and the intent of the alleged infringer to palm off his products.

as those of another. Sufficiently pleading a claim under the Lanham Act is sufficient to support an unfair competition claim under the UDTPA.

b. Private Enforcement and Remedies

A plaintiff may bring a CFA action even if the false representations or omissions were not made to the plaintiff directly if the defendant made the representations or omissions to a learned intermediary knowing the intermediary may act in reliance on those representations or omissions.

For a private cause of action under the CFA, a plaintiff needs to show damages caused by the defendant. The damages must be causally related to the defendant’s unlawful conduct. In an action under the CFA, “the proper measure of damages is either (i) benefit of the bargain damages or (ii) out of pocket damages which return the injured party to his/her position before the transaction occurred.”

Courts continue to hold that a private plaintiff must plead CFA claims with particularity. Private parties may contractually agree to arbitrate a CFA claim within the contract related to the underlying transaction even if the CFA claims arose prior to the contract.

Courts continue to require a plaintiff to have a business or trade interest at stake which is the subject of the deceptive trade practice and the conduct must be within the horizontal relationship between the parties’ business interest to have standing to bring a claim under the UDTPA.

205. Id.
c. Government Enforcement and Remedies

Legislation was passed related to the administrative proceeding process in which the Director of the Consumer Protection Division may utilize to enforce both the CFA and the UDTPA. First, it clarified how the administrative proceeding may obtain personal jurisdiction over nonresidents, including the manner of service over nonresidents. Second, it empowered administrative hearing officers to issue subpoenas upon request of the parties.

9. District of Columbia

a. Scope of the Statute and Elements of a Cause of Action

(1) Unlawful Trade Practices

D.C. law previously recognized that accurate statements generally would not mislead a consumer without excluding the possibility that some accurate statements could be misleading. Recent cases have confirmed that the Consumer Protection Procedures Act (CPPA) does not foreclose a claim based on statements that are “literal truth” if a reasonable consumer would find them misleading. For example, a technically accurate statement could be actionable under the catchall provisions of the CPPA if there is widespread consumer confusion.

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210. DEL. CODE tit. 29, § 2523(f) & (g).
211. DEL. CODE tit. 29, § 2523(h).
214. See, e.g., Nat'l Consumers League v. Bimbo Bakeries USA, 2015 WL 1504745, at *11 (D.C. Super. 2015); Beyond Pesticides v. Monsanto Co., 311 F. Supp. 3d 82, 90 (D.D.C. 2018) (even if advertising claim that Roundup pesticide targets “an enzyme found in plants but not in people or pets” could be construed as literally true to the extent the subject enzyme appears in “gut bacteria” found in humans, complaint plausibly alleged a violation of CPPA based on allegation that the claim was misleading).
215. See D.C. CODE § 28-3904(e), (f) & (f-1).
surrounding certain material terms that cause them to have a tendency to mislead.216

(2) Legal Standard for Consumer-Merchant Relationship

The CPPA only applies to unlawful trade practices arising out of consumer-merchant relationships involving the transfer of goods and services and “does not apply to commercial dealings outside the consumer sphere.”217 The D.C. Court of Appeals recently found that employee-employer relationships do not fall within the scope of the CPPA.218 Likewise, individuals owning property for reasons other than personal, family, or household purposes, even if the use of the property provides personal economic benefit, do not qualify as consumers under the CPPA.219 When faced with a similar question of consumer status, the U.S. Court of Appeals for the D.C. Circuit, applying the precedents of the D.C. Court of Appeals, rejected the argument that a borrower of

216. See Bimbo Bakeries, 2015 WL 1504745, at *11 (denying motion to dismiss as to § 28-3904(e), (f) & (f-1) claims where fact-finder could conclude that use of label “light multi-grain” on baked goods that had minimal amounts of whole grain was a material statement that took advantage of consumer confusion and had tendency to mislead). The Bimbo Bakeries court further rejected the bakery’s argument that its technically accurate statements could not have a tendency to mislead when there was preexisting confusion in the market regarding whole-grain products, finding that such confusion could be caused, in part, by product naming, packaging and advertising, and the bakery was therefore “not an innocent bystander of general confusion caused by others but the perpetrator of the confusion. . . .” Id.


218. Stone v. Landis Constr. Co., 120 A.3d 1287, 1290 (D.C. 2015). The Stone court reasoned that employees are not consumers because employment “creates the economic outputs that consumers demand” and employees only enter the market as consumers when they spend the money they have earned for “personal, household, or family use.” Id. (emphasis removed) (internal quotation marks omitted). Further, employment does not fall within the definition of “goods and services” because “[i]t is not ‘the economic output of society,’ but rather one of the relationships within that society, whereby economic output is produced.” Id.

219. Price, 110 A.3d at 574 (holding that a landlord who leased property to others rather than using it himself was not a consumer).
student loans was a “consumer” of the services of a debt collector and held that the CPPA did not apply.220

“A merchant need not be the actual seller of goods and services complained of, but must be connected with the supply side of the consumer transaction.”221 The D.C. Court of Appeals recently declined to extend the CPPA to include aiding and abetting or civil conspiracy liability for a non-merchant individual who allegedly withheld material information when selling his house through a merchant realtor.222 The U.S. District Court for the District of Columbia dismissed a CPPA claim by a buyer against the seller of a residence finding that the mere fact that the seller worked as a real estate broker did not render the seller a “merchant,” where the seller did not act as anyone’s broker during the subject transaction.223 However, a plaintiff plausibly alleged that a homeowners’ home insurance provider was a “merchant” under the CPPA where the complaint alleged that the insurer was “significantly involved” in a contractor’s repair work, including by (1) conditioning payment under the policy on using the preferred contractor, (2) serving as a go-between for complaints by the plaintiff about the contractor’s work, (3) making representations about the contractor’s warranty, and (4) asserting control over the contractors’ staffing.224

(3) Pleading Standard for CPPA Claims

Although there is no binding case law governing whether CPPA complaints must meet heightened pleading standards for fraud,225 lower courts have consistently rejected the applicability of the heightened

220. Baylor v. Mitchell Rubenstein & Assocs., 857 F.3d 939, 948-49 (D.C. Cir. 2017) (reasoning that debt collector did not have a consumer-merchant relationship with borrower because it did not supply the borrower’s student loans that it was trying to collect and the consumer of the collector’s services was the party that hired it).

221. See, e.g., McMullen v. Synchrony Bank, 164 F. Supp. 3d 77, 91 (D.D.C. 2016) (internal quotation marks omitted) (holding that banks’ issuance of unauthorized lines of credit to a gym patron through the gym owner that resulted in fraudulent transactions was trade practice sufficiently connected with supply side of consumer transaction).


pleading standard of Rule 9(b) of the D.C. Superior Court Rules of Civil Procedure to CPPA complaints filed in D.C. courts. The U.S. District Court for the District of Columbia has also concluded that the pleading standard in CPPA cases should be governed by the more lenient Rule 8(a) of the Federal Rules of Civil Procedure, which is substantially the same as Rule 8(a) of the D.C. Superior Court Rules of Civil Procedure.

(4) Preemption

Claims under the CPPA that a product is mislabeled as “organic” are preempted by the Organic Food Production Act.

b. Private Enforcement and Remedies

(1) Standing

Although section 3905(k)(1)(B) allows an individual to “bring an action seeking relief” from an unlawful trade practice involving consumer goods and services “on behalf of both the individual and the general public,” the D.C. Court of Appeals has held that this language does not displace D.C. Superior Court Rule 23 procedures for class action lawsuits in representative claims brought under the CPPA. In the absence of clear legislative intent, the D.C. Court of Appeals declined to replace the Rule 23 framework with a separate, ad hoc system for managing representative actions under the CPPA.

(2) Remedies

The CPPA allows prevailing plaintiffs to recover “[t]reble damages, or $1,500 per violation, whichever is greater, payable to the

226. See, e.g., id. (observing that “this Court has consistently concluded that Rule 9(b) does not apply to [CPPA] claims”).
227. Campbell v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 130 F. Supp. 3d 236, 267 (D.D.C. 2015) (recognizing that CPPA claims are causes of action “specifically created with the intent to relieve plaintiffs from the burden of pleading fraud.”); see also McMullen, 164 F. Supp. 3d at 91.
230. Id. at 989.
consumer.”231 However, there is some uncertainty as to what constitutes a single violation under the CPPA. The U.S. District Court for the District of Columbia recently held that, “[a]lthough existing law is not conclusive,” statutory damages under the CPPA “flow from a purchase or receipt of consumer goods or services—not the mere observation” of unlawful trading practices.232 Thus, per-violation penalties for false or misleading advertising should be calculated based on each purchase a plaintiff made of advertised products, not each instance the plaintiff viewed the advertising.233

Public interest organizations bringing suit as representatives for consumers may also recover damages. Lower courts have found that section 3905(k) (2) (E), which allows for restitution in “representative actions,” does not limit recovery in cases brought by public interest organizations solely to restitution damages.234 Although the language of section 3905(k) (2) (A) provides for treble damages “payable to the consumer,” courts have broadly construed this language to specify that organizations should pass recovered damages on to consumers who have suffered the harm.235

10. Florida

a. Scope of the Statute and Elements of the Cause of Action

Claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)236 may be based upon violations of state and federal laws dealing with deceptive and unfair trade practices. However, unless the relevant statutes otherwise permit, if the facts supporting the FDUTPA count are not materially distinct from those supporting the claim for violation of the underlying state or federal law, the FDUTPA claim may be preempted.237 Preemption also applies where the FDUTPA is

231. D.C. CODE § 28-3905(k) (2) (A).
233. Id.
235. Id.; see also Bimbo Bakeries, 2015 WL 1504745, at *12.
236. FLA. STAT. §§ 501.001 et seq.
237. See Sentry Data Sys. v. CVS Health, 361 F. Supp. 3d 1279, 1295 (S.D. Fla. 2018) (holding FDUTPA claim was preempted by the Florida Uniform Trade Secrets Act since misappropriation of the trade secret
inconsistent with applicable substantive federal law, or where Congress has expressly prohibited states from regulating a particular activity. Furthermore, the FDUTPA has a safe harbor provision that exempts any "act or practice required or specifically permitted by federal or state law." Courts have dismissed FDUTPA claims based upon this safe harbor provision in a variety of contexts.

b. Private Enforcement and Remedies

In Curcio v. State Department of Lottery, the court held that the FDUTPA does not contain a clear and unequivocal waiver of the state’s sovereign immunity, and thus the state of Florida and its political subdivisions are immune from claims brought under the act.

238. See Pantropic Power, Inc. v. Jalapeno, 2016 WL 7626209, at *5 (S.D. Fla. 2016) (holding FDUTPA claim preempted by the Copyright Act where the rights asserted in the FDUTPA claim fell within the subject matter of copyright, were equivalent to the exclusive rights in the copyrighted work, and no extra element was required for the FDUTPA claim).

239. See Bailey v. Rocky Mountain Holdings, LLC, 136 F. Supp. 3d 1376 (S.D. Fla. 2015), aff’d, 889 F.3d 1259 (11th Cir. 2018) (holding FDUTPA claim based on air ambulance service’s billing practices were preempted by the Airline Deregulation Act).


243. Id. at 754.
The statute of limitations on a FDUTPA claim expires four years from the date of the sale of the product or service at issue. The statute of limitations may be tolled, however, by the doctrine of fraudulent concealment. In contrast, courts have held that the delayed discovery rule does not apply to FDUTPA claims.

In Sanders v. Drivetime Car Sales Company, a putative class representative asserted an arbitration clause was void for violation of public policy because it prohibited her from bringing a private attorney general action in arbitration. Rejecting the argument, the court held that an individual does not qualify as an “enforcing authority” under the act, and thus a private claim for violations of the FDUTPA cannot be deemed a private attorney general action.

Under FDUTPA, there are two private causes of actions that may be brought: (1) an action for injunctive and declaratory relief pursuant to section 501.211(1); and (2) an action for damages pursuant to section 501.211(2).

In order to bring an action for declaratory or injunctive relief under FDUTPA, a person must be “aggrieved” by a violation of the act, but the term “aggrieved” is not defined in the act. In Ahearn v. Mayo Clinic, the court held that for purposes of this provision of the act, the term “aggrieved” means a person who is “angry or sad on grounds of perceived unfair treatment.” In addition, the court held that the offending conduct need not be continuing in order to support declaratory or injunctive relief.

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245. In re Takata Airbag Prods. Liab. Litig., 2016 WL 6072406, at *11 (S.D. Fla. 2016) (denying motion to dismiss and holding that plaintiff had sufficiently alleged fraudulent conduct sufficient to toll statute of limitations); Licul, 2013 WL 6328734, at *6-7 (dismissing FDUTPA count without prejudice, noting that plaintiff might be able to allege facts sufficient to satisfy requirements of doctrine of fraudulent concealment).
246. Licul, 2013 WL 6328734, at *6 (citing Marlborough Holdings Grp. v. Azimut-Benetti, Spa, Platinum Yacht Collection No. Two, Inc., 505 F. App’x 899, 906 (11th Cir. 2013)).
248. Id. at 719.
249. Id.
252. Id. at 172.
253. Id. at 173.
the court adopted a different meaning of “aggrieved” for business entities since entities are not capable of being “angry or sad.” As applied to entities, the term “aggrieved” means that the entity’s “rights have been, are being, or will be adversely affected.”

Although it is well-established that non-consumers, such as business competitors, can seek declaratory or injunctive relief under FDUTPA, courts have split on whether business competitors have standing to bring a claim for damages under FDUTPA. Recently, three of Florida’s District Courts of Appeal have found that business competitors do have standing to bring a FDUTPA claim for damages. However, the plaintiff in such cases must still show consumer harm resulting from the challenged conduct.

In addition to standing, there is also a split as to whether non-consumers who do not purchase a defendant’s products or services can allege “actual damages,” which is an element required to plead a FDUTPA claim for damages. Some courts require plaintiffs in non-

255. Id. at 214.
256. Id.
257. See id. (holding business entity can bring an equitable claim under FDUTPA if it “presents evidence of the required elements”); Bailey v. St. Louis, 196 So. 3d 375, 382-83 (Fla. Dist. Ct. App. 2016) (collecting cases).
260. See CEMEX Constr. Materials Florida, LLC v. Armstrong World Indus., 2018 WL 905752, at *15 (M.D. Fla. Feb. 15, 2018) (dismissing FDUTPA count when business entity failed to plausibly allege the deceptive conduct was likely to cause consumer injury); Caribbean Cruise Line, 169 So. 3d at 169 ("[W]hile the claimant would have to prove that there was an injury or detriment to consumers in order to satisfy all of the elements of a FDUTPA claim, the claimant does not have to be a consumer to bring the claim.") (emphasis in original).
consumer cases to adhere to the *Rollins, Inc. v. Heller*,\(^{262}\) definition of “actual damages,” i.e. the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties, which does not allow for the recovery of consequential damages or lost profits.\(^{263}\) Other courts have construed “actual damages” in non-consumer cases to allow for recovery of past lost profits.\(^{264}\)

Because “actual damages” under FDUTPA does not include consequential damages, at least in consumer cases, in *Nazario v. Professional Account Services*,\(^{265}\) the court held that damages for slander of credit and invasion of privacy are consequential and thus not recoverable under FDUTPA.\(^{266}\)

c. Government Enforcement and Remedies

In *Outreach Housing, LLC v. Office of the Attorney General,*


\(^{263}\) See *ADT LLC v. Vivint, Inc.*, 2017 WL 5640725, at *5 (S.D. Fla. Aug. 3, 2017) (dismissing FDUTPA claim as competitor “failed to allege a difference in the market value of a product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties”); *Diversified Mgmt. Sols., Inc. v. Control Sys. Research*, 2016 WL 4256916, at *5 (S.D. Fla. May 16, 2016) (rejecting argument that business competitors can recover damages in the form of lost profits under FDUTPA).


\(^{266}\) Id. at *5.*
Department of Legal Affairs, the court held that the enforcing authority can seek consumer restitution under FDUTPA.

II. Georgia

a. Scope of the Statute and Elements as a Cause of Action

(1) Exemptions

The scope of this exception to the broad exemption, as applies to mortgage servicing activity, has been addressed in a number of recent cases. As the U.S. District Court for the Northern District of Georgia held in June 2015, “[s]ince Stroman however, the Eleventh Circuit as well as other courts in this circuit have endorsed the idea that claims for conduct such as that complained of here do not set forth a cause of action under the [Fair Business Practices Act] when asserted against services or lenders.”

b. Private Enforcement and Remedies

(2) Arbitration

The Georgia Supreme Court addressed arbitration of consumer claims in Bickerstaff v. SunTrust Bank. There, the Georgia Supreme Court construed the terms of an arbitration provision that allowed bank depositors to reject arbitration under certain circumstances and addressed whether an individual’s rejection of arbitration could serve as a rejection of arbitration for all members of the proposed class. The court held that the plaintiff’s timely rejection of arbitration tolled the time for

268. Id. at 697.
270. 788 S.E.2d 787 (Ga. 2016).
271. 788 S.E.2d at 790-91.
putative class members to provide similar notice and further held that those class members could validly provide such notice by electing not to exclude themselves from the class if and when a motion for class certification were granted and an opportunity to request exclusion provided. 272 It is rare that arbitration provisions authorize consumers to exclude themselves from pursuing claims through arbitration. Nevertheless, for any provisions containing that exclusion, the court’s holding in Bickerstaff that, in effect, a named plaintiff’s decision to reject arbitration can stand in the place of class members’ rejections substantially narrows the impact of AT&T Mobility LLC v. Concepcion. 273

In January 2018, the Supreme Court of Georgia affirmed the broad policy favoring arbitrability in the context of consumer claims. In SunTrust Bank v. Lilliston, 274 the court addressed potential waiver of the right to arbitrate and held that litigating for over a year did not constitute a waiver of the right to invoke arbitration in a “renewal action.” 275 This action is a unique procedural device available to litigants under Georgia’s Civil Practice Act. The court was clear that its ruling in favor of arbitration was based on application of the Georgia statute and the fact that defenses, including the defense of arbitration, are to be evaluated in a renewal action independently of the conduct in the prior action between the parties. 276 Nevertheless, the Court recognized the “liberal federal policy favoring arbitration” and the “strong presumption against waiver under the FAA.” 277

12. Hawai’i

a. Scope of the Statute and Elements of a Cause of Action

No person may bring an action for violation of the Deceptive
Practices Act (DPA)\textsuperscript{278} except a consumer, the attorney general or the director of the office of consumer protection.\textsuperscript{279} Because the DPA’s definition of “consumer” includes one who “is solicited to purchase goods,” the Intermediate Court of Appeals held that the plaintiff need not have purchased goods with his own funds to qualify as a “consumer.”\textsuperscript{280}

a. Private Enforcement and Remedies

Additional civil penalties may be imposed for consumer frauds committed against elders; in addition to any other civil penalty, a court may impose a civil penalty not to exceed $10,000 for each violation.\textsuperscript{281} Under the DPA “elder” means a consumer who is sixty-two years of age or older.\textsuperscript{282} The DPA sets forth five delineated factors for imposition of enhanced civil penalties for consumer frauds committed against elders, and the trial court must make findings as to each factor in order to impose the enhanced civil penalties.\textsuperscript{283}

13. Idaho

a. Scope of the Statute and Elements of a Cause of Action

The Idaho Consumer Protection Act (ICPA)\textsuperscript{284} must be liberally construed to give effect to the legislative intent.\textsuperscript{285} The intent is to deter

\textsuperscript{278} Haw. Rev. Stat. §§ 476-1 et seq.
\textsuperscript{279} Haw. Rev. Stat. § 480-2(d).
\textsuperscript{280} Ozaki v. Saunders, 403 P.3d 307 (Table), at *3 (Haw. Ct. App. 2017).
\textsuperscript{281} Haw. Rev. Stat. § 480-13.5.
\textsuperscript{282} Id. at § 480-13.5(c).
\textsuperscript{283} Ozaki, 403 P.3d at *3 (vacating enhanced penalties and remanding for further consideration where trial court made findings on only two of the five factors).
\textsuperscript{284} Idaho Code §§ 48-601 et seq.
\textsuperscript{285} Pierce v. McMullen, 328 P.3d 445, 454 (Idaho 2014). Plaintiffs alleged that the defendants had fraudulently promised to help the plaintiffs avoid foreclosure by deeding property to the defendants, who ultimately allowed foreclosure proceedings to occur. The district court held that the plaintiffs had not “purchased anything,” and so could not invoke the protection of the ICPA. The Idaho Supreme Court disagreed, noting that the plaintiffs had contracted with the defendants for a specific service and that the agreement, therefore, fell within the scope of the ICPA, considering its legislative purpose to protect consumers from deceptive trade practices.
deceptive and unfair trade practices and to provide relief to consumers exposed to those practices. In keeping with this intent, there need not be a purchase or lease for a party to have relief under the ICPA. Where there is an agreement for one party to provide services or work for another party, that agreement will be subject to the ICPA.

The ICPA is not intended to protect consumers from unwise purchases. For example, the ICPA does not provide a cause of action for relief from the purchase of vouchers that have expiration dates. Furthermore, the Idaho Supreme Court is not receptive to expanding the ICPA’s scope to include unwise purchases, and may be inclined to find claims over such purchases to be frivolous.

The Idaho Supreme Court also recognizes that the ICPA’s two-year statute of limitations begins to run when damages are merely ascertainable by a plaintiff.

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286. Id.
287. Id.
288. Id.
289. Doble v. Interstate Amusements, Inc., 372 P.3d 362, 364 (Idaho 2016). The plaintiff claimed the sale of movie theatre vouchers was unconscionable where the vouchers had expiration dates. However, the plaintiff could not establish that he had actually purchased the vouchers or had a contractual relationship with the defendant. The Idaho Supreme Court found that the plaintiff brought a frivolous claim for relief because the plaintiff lacked a contractual relationship with the defendant and also because the expiration dates were clearly printed on the vouchers. While the plaintiff argued that the claim was not frivolous because it was an issue of first impression, the court concluded that it was only an issue of first impression because Idaho law did not provide a cause of action for the purchase of cash vouchers.
290. Id.
291. Id.
292. Swafford v. Huntsman Springs, Inc., 409 P.3d 789, 793 (Idaho 2017). The plaintiffs’ claims, filed in 2015, were foreclosed by the applicable statute of limitations on the basis that the plaintiffs were put on notice of damages when the defendant had anticipatorily breached a development contract in 2008, at which time the defendant began to construct other improvements in the location of the proposed ingress/egress that the plaintiffs claimed was part of the contract.

a. Scope of the Statute and Elements of a Cause of Action

The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)\textsuperscript{293} was amended between 2015 and 2018 to add several statutes to the list of laws whose violation is deemed a per se unlawful practice\textsuperscript{294} including the Reverse Mortgage Act\textsuperscript{295}; section 25 of the Youth Mental Health Protection Act\textsuperscript{296}; the Installment Sales Contract Act\textsuperscript{297}; and the Student Online Personal Protection Act.\textsuperscript{298}

Courts interpreting ICFA continue to apply the \textit{expressio unios est exclusio alterius} canon of statutory construction to hold that a violation of a federal or state statute does not constitute a per se ICFA violation unless it is listed in section 505/2Z of the act. For example, in the U.S. District Court for the Northern District of Illinois, the court held that a violation of federal regulations governing slack-fill (unfilled space in packaged foods), promulgated under the Federal Food, Drug and Cosmetic Act, was not a per se ICFA violation in dismissing a lawsuit alleging that Tootsie Roll Industries deceptively filled boxes of Thin Mints less than two-thirds full.\textsuperscript{299} However, in a case in the U.S. District Court for the Southern District of Illinois, the court denied a motion to dismiss an ICFA claim finding that although the alleged statutory violation did not give rise to an independent right of action and was not enumerated in section 505/2Z, the statute nonetheless reflected the state’s public policy; therefore, allegations that the defendants intentionally skirted the statute’s protections sufficiently pled an unfair practice under ICFA.\textsuperscript{300} 

\textsuperscript{293} 815 ILL. COMP. STAT. § 505/1 et seq.
\textsuperscript{294} 815 ILL. COMP. STAT. § 505/2Z.
\textsuperscript{295} 765 ILL. COMP. STAT. §§ 945/1 to 945/40
\textsuperscript{296} 405 ILL. COMP. STAT. § 48/25 (relating to offering homosexuality conversion therapy); 815 ILL. COMP. STAT. § 505/2MM(n-5).
\textsuperscript{297} 765 ILL. COMP. STAT. §§ 67/1 to 67/999 (protecting buyers who purchase homes over time pursuant to a sales contract, rather than a mortgage)
\textsuperscript{298} 105 ILL. COMP. STAT. § 85/1 to 85/99 (protecting privacy and security of student data collected by educational technology companies)
\textsuperscript{299} Stemm v. Tootsie Roll Indus., 374 F. Supp.3d 734, 742 (N.D. Ill. 2019).
In 2018, the ICFA was amended to add prohibitions on non-disparagement clauses in contracts for the sale or lease of consumer merchandise or services\(^{301}\) and on accepting referral fees for referring patients to particular mental health treatment facilities.\(^{302}\) Additionally, the legislature adding a provision providing that differentiating pricing for services based on factors, including amount of time, difficulty, and costs of providing the service, among other factors, was not a fraudulent, unfair or deceptive act or practice under ICFA.\(^{303}\)

(1) Deceptive Acts or Practices

Law-school graduates who sued a law school for publishing allegedly deceptively high employment figures for the school’s prior graduates did not state an ICFA claim, because the employment information reported by the school was not deceptive “as reasonably understood in light of all the information available to plaintiffs.”\(^{304}\) Among other things, the appellate court noted that the students had access to more detailed employment data published by the ABA.\(^{305}\)

A retail sales associate’s representation to a buyer that the buyer owed more sales tax than authorized by law constituted a violation of ICFA where the trial court found that the store was aware that the subject tax should not be charged and the buyer was actually deceived by the sales associate’s representation.\(^{306}\)

(3) Exemptions

The ICFA “safe-harbor” for acts “specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States”,\(^{307}\) does not apply if a government agency has merely issued guidance indicating it will forbear

\(^{301}\) 815 ILL. COMP. STAT. § 505/2UUU
\(^{302}\) 815 ILL. COMP. STAT. § 505/2VVV
\(^{303}\) 815 ILL. COMP. STAT. § 505/2TTT.
\(^{305}\) Id.
\(^{307}\) 815 ILL. COMP. STAT. 505/10b(1).
from enforcing a statutory prohibition. Instead, the governmental agency must specifically authorize the conduct as evidenced by its “affirmative acts or expressions of authorization.”

b. Private Enforcement and Remedies

The Appellate Court of Illinois confirmed in 2017 that proof of public injury – i.e. a trade practice addressed to the market generally – is not a required element of an ICFA claim. The court explained that amendments to the statute in 1996 requiring proof of public injury applied only to cases against new and used car dealers.

In 2019, the Supreme Court of Illinois held that ICFA claims are not categorically exempt from the voluntary payment doctrine. A plaintiff in a personal-injury action against an insured is not a consumer of the insured’s insurance policy with standing to sue under ICFA for the insurance company’s failure to disclose the insured’s full policy limitations.

15. Indiana

a. Scope of the Statue and Elements of a Cause of Action

In 2011, the Indiana General Assembly amended numerous provisions of the Indiana Deceptive Consumer Sales Act (IDCSA).

308. Vanzant v. Hill’s Pet Nutrition, Inc. 2019 WL 3928666, at *3-4 (7th Cir. 2019) (FDA guidance that enforcement action against a pet food maker was unlikely if the product was only sold under direction of a veterinarian was not a specific authorization by the government for the defendant to sell “prescription” cat food under a veterinarian’s care if the prescription-strength cat food was not materially different from nonprescription varieties).

309. Id., (quoting Price v. Philip Morris, Inc., 848 N.E.2d 1, 36 (Ill. 2005)).


311. Id. at 1133-34.

312. McIntosh v. Walgreens Boots Alliance, 2019 WL 2536882, *5-6 (Ill. 2019) (finding plaintiff’s voluntary payment of municipal tax on purchases of bottled water that were exempt from the tax precluded ICFA claim, because plaintiff failed to plead sufficient facts supporting application of the fraud exception to the voluntary payment doctrine).


314. IND. CODE §§ 24-5-0.5-1 et seq.
Additional changes (primarily technical or slight wording changes) were made in 2013, 2014, 2018 and 2019. The primary purpose of the act is to protect consumers against the deceptive or unconscionable sales acts of suppliers of goods and services. As amended, the act lists about forty categories of deceptive acts, including general provisions concerning deceptive conduct related to misrepresentations by the supplier regarding such things as third-party sponsorship or approval of the product or service; the quality or characteristics of the product or service; that the product is new or unused, or is or is not in need of repair or replacement; available price advantages, warranties, disclaimers, rights, remedies, discounts, rebates or other inducements to purchase; validity of cost estimates; undisclosed limitations on the timing or quantity of the product or service for sale; the use of alternative or assumed business names or locations of the supplier; use of false or deceptive packaging or promotional materials; as well as specific provisions related to cigarette sales, debt collection, health spa services, business opportunities, door-to-door sales, home and real property improvement contracts, telephone solicitations, motor vehicle subleasing and buyback programs, the use of automatic telephone dialing/announcing devices, consumer credit services, environmental marketing claims, prescription drug cards, real estate appraisals, identity theft, mortgages, promotional gifts and contests, towing services, and commercial solicitations disguised as invoices, legal notices, or other similar documents or solicitations sent even though the goods solicited have not been shipped or the services solicited have not been performed.\textsuperscript{315} Many of these sections of the act are cross-referenced to other provisions in the Indiana Code or federal law relating to consumer protection.\textsuperscript{316} For example, a violation of the Fair Debt Collection Practices Act (FDCPA)\textsuperscript{317} or the regulations promulgated under the FDCPA is also a violation of the IDCSA.\textsuperscript{318} Similarly, automated or “robo” calling activity that is a violation of the

\textsuperscript{315} IND. CODE § 24-5-0.5-3(19)-(40).
\textsuperscript{316} \textit{Id.} § 24-5-0.5-3. \textit{See}, e.g., Darisse v. Nest Labs, 2016 WL 4385849 (N.D. Cal. 2016) (showing how a class action claim related to programmable thermostats for home heating and cooling implicated various consumer protection statutes (under all fifty states), including the IDCSA, laws related to express and implied warranties, as well as common law fraud).
\textsuperscript{318} IND. CODE § 24-5-0.5-3(20).
Telephone Consumer Protection Act (TCPA)\textsuperscript{319} is also a deceptive act covered by the IDCSA.\textsuperscript{320}

Following the 2014 amendments, the IDCSA now covers deceptive practices in the form of omissions or implicit misrepresentations as well as affirmative misrepresentations and other deceptive conduct.\textsuperscript{321} In \textit{Sims v. New Penn Financial},\textsuperscript{322} the court explained the act now covers omissions and refused to dismiss a claim that the mortgage holder violated the IDCSA by omitting to inform the debtors of all documentation and steps necessary to reinstate a loan and avoid foreclosure.\textsuperscript{323} Indiana courts have construed the term “representation” under IDCSA to include the defendant’s words, as well as representations implied by the defendant’s actual words. In \textit{Kesling v. Hubler Nissan, Inc.},\textsuperscript{324} the plaintiff claimed a car dealership represented that the car she purchased was safe to drive when in fact it was not. The only representation at issue was the statement that the car was a “Sporty Car at a Great Value Price.”\textsuperscript{325} The Indiana Court of Appeals reversed the trial court’s entry of summary judgment, holding that the IDCSA does not “indicate that a representation cannot be implied, so long as it is made orally, in writing, or by electronic communication, and to exclude implied representations would not be consistent with the requirement that the Act be liberally construed and applied to promote its purposes.”\textsuperscript{326} The court held that the jury must determine whether “Sporty Car at a Great Value Price,” was an implied representation regarding the car’s safety.\textsuperscript{327}

\textsuperscript{319} 47 U.S.C. § 227.
\textsuperscript{320} Davis v. Contactability.com, 2017 WL 413290, at *2 (S.D. Ind. 2017) (citing IND. CODE § 24-5-0.5-3(b) (19), but dismissing the plaintiff’s claims without prejudice because the plaintiff did not plead facts sufficient to show calls were made with an intent to defraud).
\textsuperscript{322} 2016 WL 5510835 (N.D. Ind. 2016) (citing 2014 amendments to IND. CODE § 24-5-0.5(3) (a)).
\textsuperscript{323} Id. at *5.
\textsuperscript{324} 975 N.E.2d 367 (Ind. Ct. App. 2012).
\textsuperscript{325} Id. at 371.
\textsuperscript{326} Id. at 371-72.
\textsuperscript{327} Id. But see Hughes v. Chattem, Inc., 818 F. Supp. 2d 1112, 1120-21 (S.D. Ind. 2011) (granting motion to dismiss plaintiffs’ IDCSA claim that “#1 pharmacist recommended” label implied product safety because
“Consumer transaction” is defined by section 24-5-0.5-2(a) (1) of the Indiana Code, and does not include transactions related to the sale of securities or insurance, which are each covered by other sections of the Indiana Code. Now, the definition of “consumer transactions” includes collecting or attempting to collect a debt owed, due, or claimed to be owed or due. 328 Likewise, the definition of “suppliers” now includes debt collectors. 329 The terms “debt” and “debt collector” are defined by reference to federal statute. 330 In *Consumer Attorney Services v. State*, 331 the Indiana Supreme Court held that, unlike some other consumer protection statutes, the IDCSA does not exempt attorneys or law firms from its scope. 332

Although the IDCSA defines “consumer transaction,” it does not expressly define “consumer.” Several courts have addressed the meaning of “consumer” under the IDCSA. For example, in *Sheet Metal Workers Local No. 20 Welfare & Benefit Fund v. CVS Health Corp.*, 333 the court found that third-party payors who provided prescription drug insurance benefits for union members and others were “consumers” under the IDCSA. 334 That result follows the holding in *In re Actiq Sales & Marketing Practices Litigation*, 335 and other cases in which courts extended the private right of action under the act to “indirect” consumers, including third-party payors of prescription plans where the claim was essentially that prescription costs were higher than they should have been based on the defendant’s deceptive conduct. 336 These results are consistent with the reasoning that IDCSA requires a liberal and broad construction to protect consumers 337 and that if the legislature meant to limit the statute from this application, it would have done so explicitly. 338

328. IND. CODE § 24-5-0.5-2(a) (1) (C).
329. Id. § 24-5-0.5-2(a) (3) (C).
330. Id. §§ 24-5-0.5-2(a) (14), (15).
331. 71 N.E.3d 362 (Ind. 2017).
332. Id. at 368.
333. 221 F. Supp. 3d 227 (D.R.I. 2016) (applying Indiana law)
334. Id. at 232.
336. The *Sheet Metal* court declined to certify the question to the Indiana Supreme Court under Indiana Appellate Rule 64(A) regarding the definition of “consumer” under the IDCSA. 221 F. Supp. 3d. at 233.
337. IND. CODE § 24-5-0.5-1.
338. 221 F. Supp. 2d at 323-24 (holding that damages from “any reasonable reliance will suffice, not only that of a first-party nature”).
The Act does not extend to protect businesses or commercial interests from deceptive practices. In *Noble Roman’s, Inc. v. Hattenhauer Distributing*, the court declined to hold that Noble Roman’s had standing to pursue a claim under the IDCSA. Noble Roman’s claimed that Hattenhauer served pizzas bearing the Noble Roman’s brand but which contained non-conforming cheese. Noble Roman’s claimed that the consumers who ate the nonconforming pizzas were deceived into believing they were eating authentic Noble Roman’s pizzas. The court rejected Noble Roman’s claim made under the IDCSA, finding that the harm was to the Noble Roman’s brand and this type of trademark claim is not covered under the act. A similar result was reached in *In re Syngenta AG MIR 162 Corn Litigation*, where the court held that plaintiff seed retailers who purchased Syngenta’s seeds for resale to farmers were not consumers of the seeds and therefore the transaction did not fall within the act’s definition of a consumer transaction. Conceding that certain agricultural products and transactions are covered by the act, the *Syngenta* court explained that “the issue turns not on the type of item sold, but on the purpose for which the product is purchased.”

c. Private Enforcement and Remedies

The IDCSA generally allows for a private right of action to recover actual damages or statutory damages, increased (treble) damages for claims by senior consumers, willful violations, and attorneys’ fees, as well as class actions. However, the statute removes the private right of action for consumer transactions in real property, except for purchases

340. *Id.* at *3.
341. *Id.*
343. *Id.* at *11. The *Syngenta* court also found that the damages suffered by the seed retailers did not fit squarely within IND. CODE § 24-5-0.5-4(a) as “damages suffered by a consumer as a result of a deceptive act.”
344. *Id.* (other citations omitted).
345. DeWeese v. Pribyla, 114 N.E.3d 501 (Ind. Ct. App. 2018) (senior homeowner was entitled to treble damages against home improvement contractor for failure to provide a written contract).
346. IND. CODE § 24-5-0.5-4(a).
347. IND. CODE § 24-5-0.5-4(b); see Gasbi, LLC v. Sanders, 120 N.E.3d 614 (Ind. Ct. App. 2019) (consumers who were charged an undisclosed document fee stated a claim under the IDCSA against car dealership).
of time shares and camping club memberships; violations of the FDCPA; violations of certain telephone solicitation laws; and violations of certain state laws regarding automatic telephone dialing/announcing devices. There is no right to claim injunctive relief in suits brought under the IDCSA by a private individual, but other equitable remedies are available, such as restitution and limitation of certain contract clauses.

The IDCSA divides types of deceptive acts into two categories: (1) those that are “uncured” after notice to the defendant; and (2) those that are “incurable” violations occurring “as part of a scheme, artifice, or device with intent to defraud or mislead consumers.”

“Uncured” deceptive acts may be the subject of IDCSA claims where the plaintiff shows that the defendant had an opportunity to correct the problem, but failed to do so. Specifically, an “uncured” act is one of which the supplier has received notice from a customer but that the supplier has not offered to cure within thirty days or that has not been cured within a reasonable time after the consumer accepts an offer to cure. An action may not be brought on an uncured deceptive act without a showing by the plaintiff that notice of the alleged deceptive act was given in writing within the earlier of (1) six months of discovering the deceptive act or (2) one year following the closing of the consumer transaction. If a plaintiff fails to follow the notice requirements, the claim may proceed only for incurable deceptive acts. In Warfield v. Dorsey, a roofing contractor who was not licensed and failed to apply for requisite building permits committed an incurable deceptive act for which he was liable under the IDCSA and the Indiana Home Improvements Contracts Act.

348. IND. CODE § 24-5-0.5-4(a).
350. IND. CODE § 24-5-0.5-4(d).
351. IND. CODE § 24-5-0.5-2(a) (7).
352. Id. § 24-5-0.5-2(a) (8).
355. IND. CODE § 24-5-0.5-5(a); see also Ridgley v. Ethicon, Inc., 2017 WL 525854, at *3 (S.D.W.Va. 2017) (applying Indiana substantive law) (dismissing claim under IDCSA for failure to issue required presuit notice).
356. IND. CODE § 24-5-0.5-5(a); see also Castagna, 2016 WL 3413770 at *7.
358. 55 N.E.3d at 894; IND. CODE §§ 24-5-11-1 – 24-5-11-14.
While Indiana state courts have not clearly confronted the issue, federal courts have required plaintiffs asserting “incurable” IDCSA claims to plead the elements of their claims with heightened particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure because an element of an allegation of an incurable violation is intent to defraud or mislead the plaintiff.\textsuperscript{359}

d. Government Enforcement and Remedies

While private individuals have no private right of action under IDCSA for violations of the FDCPA, the Attorney General has enforcement powers over such claims,\textsuperscript{360} including the power to seek civil penalties.\textsuperscript{361} In an action to recover civil penalties, persons alleged to have violated the FDCPA have an affirmative defense for unintentional, bona fide errors notwithstanding the existence of procedures reasonably meant to avoid such errors.\textsuperscript{362}

In 2011, Indiana created a consumer protection assistance fund for the purpose of reimbursing victims of certain enumerated consumer protection law violations when the violator was ordered to pay restitution, but failed to do so.\textsuperscript{363} To seek reimbursement, the person must be a “qualifying individual”\textsuperscript{364} and submit a “qualifying claim”\textsuperscript{365} within 180 days after entry of the court order requiring restitution.\textsuperscript{366}

\textsuperscript{359}. Walkowiak v. Bridgepoint Educ., 2017 WL 2418391, at *2 (N.D. Ind. 2017) (granting motion to dismiss because plaintiff did not allege with whom the plaintiff spoke, what was said or how she relied on the representations made to her); Lautzenhiser v. Coloplast A/S, 2012 WL 4530804, at *8 (S.D. Ind. 2012) (dismissing IDCSA claim for failure to plead with particularity); \textit{Gasbi}, 120 N.E.3d at 620-21 (holding requirements of Rule 9(b) were met).

\textsuperscript{360}. \textit{IND. CODE} § 24-5-0.5-4(c).

\textsuperscript{361}. \textit{Id}. § 24-5-0.5-4(l).

\textsuperscript{362}. \textit{Id}.

\textsuperscript{363}. \textit{See id}. § 24-10-2-1 (establishing the fund and limiting payments to only those victims of certain consumer protection law violations); \textit{id}. § 24-10-2-2 (limiting payment to only those consumers who did not receive restitution despite a court order that the violator make restitution).

\textsuperscript{364}. \textit{Id}. § 24-10-1-4 (defining “qualifying individual”).

\textsuperscript{365}. \textit{Id}. § 24-10-1-3 (defining “qualifying claim”).

\textsuperscript{366}. \textit{Id}. § 24-10-2-2(b). For good cause, the deadline for submitting claims can be extended up to two years after the entry of the restitution order. \textit{Id}.
16. Iowa

b. Private Enforcement and Remedies

(1) Scope

Iowa courts apply a “but-for” test in determining whether the defendant caused the plaintiff’s harm under the Private Right Act.\(^{367}\) Furthermore, the plaintiff must establish an “ascertainable loss” to recover under the Private Right Act.\(^{368}\)

(2) Exemptions

While retail sellers of drugs or other products claiming to have a health-related benefit or use are not exempt under the Private Right Act, a regional health care delivery system and its hospital are exempt where the system did not offer or sell “consumer merchandise.”\(^{369}\)

c. Government Enforcement and Remedies

The Iowa Consumer Fraud Act (ICFA)\(^{370}\) provides that “the attorney general is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys’ fees, for the use of this state.”\(^{371}\) This provision only applies to civil actions commenced under section 714.16(7) relating to violations of the ICFA.\(^{372}\) The Supreme Court has held that the award of attorneys’ fees is mandatory and not within the discretion of the courts in a successful consumer fraud action.\(^{373}\) The attorney general is not entitled

\(^{368}\) McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518, 533 (Iowa 2015) (finding plaintiff failed to show an “ascertainable loss” under the Private Right Act when the casino failed to pay a bonus allegedly won on a slot machine).
\(^{370}\) I OWA CODE §§ 714.1 et seq.
\(^{371}\) I OWA CODE § 714.16(11).
\(^{373}\) State ex rel. Miller v. Fiberlite Int’l, 476 N.W.2d 46, 47 (Iowa 1991).
to recover the costs of a court action or attorneys’ fees in an action under section 714.16(6) to enforce a subpoena under the ICFA.374

17. Kansas

a. Scope of the Statute and Elements of a Cause of Action

A number of statutory revisions and recent cases have modified, interpreted, or applied key provisions of the Kansas Consumer Protection Act (KCPA).375

(3) Consumer

The KCPA defines “consumer” as “an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes.”376 In several recent cases, the federal courts in Kansas have examined whether a party was a “consumer” under the KCPA. For example, corporations organized for profit are not consumers and thus cannot allege they were the victims in a consumer transaction.377

In a different case, the court held that the wife and son of a man who purchased a truck were not “consumers” under the KCPA because they were not parties to the contract, even if the son provided money for a down payment.378 The court also held that the truck was not acquired by a “family partnership” under the KCPA because the KCPA requires an actual “partnership” under Kansas law, not simply a family unit.379

374. *Awakened*, at *3 (“[A] subpoena enforcement proceeding is not an independent ‘action’ under the [ICFA]. As such, the award of investigation costs and attorney fees was not permissible at this stage of the attorney general’s investigation.”). Those costs may be recoverable as the costs of “any investigation which may have been conducted” in a successful action under § 714.16(7) relating to violations of the ICFA. See *Iowa Code* § 714.16(11).


376. Id. § 50-624(b)


379. Id. at 1153.
In *Wright v. Enhanced Recovery Co.*\(^{380}\) the federal district court held that the recipient of a debt collector’s phone calls regarding a debt owed by someone else was not a “consumer” under the KCPA because the recipient of the phone calls never contracted with a supplier for goods or services.\(^{381}\) In another case, the federal district court held that a widow who received calls from a loan servicer to collect on her deceased husband’s loans was not a “consumer” under the KCPA because the widow did not participate in the purchase, did not sign the promissory notes, and was not liable for the debt.\(^{382}\)

In 2015, a Massachusetts federal court determined that “end payors”—consumers and third-party payors who indirectly purchased, paid for or provided reimbursement for a prescription drug other than for resale—were not “consumers” under the KCPA.\(^{383}\)

\((4)\) Supplier

Effective July 1, 2019, the Kansas Legislature amended the definition of “supplier” in the KCPA to delete the exemption previously granted to any “bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral . . . .”\(^{384}\) Before this statutory change, courts read the exemption as excluding banks from all KCPA liability generally, regardless of whether the case actually involved a disposition of repossessed collateral.\(^{385}\) Courts had also dismissed several cases against debt collectors because the original transaction involved a bank that did not meet the KCPA’s definition of a “supplier.”\(^{386}\)

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381.  *Id.* at *2–4.
386.  *Briscoe*, 2014 WL 7363385, at *4 (granting defendant debt collector’s motion for summary judgment because the bank that provided the initial loan to plaintiff was not a “supplier” under the KCPA); *see also*
Because of this change, banks and those that enforce their obligations (e.g. debt collectors) will no longer have the same broad exemption from suit under the KCPA they once enjoyed. However, because these changes are prospective, courts have continued to apply the previous broad exclusion for banks in cases where the transaction at issue predates the statutory revision.\textsuperscript{387} Furthermore, due to the Kansas Legislature’s simultaneous revision of the definition of “consumer transaction,” some exemption remains for transactions specifically involving the disposition of repossessed collateral. The section below discusses this limited exemption.

\textit{(5) Consumer Transaction}

Effective July 1, 2019, the Kansas Legislature amended the definition of “consumer transaction” to carve out certain transactions relating to the dispossession of repossessed collateral.\textsuperscript{388} The KCPA now defines “consumer transaction” as:

\begin{quote}
[A] sale, lease, assignment or other disposition for value of property or services within this state, except insurance contracts regulated under state law, to a consumer; or a solicitation by a supplier with respect to any of these dispositions. “Consumer transaction” does not include the disposition of repossessed collateral by any supplier that is subject to and compliant with any state or federal law or rules and regulations with regard to disposition of such repossessed collateral.\textsuperscript{389}
\end{quote}

By adding this new carve-out to the definition of “consumer transaction” while simultaneously changing the definition of “supplier,” the Kansas Legislature eliminated the broad immunity banks once enjoyed,\textsuperscript{390} while preserving a limited exemption for actions taken during the dispossession of repossessed collateral. Notably, this new carve-out is not limited to banks, but rather applies to any supplier.\textsuperscript{391} However, to

\begin{flushright}
\textit{Kalebaugh}, 76 F. Supp. 3d at 1260-61 (holding that evidence indicating that a bank is subject to state or federal regulation would preclude a debtor’s KCPA claim against a debt collector attempting to collect debtor’s credit card debt owed to bank).
\end{flushright}

\textsuperscript{387} \textit{E.g.,} Schneider v. CitiMortgage, Inc., 2019 WL 3731909, at *1 (D. Kan. Aug. 8, 2019).


\textsuperscript{389} \textsc{Kan. Stat. Ann.} § 50-624(c).

\textsuperscript{390} \textit{See} notes 383 through 387, \textit{supra}.

\textsuperscript{391} \textsc{Kan. Stat. Ann.} § 50-624(c).
get the benefit of the exemption, the supplier must not only be subject to state or federal laws or regulations regarding the disposition of repossessed collateral, the supplier must also have complied with those laws or regulations.\textsuperscript{392} Thus, actions taken by an unregulated supplier, or actions taken by a regulated supplier that violate the relevant laws or regulations, now may be subject to enforcement under the KCPA. Further, actions unrelated to the disposition of repossessed collateral do not fall within the limited exemption.

Courts in Kansas hold that granting and servicing a home loan mortgage is a “consumer transaction” under the KCPA,\textsuperscript{393} as is soliciting a loan modification.\textsuperscript{394} However, the Kansas Court of Appeals found that under the KCPA no consumer transaction occurred between a mortgagor and the assignee of the mortgage because “the alleged KCPA violations occurred after the original lender granted the mortgage to the [mortgagor], and the mortgagor did not allege that the assignee ‘sold, leased, or assigned property or services to the [mortgagor].’”\textsuperscript{395}

A transaction must occur within Kansas in order to meet the KCPA’s definition of a “consumer transaction.”\textsuperscript{396} In \textit{Meyers v. Garmin International},\textsuperscript{397} the court found the defendant’s sale of a GPS device to the plaintiff to be a consumer transaction within Kansas despite the plaintiff purchasing the device from an authorized dealer in Illinois.\textsuperscript{398} The court based its holding on the fact that the defendant designs, develops, warehouses, distributes, supports, and repairs its devices in Kansas, required the plaintiff to register on the defendant’s website and agree to the defendant’s terms and conditions which included a Kansas choice of law provision, and it was “plausible that plaintiff [would] be

\textsuperscript{392} Id.

\textsuperscript{393} Queen’s Park Oval Asset Holding Trust v. Belveal, 2017 WL 2001609, at *3 (Kan. Ct. App. 2017); Schneider v. Citibank, NA, 2014 WL 219339 (D. Kan. 2014) (holding that granting home loan mortgage was a consumer transaction, and thus lender’s failure to properly service loan and refusal to refinance home loan was actionable under the KCPA).


\textsuperscript{395} Queen’s Park, 2017 WL 2001609, at *4.

\textsuperscript{396} KAN. STAT. ANN. § 50-624(c).

\textsuperscript{397} 2014 WL 273983 (D. Kan. 2014).

\textsuperscript{398} Id. at *5.
able to prove facts showing that he was solicited by defendants in Kansas.”

(6) Willful Omissions

In order to successfully make a willful omission claim under the KCPA a plaintiff must show that (1) plaintiff is a “consumer” under the KCPA, (2) defendants are “suppliers” under the KCPA, (3) defendants willfully omitted a fact about a purchase or sale, (4) the fact stated or concealed was material, and (5) defendants had a duty to disclose the “material” fact. A supplier has a duty to disclose a material fact under the KCPA if “the supplier knows that the consumer is entering into a transaction under a mistake about the material fact, and the consumer would reasonably expect disclosure of such material fact based on the relationship between the consumer and the supplier, the customs and trade, or other objective circumstances.”

b. Private Enforcement

Section 50-634 of the KCPA sets forth private remedies available to consumers, including class actions.

(7) Statute of Limitations

“The KCPA has a 3-year statute of limitations, which starts running with the occurrence of the alleged conduct constituting the violation, not the discovery of the violations.” In Clemmons v. Wells Fargo Bank, the Tenth Circuit affirmed the district court’s holding that a mortgagor’s claim against the mortgagee’s law firm accrued, thus triggering the start of the KCPA’s three-year statute of limitations, when the mortgagor first received a “Fair Debt” demand letter from the law firm.

399. Id. at *2-5.
401. Id.
403. Id. at § 50-634(2) (d).
405. 2017 WL 816875 (10th Cir. 2017).
406. Id. at *4.
(8) Class Actions

A plaintiff must also show a “causal connection” between the defendant’s violation of the KCPA and his or her damages in order to successfully bring a private cause of action under the KCPA.407 In a class action, however, a plaintiff does not need to prove on an individual basis that a defendant’s material omissions caused harm to each putative class member.408 Rather, a putative class may prove causation by showing that the objective, reasonable person would have been harmed by the omission.409 However, “[g]enerally, the causal connection/reliance element under the KCPA will destroy most class certifications because of the individualized fact issues.”410

Section 50-625 of the KCPA provides that “a consumer may not waive or agree to forego rights or benefits under this act.”411 Relying on the KCPA’s private class action provision in section 50-634(2) (d) and its anti-waiver provision in section 50-625, the court in Emilio v. Sprint Spectrum L.P.,412 affirmed an arbitrator’s decision that the class action waiver in the parties’ contract was unenforceable.413

The arbitrator in Emilio had decided that the defendant could not be compelled into class arbitration because it had not contractually agreed to do so.414 At the same time, however, the arbitrator found that the plaintiff could not be compelled into bilateral arbitration because the class action waiver in the contract was unenforceable under section 50-625 of the KCPA.415 Because the defendant could not be compelled into class arbitration and the plaintiff could not be compelled into bilateral arbitration, the arbitrator permitted plaintiff to proceed in court if the parties could not agree on the type of arbitration.416 The court found the

409. Id.
411. Id. at § 50-625.
412. 2014 WL 902564 (S.D.N.Y. 2014), aff’d, 582 F. App’x 63 (2d Cir. 2014).
413. Id. at *6.
414. Id. at *3.
415. Id.
416. Id.
arbitrator’s conclusion to be “not only permissible under Wilson, but entirely reasonable in light of the long-standing principle that a party agreeing to arbitrate a statutory claim ‘does not forgo substantive rights afforded by the statute.’”417

(9) Attorneys’ Fees

Courts may award reasonable attorneys’ fees to a prevailing party under the KCPA in particular circumstances.418 A plaintiff who accepts an offer of judgment for a KCPA claim is a prevailing party and may be entitled to attorneys’ fees.419

Courts may not award attorneys’ fees under the KCPA “for services performed by the office of the attorney general or the office of a county or district attorney.”420 However, they may award reasonable attorneys’ fees to a prevailing consumer if a supplier has committed an act or practice that violates the KCPA or a prevailing supplier if the consumer “brought or maintained an action the consumer knew to be groundless” and the action was terminated by a judgment or settlement.421

18. Kentucky

a. Scope of the Statute and Elements of a Cause of Action

(1) Exemptions

The Kentucky Consumer Protection Act (“KCPA”)422 does not apply to individual real estate transactions or a landlord-tenant relationship.423

417. Id. at *6 (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985))
418. KAN. STAT. ANN. § 50-634(e) (1)-(2).
420. KAN. STAT. ANN. § 50-634(e).
422. KY. REV. STAT. §§ 367.170 et seq.
b. Private Enforcement and Remedies

A subsequent decision held that Roberts v. Lanigan Auto Sales\(^\text{424}\) does not bar a claim for fraud in all circumstances and that an “as is” clause will not preclude a claim for intentional misrepresentation.\(^\text{425}\)

However, one court has held that the KCPA does not preempt either the FAA or the Kentucky Arbitration Act.\(^\text{426}\)

In a civil action under the KCPA, the burden of proof is a mere preponderance of the evidence.\(^\text{427}\)

c. Government Enforcement and Remedies

There is no basis in the CPA for sanctions in excess of the amounts provided for in section 367.990 merely because the violation stretched over a certain number of days, and every violation of the CPA must be based on separate, affirmative act or decisions by a defendant.\(^\text{428}\)

19. Louisiana

a. Scope of the Statute and Elements of a Cause of Action

In Brandon v. Eaton Group Attorneys, LLC\(^\text{429}\), the U.S. District Court for the Eastern District of Louisiana recognized that attorneys are not immune from the Louisiana Unfair Trade Practices and Consumer Protection Act (LUTPA)\(^\text{430}\) entirely, and denied the defendant’s motion for summary judgment on the plaintiff’s LUTPA claim stemming from the defendant’s collection efforts in connection with the plaintiff’s student loan default.\(^\text{431}\)

\(^{424}\) 406 S.W.3d 882 (Ky. Ct. App. 2013)
\(^{428}\) Id. at *7-8.
\(^{430}\) LA. STAT. ANN. §§ 1401 et seq.
\(^{431}\) 2017 U.S. Dist. LEXIS 9525, at *9-11 (distinguishing Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless, Inc., 576 So. 2d 532 (La. Ct. App. 1990), on the basis that Loveless concerned whether the legislature,
Recent examples of conduct that Louisiana courts have deemed unfair or deceptive trade practices include: a furniture salesman’s threat of criminal and professional charges against a purchaser to secure full payment from the purchaser for defective goods; a towing company’s failure to notify a car owner that her car had been towed and that it would be seized and sold, as well as its subsequent sale of the car and failure to keep adequate records of the sale; a chicken manufacturing company’s bad faith breach of its contract with a chicken breeder, which resulted in significant losses for the breeder, and the manufacturer’s subsequent bad faith termination of the contract based on these losses; a party’s refusal to correct defects in his previous conveyance of property to a former business partner for the purpose of preventing the latter from selling the property; an insurance fraud investigator’s reporting of an unsubstantiated tip from a competitor of a local pharmacy that the local pharmacy was violating federal laws, which prevented the sale of the local pharmacy’s business to Walgreens; and a corporate officer’s “diverting” of Facebook followers on his old company’s fan page to his new company’s fan page.

In 2018, the Louisiana Legislature amended and reenacted La.R.S. 51:1409(E). The statute had previously stated that LUTPA actions “shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action.” The statute now dictates that LUTPA actions “shall be subject to a liberative prescription of one...
year... This amendment clarified that the period governing LUTPA actions is prescriptive rather than peremptive.

b. Private Enforcement and Remedies

While the Louisiana state courts were quicker to adopt the Cheramie standard for LUTPA standing, each of the federal district courts in Louisiana has recently accepted Cheramie as well. Hence, until the Louisiana Supreme Court is presented with an opportunity to revisit and narrow the scope of its plurality opinion, Cheramie stands as the current rule for LUTPA standing across the state.

20. Maine

a. Scope of the Statute and Elements of a Cause of Action.

(1) Exemptions

In Stine v. Bank of America, N.A., the U.S. District Court for the District of Maine dismissed a Maine Unfair Trade Practices Act (MUTPA) claim against a bank—based on the exemption for “financial institutions authorized to do business in this State”—where the plaintiff pleaded the bank was organized under the laws of another state.

439. Id.
444. ME. REV. STAT. tit. 5, §§ 205 et seq.
445. ME. REV. STAT. tit. 5, § 207.
state but the court took judicial notice that the bank maintained a branch in Maine.\footnote{2016 WL 5135607 at *4.}

b. Private Enforcement and Remedies

In \textit{York Marine v. M/V Intrepid},\footnote{2016 WL 5372762 (D. Me. 2016) \textit{(citing Southworth Mach. Co. v. F/V Corey Pride, 994 F.2d 237 (1st Cir. 1993)).}} the U.S. District Court for the District of Maine held that while federal admiralty law did not preempt a private enforcement action under MUPTA, it did preempt the attorneys’ fees provision in MUTPA when the underlying conduct is a subject addressed by admiralty law.\footnote{2016 WL 5372762 at *9.}

In \textit{Napolitano v. Green Tree Servicing},\footnote{2016 WL 447451 (D. Me. 2016).} the U.S. District Court for the District of Maine held that a mortgage service provider’s trespass on property, motivated by an errant belief by the service provider that the homeowners were in default on their mortgage, stated a claim for relief under the MUTPA where that trespass resulted in damage to the homeowners’ property.\footnote{2016 WL 447451 at *9.}

\section*{21. Maryland}

a. Scope of the Statute and Elements of a Cause of Action

\textit{(1) Unfair or Deceptive Acts or Practices}

The Maryland General Assembly amended §13-301 of the Consumer Protection Act (CPA)\footnote{MD. CODE ANN., COM. LAW §§ 13-301 \textit{et seq}.} in 2015 by adding guidelines for financing and leasing vehicles from dealers. Any violations of the guidelines are now actionable as an unfair and deceptive trade practice. Vehicle dealers that violate §15-311.3 of the Maryland Transportation Article, which requires fair practices by both dealers and car purchasers when using dealer-arranged financing or leasing agreements,\footnote{H.B. 313, 435\textsuperscript{th} Md. GEN. Assemb. (2015) ("requiring that a certain notice be provided to a buyer purchasing a vehicle through dealer-arranged financing or leasing before approval of a third-party financial institution has been received; requiring a dealer to notify a buyer in}
definitions\textsuperscript{453} and penalties\textsuperscript{454} of the CPA. The statute includes multiple provisions requiring notice from the dealer when financing vehicles;\textsuperscript{455} allows the dealer to repossess the vehicle if the financing agreement is not approved by a third-party;\textsuperscript{456} and provides protections to both dealers and buyers if either dealers or buyers cannot agree on new financing or leasing terms.\textsuperscript{457} 

In its 2016 session, the Maryland General Assembly expanded the state’s CPA by adding protections for Maryland students attending private career schools and for-profit colleges.\textsuperscript{458} Under section 13-320\textsuperscript{459} writing if the terms of a certain financing or lease agreement are not approved by a third-party finance source within a certain period of time; requiring a buyer to return a vehicle to a dealer within a certain period of time under certain circumstances; authorizing a dealer to repossess a vehicle in accordance with certain provisions of law under certain circumstances; authorizing a dealer and a buyer to agree on new financing or leasing terms under certain circumstances; authorizing a dealer or a buyer to cancel a sale under certain circumstances; requiring a dealer to return any trade-in vehicle, down payment, and titling fee or and excise tax, dealer processing charge, and any other fee, tax, or charge to a buyer if a certain sale is canceled; prohibiting a dealer from charging a fee to a buyer for the use of a vehicle if a certain sale is canceled; requiring a dealer to maintain certain required security for a vehicle until a certain financing or lease agreement is approved by a third-party finance source; prohibiting a buyer from waiving the rights established by this Act”).

\textsuperscript{453} MD. CODE ANN., COM. LAW § 13-301.
\textsuperscript{454} MD. CODE ANN., COM. LAW § 13-411.
\textsuperscript{455} MD. CODE ANN., TRANSP. § 15-311.3(A-B).
\textsuperscript{456} MD. CODE ANN., TRANSP. § 15-311.3(C).
\textsuperscript{457} MD. CODE ANN., TRANSP. § 15-311.3(D).
\textsuperscript{458} Under §10-101(j) of the Maryland Education Article, a private career school is defined as “a privately owned and privately operated institution of postsecondary education other than an institution of higher education that furnishes or offers to furnish programs, whether or not requiring a payment of tuition or fee, for the purpose of training, retraining, or upgrading individuals for gainful employment as skilled or semiskilled workers or technicians in recognized occupations or in new and emerging occupations.” §10-101(d) of the Maryland Education Article defines for-profit college as “an institution of higher education that generally limits enrollment to graduates of secondary schools, awards degrees at the associate, baccalaureate, or graduate level, and is not a public or private nonprofit institution of higher education.”
\textsuperscript{459} MD. CODE ANN., COM. LAW § 13-320.
of the CPA, a private career school or for-profit college can be found to have used unfair or deceptive trade practices if:

(1) “s[uccessful completion of the educational course offerings in the program at the private career school or for-profit institution of higher education will not meet the State educational requirements for licensure or certification;
(2) [t]he State entity that licenses or certifies individuals in the field requires as a condition of licensure or certification that the private career school or for-profit institution of higher education attended by the individual satisfies a statutory or regulatory requirement, and the school does not satisfy the requirement; or
(3) [t]he private career school or for-profit institution of higher education is aware or reasonably should have been aware of any factors that may lead to the ineligibility of the student to pursue or obtain licensure or certification in the State.”

After several investigations of private career schools and for-profit colleges by the Maryland Attorney General, the Maryland General Assembly enacted the above provisions to protect student-consumers from unfair and deceptive acts such as: inflated job placement numbers; misleading assurances that credits would transfer to other accredited schools; and promised jobs and careers that the private career schools or for-profit colleges programs could not provide. The Maryland Financial Consumer Protection Act was enacted in 2018. Among its provisions are: (1) adding “abusive” practices to the types of prohibited practices, (2) increases the maximum fines for violations from $1,000 to $10,000 and from $5,000 to $25,000 for repeat violations, and (3) adding restrictions regarding servicing of student loans and creating a Student Loan Ombudsman.

In Hamilton v. Kirson, the Maryland Court of Appeals (Maryland’s highest court) criticized the standard of review used in the 2013 Hamilton v. Dackman case, but that criticism does not affect the proposition that in a lead paint CPA case, causation of physical injury from the lead paint can be a disputed issue. In another lead paint case, the Court of Special Appeals held that a tenant did not have to prove which

461. MD. CODE ANN., COM. LAW § 13-301(k).
462. Id. § 13-410(a)-(b).
463. MD. CODE ANN., FIN. INST. § 2-104.1 ET SEQ.
464. 96 A.3d 714 (Md. 2014).
specific portion of the apartment where lead-based paint had chipped or flaked was a substantial factor in plaintiff’s injury.466

b. Exemptions

During its 2015 legislative session, the Maryland General Assembly amended §13-305 of the CPA467 to exempt all savings promotion raffles conducted by any depository institutions under section 1-211(a)468 of the Financial Institutions Article. As such, exempted savings promotion raffles are not subject to the required disclosures and prohibitions described in §13-305.

d. Government Enforcement and Remedies

In 2016, §13-204 of the CPA was amended to include a provision that allows for civil action under the CPA for exploiting vulnerable adults.469 Section 13-204 describes the powers and duties of the

467. MD. CODE ANN., COM. LAW § 13-305
468. MD. CODE ANN., FIN. INST. § 1-211(a) (2) defines a "depository institution" as a “financial institution that:
   (i) Is located in this State or maintains a branch in this State; and
   (ii) Is authorized to maintain qualifying accounts.” MD. CODE ANN., FIN. INST. § 1-211(a) (4) defines “qualifying accounts” as “a savings account, share account, or other savings product or program:
   (i) Offered by a depository institution;
   (ii) Insured by the Federal Deposit Insurance Corporation, the National Credit Union Administration, or a credit union share guaranty corporation that is approved by the Commissioner; and
   (iii) Through which eligible customers may obtain chances to win prizes in a savings promotion raffle.”
469. MD. CODE ANN., CRIM. LAW § 3-604 defines vulnerable adult “an adult who lacks the physical or mental capacity to provide for the adult's daily needs.” Under MD. CODE ANN., CRIM. LAW § 8-801 (b), “(1) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult's property. (2) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.”
Maryland Division of Consumer Protection (overseen by the Maryland Attorney General) and allows the division to bring a civil action for damages against any person who “violates §8-801 of the Criminal Law Article on behalf of a victim of the offense or, if the victim is deceased, the victim's estate.” A conviction for exploiting vulnerable adults is not a prerequisite for action under the statute and the division may recover both damages and the costs of the action from the defendant.

22. Massachusetts

a. Scope of the Statute and Elements of a Cause of Action

In the Regulation for Business Practices for Consumers Proection Act (RBPCPA), Chapter 93A prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” There are two types of claims that can be brought under this Chapter. Section 9 of Chapter 93A provides a cause of action for any person other than someone who is “engage[d] in the conduct of any trade or commerce.” To state a claim under Chapter 93A § 9, a plaintiff must allege that 1) the defendant committed an unfair or deceptive act or practice; 2) this act or practice occurred in the conduct of any trade or commerce; 3) the plaintiff was injured; and 4) the defendant’s act caused the plaintiff’s injury.

While similar in scope, Chapter 93A § 11 only permits claims by “persons engaged in business.” To state a claim under section 11, a plaintiff must allege that 1) the defendant committed an unfair or deceptive act or practice or engaged in an unfair method of competition; 2) this act or practice occurred in the conduct of any trade or commerce; 3) the plaintiff suffered “loss of money or property, real or personal”; and 4) the defendant caused the plaintiff’s injury. Injunctive relief is also available if the alleged violation “may have the effect of causing such loss of money or property.”

(1) Unfair Acts or Practices

470. MASS. GEN. LAWS Ch. 93A §§ 1 et seq.
471. MASS. GEN. LAWS Ch. 93A §§ 9, 11.
473. MASS. GEN. LAWS Ch. 93A § 11.
475. MASS. GEN. LAWS Ch. 93A § 11.
Chapter 93A does not define “unfair or deceptive acts or practices.” Conduct need not be exceptionally “immoral, unethical, oppressive, or unscrupulous . . . but need only be within any recognized or established common law or statutory concept of unfairness” to be held unfair or deceptive. For example, the unjustified withholding of funds belonging to another may give rise to a 93A violation, but a breach of contract alone is typically insufficient to support a 93A claim.

(2) “In the Conduct of Trade or Commerce” Requirement

Additionally, to state a claim under Chapter 93A, a plaintiff must allege that the defendant committed an unfair or deceptive act “in the conduct of any trade or commerce.” The Supreme Judicial Court has held that, in a case brought against a brand name pharmaceutical manufacturer for failure to warn of side effects, the “trade or commerce” element was not satisfied where the plaintiff purchased the generic version of the drug from another manufacturer.

(3) Injury Requirement Under § 9


477. Exhibit Source, 114 N.E. 3d at 997-98 (holding tenant’s security deposit for seven months, while providing pretextual justifications to tenant in hope that tenant would cease pursuit of its return violated Chapter 93A); UBS Fin. Servs., Inc. v. Aliberti, 113 N.E.3d 335, 345-46 (Mass. App. Ct. 2018), review granted, 481 Mass. 1102, 119 N.E.3d 297 (2018) (plaintiff’s allegation that account custodian denied her funds to which she was legally entitled for several years stated a claim under Chapter 93A). But see Rental Prop. Mgmt. Servs. v. Hatcher, 97 N.E.3d 319, 330 (Mass. 2018) (property manager’s filing of summary process against tenant where he was not owner of property and was not an attorney did not constitute unfair or deceptive practice).

478. Aggregate Indus.-Ne. Region, Inc. v. Hugo Key & Sons, 57 N.E.3d 1027, 1032 (Mass. App. Ct. 2016) (“Ordinary contract disputes . . . typically fall outside of the reach of the statute.”); see also Nager v. Shiels, 95 N.E.3d 300 (Table), at *2 (Mass. App. Ct. 2017) (where “there was absolutely no evidence” that defendant engaged in unfair or deceptive conduct, lower court did not need to find violation of Chapter 93A despite finding that defendant breached implied covenant of good faith and fair dealing).

479. MASS. GEN. LAWS CH. 93A § 2.

A cognizable injury under Chapter 93A § 9 can be economic or non-economic, but must be “distinct from the claimed unfair or deceptive conduct itself.” In 2016, in Bellermann v. Fitchburg Gas & Electric Light Co., the Massachusetts Supreme Judicial Court clarified the harm required to recover under Chapter 93A. In an earlier decision in the same case, affirming the denial of class certification on the basis that the class members’ asserted injuries were too dissimilar, the court had observed, but did not address, the plaintiffs’ alternative theory that “[w]here a defendant’s unfair or deceptive conduct causes customers to receive a product or service worth less than the one for which the customers paid, the customers may pursue a class action under G.L. c. 93A to recover the amount by which they overpaid.” However, in a subsequent decision, the Supreme Judicial Court held that the plaintiffs’ alternative theory of injury—that they had overpaid for services because the rates charged were based on assumed regulatory compliance that did not exist—did not support a Chapter 93A claim, because the plaintiffs had not been deprived of any services for which they had paid. The plaintiffs did not allege any loss of or interruption in electric service; rather, the plaintiffs’ theory was that they paid for emergency preparedness which they would not have received as a result of the defendant’s regulatory noncompliance if an emergency had materialized (which it never did). The court concluded that “the plaintiffs received all of the electric service for which they paid,” and therefore they “have not met the threshold requirement of demonstrating an injury caused by the use or employment of the unfair or deceptive act or practice.”

Building off of this line of authority, the First Circuit rejected an “induced purchase” theory of injury under Chapter 93A in Shaulis v. Nordstrom, Inc. There, the plaintiff claimed she was injured when she purchased a sweater because of a “compare at” price tag suggesting the sweater had never been sold at other stores at a higher price, when the sweater allegedly had never been sold at other stores at this price. As the sweater

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482. 54 N.E.3d at 1108-09.
484. Bellermann II, 54 N.E.3d at 1113.
485. Id.
486. Id. at 1113, 1114.
itself was not “deficient in some objectively identifiable way,” the only impact on the plaintiff was to her “subjective belief as to the nature of the value” of the sweater, which “does not state a legally cognizable economic injury under Chapter 93A because it fails to identify anything objective that [plaintiff] bargained for that she did not, in fact, receive.”

Instead, a plaintiff must “show real economic damages, as opposed to some speculative harm” to state a claim under Chapter 93A.489

b. Private Enforcement and Remedies

(1) Demand Letters Under Chapter 93A § 9

At least thirty days before a person who is not engaged in trade or commerce (in other words, a consumer) files a claim under chapter 93A § 9, that person must file a written demand for relief.490 There is no such demand letter requirement for claims brought under § 11.491 Any person receiving such a demand may respond with a written tender of settlement within thirty days, which, if rejected, may limit recovery to the relief tendered if the court finds that the tender was reasonable in relation to the injury suffered.492 A chapter 93A demand letter is statutorily sufficient so long as it adequately details the injury suffered, even if the demand for relief is excessive in relation to the claimed injury.493

The U.S. Court of Appeals for the First Circuit has held that a chapter 93A demand letter does not trigger an insurance carrier’s duty to defend the insured.494 This is because a chapter 93A demand letter is not “a functional equivalent of a suit,” and ignoring it “would not ‘substantially compromise[] an insured’s position: a failure to respond produces a much more limited effect.”495

488. Id. at 12.
489. Id. at 10.
490. MASS. GEN. LAWS CH. 93A § 9(3) (requiring “a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered”).
491. MASS. GEN. LAWS Ch. 93A § 11.
492. Id.
495. Id. at 44-45.
A chapter 93A demand letter is not required for defendants who do “not maintain a place of business or . . . keep assets within the commonwealth.” The Massachusetts Supreme Judicial Court has interpreted this statutory exception to hold that a plaintiff is not required to serve a demand letter on a defendant that “either lacks a place of business in Massachusetts or does not keep assets in Massachusetts.” The court reasoned that the “use of the word ‘or’ to separate the prongs of a statute indicates that the prongs are alternatives, that is, that either one would be sufficient on its own and that it is not necessary to establish both.” Therefore, a plaintiff was not required to serve a demand letter on a defendant which kept assets in Massachusetts but which did not maintain a place of business in Massachusetts. The court also noted that chapter 93A, section 9(3) permits defendants who do not receive a demand letter to “otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section,” and therefore those defendants still have the ability to limit their damages.

(2) Damages Under Chapter 93A

It is well-established that consumer plaintiffs may recover actual damages or statutory damages in the amount of twenty-five dollars, whichever is greater, and “other equitable relief” as the court deems necessary and proper. Following Bellermann I, the Massachusetts Superior Court clarified that plaintiffs had asserted a compensable “injury” under chapter 93A because they had purchased a product that was “less safe than the product advertised.” Because it was reasonable to infer “the less safe product actually received has a true market value less than the product as advertised,” harm of “at least a penny may be

496. MASS. GEN. LAWS ch. 93A § 9(3).
498. Id. at 1289 (“If the Legislature had intended to excuse the plaintiff from the demand requirement only where both prongs were satisfied, it could have made this clear by using the word ‘and.’”).
499. Id.
500. Id. at 1290.
501. MASS. GEN. LAWS ch. 93A § 9(3).
Therefore, plaintiffs could recover statutory damages, even if they could not prove a quantifiable loss of actual damages.\textsuperscript{504} In an earlier decision in that case, the Massachusetts Superior Court held that plaintiffs were not entitled to disgorgement of profits as an equitable remedy under chapter 93A if they were unable to prove actual damages, as such a remedy would be inconsistent with legislative intent.\textsuperscript{505} The court also held that if plaintiffs were unable to prove actual damage, each class member would only be entitled to one statutory award of twenty-five dollars, rather than a “per transaction” award, where plaintiffs claimed that the class members had purchased the allegedly defective product on multiple occasions during the class period.\textsuperscript{506}

Finally, damages for a chapter 93A violation include double or treble damages where the defendant’s action is “willful or knowing.”\textsuperscript{507} The statute further provides that “the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence.”\textsuperscript{508} In considering whether a violation of chapter 93A was “willful or knowing,” a court can consider settlement offers made by the defendant which are not compliant with the requirements of the statute, but a defendant’s tender of such an offer does not preclude a court from awarding treble damages.\textsuperscript{509}

The Massachusetts Supreme Judicial Court has held that “the amount of the judgment” that serves as the measure of “actual damages” to be doubled or trebled does not include the amount of any postjudgment interest.\textsuperscript{510} The court noted that while prejudgment interest was an “integral component of compensatory damages,” “postjudgment interest is borne by the judgment and is separate and distinct from it,” and therefore is not subject to doubling or trebling.\textsuperscript{511}

\begin{enumerate}
\item[503.] Id.
\item[504.] Id.
\item[506.] Id.
\item[507.] MASS. GEN. LAWS ch. 93A § 9(3).
\item[508.] Id.
\item[511.] Id. at 1238.
\end{enumerate}
23. Michigan

a. Scope of the Statute and Elements of a Cause of Action

While the Michigan courts have turned to common law fraud cases for guidance in interpreting the Michigan Consumer Protection Act (MCPA), the MCPA does not require the injured party to prove the elements of fraud to prevail.513

b. Private Enforcement and Remedies

The Michigan legislature amended the MCPA to address the Michigan Supreme Court’s decision of *Converse v. Auto Club Group Ins. Co.*514 The amendment clarified that a private cause of action under the MCPA cannot be brought for harm resulting from an “unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code ..., MCL 500.2001 to 500.2093, ...”515 However, if the “method, act, or practice” also constitutes a violation of the MCPA and occurred before March 28, 2001, and a complaint was filed on or before June 5, 2014, the claim remains viable.516

24. Minnesota

b. Private Enforcement and Remedies

The Minnesota Supreme Court held that a private cause of action under the Minnesota Consumer Fraud Act (MCFA)517 can exist even if it is based on the violation of a statute for which there is no private cause of action.518 The court reached this conclusion in a case in which a union alleged that the Minnesota Pharmacy Practice Act (for which there was no private cause of action) was violated by pharmacies that failed to pass on certain savings associated with generic prescription drugs. But the

512. MICH. COMP. LAWS ANN. §§ 445.904(1) et seq.
515. MICH. COMP. LAWS ANN. § 445.904(3).
517. MINN. STAT. §§ 325f.68 et seq.
518. Graphic Comms. Local 1 B Health & Welfare Fund “A” v. CVS Caremark Corp., 850 N.W.2d 682, 694 (Minn. 2014).
court further held that “an omission-based consumer fraud claim is actionable under the [MCFA] when special circumstances exist that trigger a legal or equitable duty to disclose the omitted facts.” The court explained that the MCFA did not eliminate the common law requirement that an omission-based claim requires a “special circumstance” triggering a duty to disclose the omitted facts. Finding no allegations that would satisfy that duty, the court held that the claim had to be dismissed.

In *Engstrom v. Whiteburch*, the Minnesota Supreme Court held that incurring attorney’s fees to detect and avoid being a victim of a fraud is an “injury.” The plaintiff alleged that the defendant used falsified documents to demand payments purportedly due on a timeshare purportedly owned by the plaintiff’s late mother. The plaintiff never paid any money to the defendant, but incurred attorney’s fees and costs in investigating and responding to the demands. The Minnesota Supreme Court held that those fees and costs constitute an “injury” for purposes of Minnesota’s private attorney general statute.

### 25. Mississippi

#### a. Scope of the Statute and Elements of a Cause of Action

Whether an act or practice is “unfair” or “deceptive” under the Mississippi Consumer Protection Act (MCPA) is “guided by the interpretations given by the Federal Trade Commission and the federal courts to section 5(a) (1) of the Federal Trade Commission Act [15 U.S.C. § 45(a) (1)] as from time to time amended.” In 2017, a split Supreme Court of Mississippi affirmed the chancery court’s $30 million judgment in favor of the State holding that a pharmaceutical provider’s practice of inflating Average Wholesale Price (AWP) benchmarks, which are used by Mississippi Medicaid as a basis for reimbursing

519. *Id.* at 695.
520. *Id.* at 695-96.
521. *Id.* at 697.
523. *Id.* at 791.
pharmacies, was unfair and deceptive under the MCPA.\footnote{In re Miss. Medicaid Pharm. Average Wholesale Price Litig., 190 So. 3d 829, 841 (Miss. 2015) (opinion of Chandler, J. joined by Kitchens and King, JJ., affirming; Randolph, P.J., concurring in judgment).} The affirming opinion explained that the pharmaceutical provider’s AWP practices were “unfair” because they (1) caused or were likely to cause substantial injury; (2) “the injury [was] not outweighed by any countervailing benefits to consumers or competition that practice produces”; and (3) “the injury could not have been reasonably avoided.”\footnote{Id. (quoting Federal Trade Commission Act, 15 U.S.C. § 45(n)) (internal quotation marks omitted).} The practices were determined to be “deceptive” because “[t]he ‘prices’ were exaggerated to an extent that they were not even prices” and “[p]roviding false information is deceptive and violates the Act.”\footnote{Id. at 842; but see id. at 859 (opinion of Lamar, J., dissenting, joined by Dickinson, P.J., Pierce and Coleman, J.J.) (concluding the AWP practices were not deceptive based on the test for deceptiveness set forth in Federal Trade Commission regulatory guidance: “(1) ‘There must be a representation, omission, or practice that is likely to mislead the consumer’; (2) ‘The act or practice must be considered from the perspective of the reasonable consumer’; and (3) ‘the representation, omission or practice must be material.’”).}

In 2018, the Mississippi Supreme Court affirmed another $30 million judgment in favor of the state in another AWP case brought under the MCPA.\footnote{Watson Labs. v. Actavis Pharma, 241 So. 3d 573 (Miss. 2018).}

In certain circumstances, the state of Mississippi can be considered a consumer for the purposes of the MCPA.\footnote{In re Miss. Medicaid Pharm. Average Wholesale Price Litig., 190 So. 3d at 842.} For example, the state of Mississippi prevailed on MCPA claims where it reimbursed the drug costs for the state’s Medicaid program because the state was viewed as the “ultimate purchaser in the chain of distribution and the one directly affected by the alleged [pricing] manipulation.”\footnote{Id.; Watson, 241 So. 3d 573.}

\begin{itemize}
  \item [d.] Government Enforcement and Remedies
\end{itemize}

To assess penalties under the MCPA, “the focus in each case [must] be upon the specific conduct of the person from whom the Government
seeks to collect the [penalties]." 532 The Supreme Court of Mississippi recently affirmed a chancery court opinion that counted violations of the MCPA based on the number of times a pharmaceutical provider published an inflated AWP, which yielded a lower penalty than the alternative calculation proposed by the state that was based on the number of times the state reimbursed a claim using a published AWP. 533

26. Missouri

a. Scope of the Statute and Elements of a Cause of Action

The general fraud provisions of the Missouri Merchandising Practices Act (MMPA) 534 apply to unlawful conduct only if made “in connection with the sale or advertisement” of merchandise. 535 In Jackson v. Barton, 536 the Missouri Supreme Court clarified that a “sale is not completed until payment is received for the [goods or] services rendered.” 537 Based on this interpretation, the court held that the actions of a third-party debt collector—in that case, an attorney—were sufficiently “in connection with” the original sale to allow a debtor to sue the debt collector. 538

(1) Unfair Acts or Practices

Under regulations issued by the Office of the Missouri Attorney General, it is an unfair practice to file a civil action, or threaten to file such action, to collect a consumer debt that is beyond the statute of limitations, has been discharged through bankruptcy, has been declared

533. Id.
534. MO. REV. STAT. §§ 407.010 et seq.
535. Id. §§ 407.020.1; see Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 414 (Mo. 2014) (clarifying that this requirement is slight, and that conduct is “in connection with” a sale if it has “a relationship” with the sale); cf. Faltermeyer v. FCA US LLC, 899 F.3d 617, 622 (8th Cir. 2018) (affirming summary judgment in favor of defendant, a car manufacturer, because plaintiff purchased vehicle second-hand and neither the plaintiff nor the seller were aware of the alleged misrepresentations by the manufacturer).
536. 548 S.W.3d 263 (Mo. 2018).
537. Id. at 270-71.
538. Id.
void or unenforceable by a court, or was deemed fully satisfied by an agreement between the consumer and the creditor or its assigns.\textsuperscript{539} Further, it is an unfair practice to seek a reaffirmation of such debt without giving valuable consideration in exchange for the reaffirmation.\textsuperscript{540}

(2) \textit{Deceptive Acts and Practices}

The Missouri Court of Appeals has addressed two key issues regarding the burgeoning area of deceptive product labeling lawsuits (e.g. that a product is “all natural”) under the MMPA. First, because the issues of how a reasonable consumer would understand a given term and whether a given practice is unfair or deceptive are all questions of fact, claims that a defendant falsely labeled its products as “all natural” are not, as a matter of law, too vague or subjective to support a cause of action.\textsuperscript{541} Second, the Missouri Court of Appeals expressly rejected the “ingredients list” defense as a means to outright defeat MMPA claims.\textsuperscript{542} Thus, an “‘ingredient list’ defense cannot, as a matter of law, defeat an MMPA claim” though it “may be relevant” at trial.\textsuperscript{543}

(3) \textit{Exemptions}

Courts at both the state and federal level have grappled with the MMPA’s so-called regulated entities exemption. That provision exempts companies that are “subject to chartering, licensing, or regulation” by certain state agencies unless the agency directors “specifically authorize the attorney general to implement the powers of this chapter or such

\textsuperscript{539} 15 MO. CODE REGS. § 60-8.100.
\textsuperscript{540} \textit{Id.} § 60-8.110.
\textsuperscript{541} Murphy v. Stonewall Kitchen, LLC, 503 S.W.3d 308, 312 (Mo. Ct. App. 2016) (rejecting reasoning of Kelly v. Cape Cod Potato Chip Co., 81 F. Supp. 3d 754 (W.D. Mo. 2015)).
\textsuperscript{542} Murphy, 503 S.W.3d at 312-13. An “ingredients list” defense asserts that the false or deceptive nature of a representation like “all natural” on a product label becomes neutralized if the allegedly synthetic ingredient is nonetheless also disclosed in the ingredients list on the product. \textit{Id.}
\textsuperscript{543} \textit{Id.} at 313 (explaining that a “reasonable consumer would expect that the ingredient list comports with the representations on the packaging” and “the manufacturer, not the consumer, is in the superior position to know and understand the ingredients in its product and whether the ingredients comport with its packaging”).
powers are provided to either the attorney general or a private citizen by statute.\textsuperscript{544}

With respect to the first exception to this exemption (i.e. specific authorization by the respective agency), some trial courts have found that a specific authorization to the attorney general also allows for private plaintiffs to bring suit against the regulated entity.\textsuperscript{545} Other trial courts have disagreed.\textsuperscript{546}

With respect to the second exception to the exemption (i.e. a specific statutory conferral of power), Missouri’s Court of Appeals has held that the statutory section authorizing a private right of action\textsuperscript{547} does not satisfy this requirement.\textsuperscript{548}

Finally, at least one trial court has cast doubt on whether the exemption applies if the regulated entity’s liability flows from acts taken outside of its status as a regulated entity.\textsuperscript{549}

b. Private Enforcement and Remedies

Though the MMPA “does not require that an unlawful practice

\begin{footnotes}

\footnote{544}{MO. REV. STAT. § 407.020.2(2).}
\footnote{545}{Fielder v. Credit Acceptance Corp., 19 F. Supp. 2d 966, 978 (W.D. Mo. 1998), vacated in part, on other grounds, 188 F.3d 1031 (8th Cir. 1999).}
\footnote{547}{MO. REV. STAT. § 407.025.}
\footnote{548}{Meyers v. Kendrick, 529 S.W.3d 54, 62 (Mo. Ct. App. 2017); see also Rashaw v. United Consumers Credit Union, 685 F.3d 739, 745 (8th Cir. 2012); Vogt, 2017 WL 471574, at *9-11; Hatcher, 2016 WL 7508836, at *2.}
\footnote{549}{Cook v. In & Out Auto Plaza, LLC, 2014 WL 10435490, at *3 (Mo. Cir. Ct. St. Louis City 2014). In Cook, one of the defendants was a regulated vehicle finance company. Id. The court denied the company’s motion for summary judgment because there were disputed facts as to whether the company went beyond its role as a vehicle financier by wrongfully directing a car dealership to withhold vehicle titles at the time of sale. Id. The court explained, “[i]t will not do for Westlake to assert control over a retail transaction through an agent and then attempt to shield itself from liability under the MMPA by retreating behind the exemption provided in § 407.020.2.” Id.}
\end{footnotes}
cause[d]" the plaintiff to make the *purchase or lease* in question,\(^{550}\) the defendant’s unlawful practice must cause the private plaintiff to suffer an *ascertainable loss* in order to sustain a private right of action.\(^{551}\) If there is no causal connection between the unlawful practice and the plaintiff’s alleged loss, no private right of action exists.\(^{552}\)

In the case of undisclosed risks or product defects, courts have reached conflicting conclusions over whether a plaintiff can have an ascertainable loss absent manifestation of the defect or injury from the undisclosed risk. Though considering the issue in the context of a class certification motion, Missouri’s Court of Appeals has twice indicated that, under the benefit-of-the-bargain rule,\(^{553}\) manifestation is not necessary if the value of the product actually obtained is less than what the product would have been worth if it were as the defendant represented.\(^{554}\) Several federal courts applying the MMPA, however,

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550. Plubell v. Merck & Co., 289 S.W.3d 707, 714 (Mo. Ct. App. 2009) (emphasis added) (explaining that the phrase “as a result of” in MO. REV. STAT. § 407.025 “modifies ‘ascertainable loss’; it does not modify ‘purchases or leases’”). Private plaintiffs, of course, still must have actually consummated a purchase or lease of merchandise, even though the unlawful practice need not have been the inducement for them to enter the transaction. Freeman Health Sys. v. Wass, 124 S.W.3d 504, 507 (Mo. Ct. App. 2004); Jackson v. Charlie’s Chevrolet, Inc., 664 S.W.2d 675, 677 (Mo. Ct. App. 1984).


552. *Id.* (affirming summary judgment in favor of defendant because “[n]othing about any representations made during the negotiation for a forbearance agreement or loan modification” actually caused the foreclosure on plaintiff’s home).

553. Under the benefit-of-the-bargain rule, a plaintiff “adequately pleads” an ascertainable loss if they allege “the actual value of the item” is less than “the value of the item if it had been as represented at the time of the transaction.” Murphy v. Stonewall Kitchen, LLC, 503 S.W.3d 308, 313 (Mo. Ct. App. 2016).

554. Hope v. Nissan N. Am., 353 S.W.3d 68, 81 (Mo. Ct. App. 2011) (affirming certification of a class that alleged “each member of the class sustained damages (economic loss by virtue of stigma reduction) as a result of the allegedly defective dashboards—whether such a defect manifested or not.”); Plubell v. Merck & Co., 289 S.W.3d 707, 715 (Mo. Ct. App. 2009) (affirming certification of class and stating, “because Plaintiffs alleged Vioxx was worth less than the product as represented [because of undisclosed safety risks], they stated an objectively
have cut such claims off at the dismissal stage by imposing a manifestation requirement\textsuperscript{555} while other federal courts have rejected such a manifestation requirement.\textsuperscript{556}

While the MMPA gives courts discretion to award a prevailing party its attorney’s fees “based on the amount of time reasonably expended,”\textsuperscript{557} this language does not mandate that the prevailing party actually submit an itemized list of the attorney’s services.\textsuperscript{558} The court “that tries a case and is acquainted with all the issues involved may fix the amount of attorneys’ fees without the aid of evidence”; thus, a trial court does not automatically err in awarding fees under the MMPA in the absence of such time records.\textsuperscript{559}

c. Government Enforcement and Remedies

Trial court decisions in Missouri have permitted the attorney general to seek punitive damages for violations of the MMPA as a means for deterring future misconduct.\textsuperscript{560}

ascertainable loss under the MMPA using the benefit-of-the-bargain rule”).


\textsuperscript{556} In re Gen. Motors LLC Ignition Switch Litig., 2016 WL 3920353, at *34 (S.D.N.Y. 2016) (noting that “many of the cases appearing to require a plaintiff to show a manifest defect seem to be driven by skepticism that the products at issue were even defective at all”).

\textsuperscript{557} MO. REV. STAT. § 407.025.1.

\textsuperscript{558} Rogers v. Superior Metal, Inc., 480 S.W.3d 480, 484 (Mo. Ct. App. 2016).

\textsuperscript{559} Id. (quoting W. Blue Print Co. v. Roberts, 367 S.W.3d 7, 23 (Mo. 2012)). Though not required by statute, providing such itemization would be wise practice. While the MMPA permits the award of attorney’s fees, it does not necessarily require it. Scott v. Blue Springs Ford Sales, 215 S.W.3d 145, 167 (Mo. Ct. App. 2006), overruled on other grounds by Badahman v. Catering St. Louis, 395 S.W.3d 29 (Mo. 2013); see Hayden v. In & Out Plaza, 2015 WL 10384338, at *2 (Mo. Cir. Ct. St. Louis City 2015) (refusing to award any fees to prevailing plaintiff because she “unreasonably rejected” good faith offers “in favor of a trial on a claim with limited value”).

\textsuperscript{560} State ex rel. Hawley v. Mundy, Case No. 1731-CC00328, Slip Op. at 23 (Mo. Cir. Ct. Greene County Nov. 20, 2017) (entering judgment and
27. **Montana**

a. Scope of the Statute and Elements of a Cause of Action

In a medical malpractice case, the Montana Supreme Court affirmed summary dismissal of an Montana Unfair Trade Practices Act (MUTPCPA)\(^{561}\) claim holding that practicing medicine, even if unfair or defective, is an act outside the statute’s scope. Disputes about “informed consent . . . fall within the realm of professional negligence, not trade or commerce” under the MUTPCPA.\(^{562}\)

For a representation to be an unfair or deceptive act under the MUTPCPA, it must be untrue at the time it is made. So in a dispute arising from a real estate purchase agreement, the Supreme Court held that the buyer failed to assert a claim where the seller represented that the Yellowstone Club, a private resort, would provide ski-out access from the property in the future. The resort’s subsequent bankruptcy did not render the representation untrue when the buyer made it.\(^{563}\)

In *Morrow v. Bank of America*,\(^{564}\) the Montana Supreme Court held that debtors presented sufficient evidence to survive summary judgment where they alleged their lender promised a loan modification, instructed them to default on the loan and make only partial payments, and yet ultimately denied the modification.\(^{565}\) The debtors’ balance grew for several months as a result. If true, lender’s actions would constitute a


\(^{563}\) WLW Realty Partners v. Cont’l Partners VIII, 360 P.3d 1112, 1118-19 (Mont. 2015).

\(^{564}\) Morrow v. Bank of Am., 324 P.3d 1167 (Mont. 2014)

\(^{565}\) *Id.* at 1184-85.
practice substantially injurious to consumers under the MUTPCPA.\textsuperscript{566} In a case three years later, the Montana Supreme Court distinguished \textit{Morrow} and affirmed a dismissal of a plaintiff-debtor’s MUTPCPA claim when there was no evidence that mistaken advice by the bank that the debtors would be approved for a loan modification induced the debtors to enter into any loan transaction or take other steps to cause an ascertainable loss.\textsuperscript{567}

b. Private Enforcement and Remedies

The MUTPCPA’s two-year statute of limitations was not tolled in a construction defect case where the homeowner noticed water damage from a defective roof each winter but waited eleven years after construction to seek an opinion from an independent contractor. The homeowner could maintain claims against the builder only for defective repairs that occurred within the two-year period.\textsuperscript{568}

In an antitrust case, the statute of limitations on the plaintiff’s MUTPCPA claim ran when the defendant’s conduct impacts fair competition.\textsuperscript{569}

The Supreme Court affirmed an award of $50,000 for emotional distress damages arising from a loan servicer’s communications with a debtor, since the MUTPCPA grants a district court broad discretion to award equitable relief.\textsuperscript{570}

28. **Nebraska**

a. Scope of the Statutes and Elements of the Causes of Action

(1) \textit{Consumer Protection Act}

In \textit{In re Syngenta AG MIR 162 Corn Litigation},\textsuperscript{571} the U.S. District Court for the District of Kansas denied the part of a seller’s motion to dismiss asserting a claim for violation of the Nebraska Consumer

\textsuperscript{566} Id.
\textsuperscript{568} Hein v. Sott, 353 P.3d 494, 498-99 (Mont. 2015).
\textsuperscript{570} Jacobson v. Bayview Loan Servicing, 371 P.3d 397, 413 (Mont. 2016) (citing MONT. CODE ANN. § 30-14-133(1)).
\textsuperscript{571} 131 F. Supp. 3d 1177 (D. Kan. 2015).
Protection Act (CPA).\textsuperscript{572} The multi-district case involved a seller of genetically modified crop seeds being sued for misleading the public about the likelihood of Chinese approval of its crops, as well as the potential for infiltration of other crops.\textsuperscript{573} The court held that even though Nebraska statutes provide exemptions for transactions that are “regulated under laws administered by . . . [a] regulatory body or officer acting under statutory authority of . . . the United States,”\textsuperscript{574} the exemption did not apply as “the court [could] not say as a matter of law that the specific manner in which Syngenta sold its products . . . was regulated by the agencies that authorized those products’ sale.”\textsuperscript{575}

(2) Deceptive Trade Practices Act

The Nebraska Deceptive Trade Practices Act (DTPA)\textsuperscript{576} was amended in 2016 to include additional enumerated deceptive trade practices. The DTPA now prohibits the representation that “goods or services do not have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they have.”\textsuperscript{577} The 2016 amendment also prohibits the use of “deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or concealment, suppression, or omission of any material fact” in the solicitation of funds for a charitable purpose.\textsuperscript{578} The DTPA now prohibits certain actions in the “manufacture, production, importation, distribution, promotion, display for sale, offer for sale, attempt for sale, or sale of a substance,” including: (1) “[deception], misleading representation or designation, or [omission of] material information about a substance” or contents within a package and (2) the “[causing of confusion] . . . as to the effects a substance causes when introduced into the human body.”\textsuperscript{579} A person is deemed to have violated the DTPA “for each individually packaged product that is manufactured, produced, imported, distributed, promoted, displayed for sale, offered for sale, attempted to sell, or sold.”\textsuperscript{580} A violation of this

\textsuperscript{572} Id. at 1187; see also Neb. Rev. Stat. §§ 59-1601 et seq.
\textsuperscript{573} Id. at 1186.
\textsuperscript{574} Neb. Rev. Stat. § 59-1617 (1).
\textsuperscript{575} 131 F. Supp. 3d 1177, 1238 (D. Kan. 2015).
\textsuperscript{576} Neb. Rev. Stat §§ 87-302 et seq.
\textsuperscript{577} Neb. Rev. Stat. § 87-302(a) (6).
\textsuperscript{578} Neb. Rev. Stat. § 87-302(a) (21).
\textsuperscript{579} Id. § 87-302(a) (22) (i).
\textsuperscript{580} Id. § 87-302(a) (22) (ii).
section is treated as a separate violation from any other violations alleged to have been committed.581

The addition of these subsections has caused a renumbering of the subsections identified in the main volume of this treatise.582

c. Government Enforcement and Remedies

(2) Deceptive Trade Practices Act

In *Activision TV v. Pinnacle Bancorp Inc.*583 the U.S. District Court for the District of Nebraska held that a cease-and-desist order issued by the Attorney General against any person engaged in violation of the DTPA584 may constitute a prior restraint on speech and improperly restrict the right to counsel of choice, in violation of the First Amendment.585 The case involved alleged patent infringement, where the law firm representing the patentee sent letters alleging infringement by certain parties.586 The attorney general issued a cease-and-desist order prohibiting the firm from “initiating new patent infringement enforcement efforts within the State of Nebraska.”587 The court held that the cease and desist order was issued “prior to the conclusion of investigation, prior to any hearings, and prior to permitting submission of documents and evidence by [the firm]” and constituted a prior restraint on speech, infringing the patentee’s right to be represented by counsel of choice.588

581. *Id.* § 87-302(a) (22).
582. From the main volume, the subsection number in footnotes 2169-2175 and 2178-2179 that refer to subsection 87-302(a) (6) or higher, are now one number greater.
584. NEB. REV. STAT. § 87-303.3(1) (b).
586. *Id.* at 1161.
587. *Id.*
588. *Id.* at 1166-1167.
29. Nevada

a. Scope of the Statute and Elements of a Cause of Action

(1) Deceptive Trade Practices

The Nevada Deceptive Trade Practices Act (NDTPA)\textsuperscript{589}, codified in Chapter 598 of the Nevada Revised Statutes, was amended, effective July 1, 2017, to make it a deceptive trade practice: (1) to “charge[s] a fee to a person to change or update any records, including without limitation, billing or credit information, which relates to the person requesting the change or update”;\textsuperscript{590} (2) to “offer to provide a gift certificate or gift card, free of charge, as part of a promotion or incentive to potential customers if the promotion is only redeemable by mail,” unless certain disclosure requirements are met;\textsuperscript{591} (3) to “repossess[es] a vehicle from a debtor pursuant to NRS 104.9609 before default by the debtor”;\textsuperscript{592} as such term is defined in the form of vehicle sales contract prescribed by the Commissioner of Financial Institutions; (4) to “commit[s] an act against a consumer who entered into a contract for the sale of a vehicle with the person which entitles the consumer to any remedy available pursuant to NRS 104.9625”;\textsuperscript{593} (5) to knowingly violate newly added provisions relating to the purchase and resale of tickets to athletic events or live entertainment events;\textsuperscript{594} (6) to violate newly added provisions that prohibit certain creditors or long-term lessors of certain motor vehicles from (a) installing or requiring the installation of certain technology devices which record the location of a motor vehicle unless the consumer who has purchased or leased the motor vehicle is given written notice or agrees in writing to such installation, or (b) installing or using certain technology devices which can remotely disable a motor vehicle in the event of a default unless the consumer agrees in writing to such installation and use;\textsuperscript{595} (7) to violate newly added provisions which impose certain requirements and restrictions on persons who manufacture, provide, or install such technology devices, or who possess

\textsuperscript{589} Nev. Rev. Stat. §§ 598.0903 \textit{et seq.}
\textsuperscript{590} Nev. Rev. Stat. § 598.092(15).
\textsuperscript{591} Nev. Rev. Stat. § 598.09213.
\textsuperscript{592} Nev. Rev. Stat. § 598.092(10).
\textsuperscript{593} Nev. Rev. Stat. § 598.092(11).
\textsuperscript{594} Nev. Rev. Stat. §§ 598.397-598.3984.
\textsuperscript{595} Nev. Rev. Stat. §§ 598.9714-598.9715.
or obtain data from such technology devices; and (8) to violate or fail to comply with newly added provisions relating to the lease or sale of certain solar energy systems.

In 2019, provisions relating to the purchase and resale of tickets at athletic events were added that generally provide more consumer access to the initial allotment of tickets when they are first sold to the public and add other restrictions on re-sellers.

Provisions of Chapter 598 related to sellers of travel, sightseeing tour brokers and operators, certain fee-based membership organizations that provide goods or services at a discount, dance studios, and health clubs, which were temporarily repealed in 2009, were restored effective as of July 1, 2017.

While the Nevada Supreme Court indicated in Betsinger v. D.R. Horton, Inc. that Chapter 598 applies to the deceptive sale of real property including associated financing, the U.S. Court of Appeals for the Ninth Circuit opined in a 2017 case, Dowers v. Nationstar Mortgage, that “the Supreme Court of Nevada would hold that real estate loans do not fall within the DTPA.” The Dowers opinion did not cite Betsinger.

Chapter 597 of the Nevada Revised Statutes was amended: (1) to prohibit a person from leasing any living animal or goods intended for personal, family or household use if the living animal or good is expected to have not more than a minimal residual financial value at the end of the term of the lease or contract; and (2) to state that a failure to comply with the forgoing or the related provisions of Chapter 597 constitutes a deceptive trade practice for purposes of NRS 598.0903 to 598.0999, inclusive.

598. S. B. No. 131, 2019 Leg., 80th Sess. (Nev. 2019) (to be codified as amended at §§ 598.397 et seq.).
601. Id. at 436 n.4
602. Dowers v. Nationstar Mortg., 852 F.3d 964 (9th Cir. 2017)
603. Id. at 972.
(2) Exemptions

b. Government Enforcement and Remedies

In 2009, the Nevada legislature significantly revised Chapter 598, relating to deceptive practices. The Consumer Affairs Division of Nevada’s Department of Business and Industry was temporarily eliminated, and most of the Division’s enforcement authority was transferred to the attorney general.606 While those changes were initially set to expire in 2011, the legislature extended the sunset provision until June 30, 2015.607

In 2015, the duties and the enforcement authority of the Consumer Affairs Division were restored, but assigned temporarily to a newly created Consumer Affairs Unit within the state’s Department of Business and Industry, until July 1, 2017.608 Thereafter, much of the enforcement authority set forth in Chapter 598 that was eliminated in 2009 can again be exercised by the Commissioner of the Consumer Affairs Division, the Director of the Department of Business and Industry, and/or the Attorney General.

Under NRS 598.097, the Commissioner, Director, or Attorney General may apply to any district court for equitable relief if a person fails to cooperate with an investigation initiated by the Commissioner, Director, or Attorney General or fails to obey a subpoena issued by the Commissioner, Director, or Attorney General.609 NRS 598.097 was amended to permit the district court to order the person subject to such an investigation or subpoena to cease doing business in the state, upon application by the Commissioner, Director, or Attorney General and a showing of reasonable grounds.610

NRS 598.0971 was amended to require that an administrative hearing on any action brought by the Commissioner under NRS 598.0971 must be conducted “before the Director or his or her designee” rather than by the Commissioner.611 NRS 598.0971 was also amended to permit the Director to impose “an administrative fine of $1000 or treble
the amount of restitution ordered, whichever is greater,” if the Director determines that the person has violated the NDTPA.612

30. New Hampshire

a. Scope of the Statute and Elements of a Cause of Action

To determine whether a claim is exempt from the New Hampshire Consumer Protection Act (CPA),613 the New Hampshire Supreme Court will look back from the time that the plaintiff “knew or reasonably should have known” of the alleged violation. If the transaction at issue occurred more than three years before that time then it is exempt. The person claiming the exemption bears the burden of proving that the transaction is exempt.614

Effective January 1, 2018, the face value of gift certificates subject to the CPA increased from $100 to $250.615 The legislature also added a prohibition on charging unreasonable fees to prepare or aid any applicant or recipient in the procurement, maintenance, or securing of aid or services from federal or state veteran services which became effective July 1, 2017.616

31. New Jersey

a. Scope of the Statute and Elements of a Cause of Action

In Spade v. Select Comfort Corp.,617 the New Jersey Supreme Court was called upon by the Third Circuit to clarify the Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA),618 particularly whether a consumer who is presented with a contract that violates a clearly established right or responsibility of the seller must also demonstrate an adverse consequence as a result of that violation. The consumers in that case claimed that their furniture purchase agreements failed to comply with regulations adopted under the New Jersey Consumer Fraud Act

612. Id. § 598.0971(3) (d).
615. N.H. REV. STAT. ANN. § 358-A:2 XIII.
616. N.H. REV. STAT. ANN. § 358-A:2 XVII.
618. N.J. STAT. §§ 56:12-1 et seq.
(NJCFA), including provisions regarding the consumers’ rights in the event delivery of the furniture was delayed. In both instances, however, despite the regulatory violation, the consumers’ furniture was delivered on time.

The New Jersey Supreme Court held that inclusion of non-compliant language in the consumers’ purchase agreements may, by itself, constitute a violation of TCCWNA. That, however, did not end the inquiry, as the New Jersey Supreme Court had to address whether “a consumer who receives a contract containing provisions that violate one of the regulations at issue, but who has suffered no adverse consequences as a result of the contract’s noncompliance with the regulation, constitutes an ‘aggrieved consumer’” under TCCWNA. The New Jersey Supreme Court held that a consumer in such a circumstance must demonstrate some harm or adverse consequence as a result of the violation, even if that harm is not monetary.

c. Private Enforcement and Remedies

New Jersey courts continue rigorously to examine whether a plaintiff has suffered the necessary “ascertainable loss” to state a claim under the NJCFA. In Mladanov v. Wegmans Food Markets, the court dismissed a plaintiff’s NJCFA claim based on dissatisfaction with a product for

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619. N.J. STAT. § 56:8-1 et seq.
621. Id. at 973-74.
622. Id. at 978.
623. Id.
624. Id. at 980-981 (“Thus, a consumer may be ‘aggrieved’ for purposes of [TCCWNA] if he or she has suffered harm as a result of the defendant’s inclusion of prohibited language in a contract or other writing even if that harm is not a basis for a damages award. If, for example, a furniture seller fails to timely deliver a consumer’s furniture, and the consumer would have sought a refund had he or she not been deterred by the ‘no refunds’ language prohibited by [the regulations], that consumer may be an ‘aggrieved consumer’ entitled to a civil penalty under [TCCWNA]. If an untimely delivery and misleading ‘no refunds’ language leave a consumer without furniture needed for a family gathering, the consumer may be an ‘aggrieved consumer’ for purposes of [TCCWNA]. Proof of harm resulting from contract language prohibited by [TCCWNA] may warrant a civil penalty under [TCCWNA], even if the harm is not compensable by damages.”)
lack of ascertainable loss.\textsuperscript{626} While the allegations of ascertainable loss need not be perfectly formulated, the claimed loss cannot be speculative or unquantified.\textsuperscript{627}

Plaintiffs must demonstrate a causal nexus between the alleged misrepresentation and the alleged loss—though the common law element of reliance is not required.\textsuperscript{628}

While arbitration of consumer claims is permissible in New Jersey, courts carefully scrutinize arbitration provisions in consumer contracts, and will invalidate arbitration clauses that do not clearly and explicitly explain to consumers that arbitration means the consumer is waiving her right to seek relief in court and that arbitration is a substitute for a court or jury.\textsuperscript{629}

\textsuperscript{626} Id. at 375; Block v. Seneca Mortg. Servicing, 221 F. Supp. 3d 559, 593 (D.N.J. 2016).


\textsuperscript{628} Dugan v. TGI Fridays, Inc., 171 A.3d 620, 649 (N.J. 2017) (affirming denial of class certification, because individual questions would predominate over common issues with respect to whether a class member was an "aggrieved consumer" as determined by whether the class member received the allegedly offending beverage menu item that excluded pricing information); Aragbright v. Rheem Mfg. Co., 201 F. Supp. 3d 578, 611 (D.N.J. 2016) (“If the plaintiff did not see any of the statements before the purchase, the statements could not have been the cause of plaintiff’s injury, there being no connection between the deceptive act and the plaintiff’s injury.”) (internal quotation and citation omitted).

\textsuperscript{629} Morgan v. Sanford Brown Inst., 137 A.3d 1168, 1179-80 (N.J. 2016) (further noting that “[n]o magical language is required to accomplish a waiver of rights in an arbitration agreement” and language such as “all disputes…shall be decided by an arbitrator”, that the party “waived her right to a jury trial”, and that “rules in arbitration are different…no judge or jury is present…and review is limited” had passed muster) (citations omitted); Myska v. New Jersey Mfrs. Ins. Co., 114 A.3d 761, (N.J. Super. Ct. App. Div. 2015) (invalidating insurance contract’s arbitration provision where it did “not identify the insured’s clear and unmistakable waiver of the right to seek determination of disputes in a judicial forum when choosing arbitration”) (citation omitted).
32. New Mexico

a. Scope of the Statute and Elements of a Cause of Action

In Robey v. Parnell, the New Mexico Court of Appeals rejected a plaintiff’s claims under the state’s Unfair Practices Act (UPA), for failing to demonstrate that the misrepresentations were made “knowingly.” The plaintiff, a farmer, failed to establish that false or misleading representations made by a builder who constructed an irrigation well on the farmer's property were knowingly made. The court stated that in determining whether the disparity under the UPA is disproportionate, the court will “look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” In this case, the farmer did not keep sufficient records and therefore, could not satisfy the “knowingly” element of the UPA. However, the court did not find the farmer’s UPA claim groundless for purposes of awarding attorney fees.

Even though the UPA does not apply to the sale of a completed structure affixed to real estate under the real estate exclusion of the UPA, the UPA does apply to construction services rendered prior to the completion of a residential home.

In 2019, the New Mexico Legislature amended UPA’s definition of per se unfair to include pricing or service based on gender or perceived gender.

b. Private Enforcement and Remedies

In Dalton v. Santander Consumer U.S.A., a case involving an arbitration clause in a consumer finance contract, the New Mexico

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631. N.M. STAT. §§ 57-12-1 et seq.
632. Robey, 392 P.3d at 656–57.
633. Id. at 655–656
634. Id. at 658.
635. Id. at 655–656.
636. Id. at 654–655.
Supreme Court held that an arbitration clause that either party could compel was not unconscionable because it was not one-sided.\textsuperscript{640} The New Mexico Supreme Court, overruling the New Mexico Court of Appeals, determined that the self-help and small claims carve-out provisions were not substantively unconscionable on their face.\textsuperscript{641} The court was “hesitant to adopt a holding that might discourage bilateral small claims carve-outs,” and accordingly, “frustrate New Mexico's broad public policy favoring economy and efficiency in dispute resolution.”\textsuperscript{642}

The Supreme Court stated that while the Federal Arbitration Act supersedes state law, the “self-help remedies, which are private and nonadjudicatory by their very nature, are categorically different from the administrative and judicial proceedings,” and therefore rejected the plaintiff’s argument that the FAA was relevant.\textsuperscript{643}

The UPA does not create a cause of action to recover lost profits from a competitor.\textsuperscript{644}

c. Government Enforcement and Remedies

In \textit{State ex rel. Attorney General v. ITT Educational Services},\textsuperscript{645} An arbitration and confidentiality clause in a contract between a consumer and a business cannot be used to require the State arbitrate a claim under the UPA or to shield the business from compliance with an investigate demand from the attorney general.\textsuperscript{646}

\textbf{33. New York}

a. Scope of the Statute and Elements of a Cause of Action

Courts have reached different conclusions regarding whether data security representations in privacy notices can be challenged in data breach litigation under the New York Consumer Protection

\textsuperscript{640} \textit{Id.} at 625.  
\textsuperscript{641} 385 P.3d at 625.  
\textsuperscript{642} \textit{Id.}  
\textsuperscript{643} \textit{Id.} at 623.  
\textsuperscript{646} \textit{Id.} at 853-55.
In Abdale v. North Shore-Long Island Jewish Health System, the Supreme Court Queens County ruled that defendants’ data security representations in a privacy policy and online notices “do not constitute an unlimited guaranty that patient information could not be stolen or computerized data could not be hacked.” Therefore, “[d]efendants’ alleged failure to safeguard plaintiffs’ protected health information and identifying information from theft did not mislead the plaintiffs in any material way and does not constitute a deceptive practice within the meaning of the [NYCPA].”

By contrast, the federal court in Fero v. Excellus Health Plan ruled that it was plausible that defendants’ data security representations in privacy policies and a website “would lead a reasonable consumer to believe that the [defendants] were providing more adequate data security than they purportedly were” and denied a motion to dismiss a NYCPA data breach claim. The court also ruled that it was plausible that the failure to disclose purportedly inadequate data security measures would mislead a reasonable consumer under the NYCPA.

b. Private Enforcement and Remedies

In Wexler v. AT&T, a federal court refused to enforce a broad mandatory arbitration clause in a private action under the Telephone Consumer Protection Act after finding that the parties did not mutually intend to agree to such arbitration as a matter of New York contract law. The court reasoned that its reliance on the lack of mutual intent in contract formation was consistent with the Supreme Court’s ruling in AT&T Mobility LLC v. Concepcion that the Federal Arbitration Act.

647.  NY GEN BUS. §§ 349 et seq.
649.  Id. at 859-60.
650.  Id.
652.  Id. at 776-77.
653.  Id.
656.  Wexler, 211 F. Supp. 3d at 504-05.
658.  9 U.S.C. § 1
preempted California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts.\footnote{Wexler, 211 F. Supp. 3d at 505.}

c. Government Enforcement and Remedies

In People ex rel. Schneiderman v. The Trump Entrepreneur Initiative LLC,\footnote{26 N.Y.S.3d 66 (N.Y. App. Div. 2016).} the Supreme Court Appellate Division held that Executive Law 63(12) authorizes the Attorney General to bring an independent action for fraud that does not need to be linked to a separate common law fraud claim.\footnote{Id. at 72-23.} The court also ruled that such a fraud claim is subject to a six-year statute of limitations.\footnote{Id. at 73.}

34. North Carolina

a. Scope of the Statute and Elements of a Cause of Action

North Carolina’s Unfair and Deceptive Trade Practices Act (UDTPA)\footnote{N.C. Gen. Stat. §§ 75-1 et seq.} declares unfair or deceptive acts or practices in or affecting commerce as unlawful.\footnote{N.C. Gen. Stat. § 75-1.1(a).} Although “commerce” is defined to include all business activities, “professional services rendered by a member of a learned profession” are specifically exempt.\footnote{Id. § 75-1.1(b).} The phrase “business activities” connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized.”\footnote{Alexander v. Alexander, 792 S.E.2d 901, 904 (N.C. Ct. App. 2016) (internal citation omitted).} To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was thereby injured.\footnote{First Atlantic Mgmt. Corp. v. Dunlea Realty Co., 507 S.E.2d 56, (N.C. Ct. App.1998).}

North Carolina courts decline to extend the definition of “in or affecting commerce” to unfairness occurring in single market
The North Carolina Supreme Court in *White v. Thompson,* noted that the UDTPA does not apply in all business settings, but rather to interactions between market participants. In *White,* the defendant’s violation of an agreement or unlawful actions with his business partners did not fall within the UDTPA because his acts were not “in or affecting commerce.”

Following the holding in *White,* the North Carolina Court of Appeals held that UDTPA does not apply to internal conduct between owners of a single business. The court affirmed a directed verdict against a minority business owner who alleged misrepresentations by another owner to induce the sale of his shares of stock.

b. Exemptions

In some circumstances, federal law preempts the North Carolina Consumer Protection Statute. In *CRST Dedicated Services v. Ingersoll Rand Co.,* the United States District Court for the Western District of North Carolina held that a defendant’s UDTPA counterclaim was preempted by the Federal Aviation Administration Authorization Act. Defendant counterclaimed the plaintiff’s breach of contract and quantum meruit claims for damages that the defendant allegedly owed for transportation of the defendant’s products to its customers. Defendant counterclaimed based on plaintiff’s failure to complete scheduled delivery routes and retention of defendant’s vehicles and cargo. The court determined that the defendant’s UDTPA counterclaim against the plaintiff was related to the price and service of a motor carrier with respect to transportation of property and therefore preempted by the Federal Aviation Administration Authorization Act.

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670. *Id.*
672. 194 F. Supp. 3d 426 (W.D.N.C. 2016).
673. *Id.* at 433.
c. Private Enforcement and Remedies

North Carolina courts lean towards applying the consumer protection statute not only in situations where consumers were charged for services not provided but also in instances where consumers are overcharged for services provided. In *Weaver Investment Co. v. Pressly Development Associates*, the North Carolina Court of Appeals upheld the lower court’s determination that an independent contractor was individually subject to trebling of damages and attorney’s fees where he managed an apartment complex owned by a partnership and overcharged the partnership for his services.\(^{674}\) The court found that even though defendant was an employee, he engaged in self-dealing conduct and “business activities” under N.C.G.S. § 75-1.1(b).\(^{675}\)

35. North Dakota

a. Scope of the Statute and Elements of a Cause of Action

In *Ireland v. Anderson*,\(^ {676}\) the U.S. District Court for North Dakota held the plain language of the North Dakota Consumer Fraud Act (NDCFA)\(^ {677}\) did not include government entities in the definition of “person.”\(^ {678}\) The court rejected a consumer fraud act claim against the executive director of the North Dakota Department of Human Services for alleged misleading practices in billing civilly confined sexual offenders for their treatment.\(^ {679}\) Because a state agency could not be subject to a consumer fraud act claim, persons acting on behalf of the state agency could not be held liable under the NDCFA.\(^ {680}\)

In addition to the NDCFA, North Dakota enacted statutory protections for air ambulance patients in 2017. Under N.D.C.C. § 23-16-17, effective August 1, 2017, hospitals are required to notify patients in non-emergency situations which air ambulances have contractual agreements with the patient’s insurance company. Additionally, effective January 1, 2018, N.D.C.C. § 26.1-47-09 limits the amount that can be charged by air ambulance companies without agreements with major

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\(^{674}\) *Weaver*, 760 S.E.2d at 761-762.

\(^{675}\) *Id.*

\(^{676}\) 2015 WL 12843768 (D.N.D. 2015).

\(^{677}\) *Id.*

\(^{678}\) N.D. CENT. CODE §§ 51-15-01 *et seq.*

\(^{679}\) *Ireland*, 2015 WL 12843768, at *2.

\(^{680}\) *Id.* at *3.*
insurers in North Dakota. The out-of-network providers may charge only the average of in-network rates. The statute further provides the insurance payments are considered full and final payment for the air ambulance services billed to the insured.

In 2019, North Dakota enacted a statute restricting the use of automatic renewal provisions in consumer contracts. Notice of the right to cancel must be provided between thirty and sixty days prior to renewal. The renewal clause in the contract must be in larger type than the surrounding text. A renewal period may not exceed one year. Any goods or services provided after purported renewal without compliance with the section is deemed to be an “unconditional gift.” There is a private right of action for violations. The attorney general can enforce the statute using the powers provided in the NDCFA.

36. Ohio

a. Scope of the Statute and Elements of a Cause of Action

In April 2017, the Ohio Consumer Sales Practices Act (OCSPA) was amended to make a supplier’s failure to maintain any “registration, license, bond, or insurance required by state law or local ordinance for the supplier to engage in the supplier’s trade or profession” an unfair or deceptive act or practice.

The OSCPA was also amended in April 2017 to specify that most of the unconscionable practices in section 1345.031 apply only to transactions in connection with the origination of a residential mortgage, and to specify that the unconscionable practices in section 1345.03 do not apply to transactions in connection with the origination of a residential mortgage. Previously both sections lacked the phrase “the origination of.”

681. N.D. CENT. CODE §§ 51-37-01 to 51-37-06.
682. Id. at § 51-37-02.2.b.
683. Id. at § 51-37-01.2.
684. Id. at § 51-37-02.5.
685. Id. at § 51-37-04.
686. Id. at § 51-37-06.
687. Id. at § 51-37-05.
688. OHIO REV. CODE §§ 1345.01 et seq.
689. OHIO REV. CODE § 1345.02(G).
690. OHIO REV. CODE §§ 1345.03, 1345.031.
In May 2018, the OSCPA was amended to regulate the sale of copies of real estate deeds by private entities, and makes a violation of these regulations an unconscionable act or practice.691

In July 2019, the OCSPA was amended to regulate certain practices related to the installation of used tires, and makes a violation of these regulations an unconscionable act or practice.692

The Ohio Supreme Court ruled in December 2015 that an auto insurer’s provision of an estimate for repairs for an insured vehicle is not a consumer transaction within the meaning of the OCSPA.693

The Ohio Supreme Court ruled in June 2016 that debt collectors, including debt buyers, and their law firms are suppliers subject to the OCSPA and are not entitled to claim the financial-institution exemption from the OCSPA.694

b. Private Enforcement and Remedies

The Ohio Supreme Court ruled in 2015 that in a class action brought pursuant to section 1345.09, all members of the class must have suffered actual damages.695

37. Oklahoma

a. Scope of the Statute and Elements of a Cause of Action

(1) The Oklahoma Consumer Protection Act

Under the Oklahoma Consumer Protection Act (OCPA),696 “consumer transaction” is defined as, among other things, the “advertising, offering for sale or purchase, sale, purchase, or distribution of any services or any property . . . or any other article, commodity, or thing of value wherever located. . . .”697 In Horton v. Bank of America,698 the District Court for the Northern District of Oklahoma held that mortgage loans fall within the purview of “consumer transaction,” as a

691. OHIO REV. CODE § 1345.032.
692. OHIO REV. CODE § 1345.022.
693. Dillon v. Farmers Ins. of Columbus, Inc., 47 N.E.3d 794 (Ohio 2015).
696. OKLA. STAT. tit. 15, §§ 751 (2011) et seq.
697. OKLA. STAT. tit. 15, § 752(2) (2011).
“thing of value,” on the basis that a loan can be sold or marketed.699 In Horton, the plaintiffs, a married couple, secured an adjustable-rate mortgage loan with Investor Universal Service Corp., which was later sold to the defendant, Bank of America. The mortgage required Bank of America to give the plaintiffs written notice of any adjustments to the interest rate. The plaintiffs continued to make payments without receiving notice of the defendant’s adjustments to the interest rate. Shortly before what the plaintiffs understood to be their final payment, the defendant informed the plaintiffs that the payment would not extinguish their debt. The plaintiffs brought a claim under the OCPA, alleging the defendant committed “unfair [and] deceptive trade practice[s].”700 The defendant argued “that the OCPA is inapplicable to mortgage loans.”701 The court rejected the defendant’s argument, finding that “consumer transaction” includes “anything that could be sold or marketed to a consumer.” The court found in favor of the plaintiffs, holding, “[I]f not property or a service, [a loan] is, at the very least, a ‘thing of value.’”702

38. Oregon

b. Private Enforcement and Remedies

Civil actions by private parties may be brought to address acts that have been declared unlawful by section 646.608.703 There are three primary required elements to pursue relief as a private remedy under the Oregon Unlawful Trade Practices Act (OUTPA): (1) the claimant must have suffered some “ascertainable loss of money or property” as a result of the unlawful practice; (2) the unlawful practice must have been committed willfully; and (3) the OUTPA action must be commenced within a one year period of time.705

699. 189 F. Supp. 3d at 1293–94; see also Hurt v. Vanderbilt Mortg. and Fin., 2019 WL 3069437 (W.D. Okla. 2019) (in light of Horton, the court refused to dismiss the plaintiff’s OCPA claim based on the defendant’s argument that the OCPA does not cover lending services).

700. OR. REV. STAT. § 646.638(1).

701. Horton, 189 F. Supp. 3d at 1292.

702. Id. at 1292–93.

703. OR. REV. STAT. § 646.638(1).

704. OR. REV. STAT. §§ 646.605 et seq..

705. Id. § 646.638(1), (6).
In *Pearson v. Philip Morris, Inc.*, the Oregon Supreme Court offered perhaps its most comprehensive explanation of the phrase “ascertainable loss of money or property.” *Pearson* was a class action in which the plaintiffs had alleged that certain cigarette manufacturers misrepresented to consumers that Marlboro Light cigarettes would deliver less tar and nicotine than regular Marlboro cigarettes. The *Pearson* plaintiffs had predicated their class claims on two distinct theories of ascertainable loss: (1) “diminished value” of the product as represented versus as received, and (2) the purchase price of the product based on plaintiffs’ alleged failure to receive what it is they believed they were getting. The Oregon Supreme Court explained,

> The requirement that a loss be “ascertainable” connotes generally that it is one “capable of being discovered, observed, or established.” Thus, the loss must be objectively verifiable, much as economic damages in civil actions must be. But unlike general economic damages in a civil action, the loss required for a UTPA claim must be specifically of “money or property, real or personal.” An ascertainable loss of some other kind—such as loss of physical ability due to a personal injury—is not cognizable in a UTPA claim. Likewise, noneconomic losses cognizable in a civil action—such as physical pain, emotional distress, or humiliation—will not satisfy a private UTPA plaintiff’s burden.

The OUTPA does not require a manifest defect.

OUTPA’s requirement that a plaintiff show that loss was suffered “as a result of” the defendant’s conduct has been interpreted to be one of causation. In the context of alleged misrepresentations, whether a plaintiff must prove causation in the form of reliance requires reasoned analysis of the claim. If the alleged unlawful trade practice is a failure

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706. 361 P.3d 3 (Or. 2015).
707. *Id.* at 8.
708. *Id.* at 23.
709. *Id.* at 22-23.
711. OR. REV. STAT. § 646.638(1).
713. *Pearson*, 361 P.3d at 28 (“Whether, to prove the requisite causation, a plaintiff must show reliance on the alleged unlawful trade practice depends on the conduct involved and loss allegedly caused by it.”).
to disclose information, however, the plaintiff is not required to prove reliance on the undisclosed information.\footnote{Scharfstein v. BP W. Coast Prods., LLC, 423 P.3d 757, 769, review denied, 363 Or. 815, 431 P.3d 90 (2018), and cert. dismissed, 2019 WL 1438377 (U.S. July 19, 2019) ("In an illegal charge case . . . , whether a customer relied on the nondisclosure of a fee does not matter; what matters is whether the fee is disclosed in the particular way that the law requires."); Mendoza v. Lithia Motors, 2017 WL 125018 (D. Or. 2017) (declining to apply Pearson in the context of alleged failures to disclose).}

Private actions are governed by a one-year statute of limitations that commences upon a claimant’s discovery of the unlawful method, act or practice.\footnote{OR. REV. STAT. § 646.638(6).} In Pearson, the Oregon Supreme Court held that “[b]ecause the limitation period is tied to the plaintiff’s ‘discovery’ of the unlawful conduct, it runs . . . from when the plaintiff[,] actually knew or should have known [of the allegedly unlawful conduct].”\footnote{Pearson, 361 P.3d at 33 (citing FDIC v. Smith, 980 P.2d 141 (1999); Saenz v. Pittenger, 715 P.2d 1126 (1986)); see also Bechler v. Macaluso, 2010 WL 2034635 (D. Or. 2010) (concluding that the one-year statute of limitations begins to run “when a plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements [of legally cognizable harm] (harm, causation, and tortious conduct) exists”).}

Few Oregon cases have addressed consumer or unlawful trade practices claims since the Supreme Court’s decision in \textit{AT&T Mobility LLC v. Concepcion}.\footnote{563 U.S. 333 (2011).} In the only consumer case to apply \textit{AT&T Mobility} and its principles, \textit{Gozzi v. Western Culinary Institute},\footnote{366 P.3d 743 (Or. Ct. App. 2016).} the Oregon Court of Appeals upheld a delegation provision of an arbitration clause, holding that the plaintiffs’ failure to challenge the delegation provision specifically meant that the provision should be treated as valid.\footnote{\textit{Id.} at 752 (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010)).} Thus, the court concluded that the task of deciding the unconscionability, validity, and enforceability of the arbitration clause properly should be delegated to the arbitrator, not to a court.\footnote{\textit{Id}.}
c. Government Enforcement and Remedies

The Oregon Attorney General or another “prosecuting attorney” is authorized to enforce the provisions of OUTPA.\textsuperscript{721} A prosecuting attorney must demonstrate willfulness to have a court impose a civil penalty.\textsuperscript{722} It need not, however, prove an “ascertainable loss.”\textsuperscript{723}

39. Pennsylvania

a. Scope of the Statute and Elements of a Cause of Action

(4) Specific Unfair Acts or Practices

There have been three important developments relating to specific unfair acts or practices under the Unfair Trade Practices and Consumer Protection Law (UTPCPL).\textsuperscript{724} First, in 2018, the Supreme Court of Pennsylvania reversed the Commonwealth Court and held that certain nursing home advertising and non-advertising materials included statements that were actionable under the UTPCPL.\textsuperscript{725} Regarding advertising materials, the Supreme Court of Pennsylvania held that the Commonwealth Court’s conclusion that certain statements regarding the provision of food, water, and clean linens were “puffery” as a matter of law was improper.\textsuperscript{726} Patently hyperbolic or excessively vague marketing statements that would dissuade a reasonable consumer from placing reliance thereon as fact render puffery non-actionable under the UTPCPL.\textsuperscript{727} In contrast, where a plaintiff establishes that a statement

\textsuperscript{721} Or. Rev. Stat. § 646.632(1) (authorizing actions by a “prosecuting attorney”); id. § 646.605(5) (defining “prosecuting attorney” to include the attorney general and district attorneys); see also State ex rel. Rosenblum v. Johnson & Johnson, 362 P.3d 1197 (Or. Ct. App. 2015) (action by the attorney general for violations of OUTPA in the distribution of the over-the-counter painkiller Motrin).

\textsuperscript{722} Id. § 646.642(3).


\textsuperscript{724} Pa. Const. Stat. §§ 201-1 et seq.

\textsuperscript{725} Commonwealth v. Golden Gate Nat’l Senior Care, 194 A.3d 1010, 1023-29 (Pa. 2018).

\textsuperscript{726} Id. at 1024.

\textsuperscript{727} Id; see also Castrol, Inc. v. Pennzoil, Inc., 987 F.2d 939, 945 (3d Cir. 1993) (noting that “puffery” is not actionable as false advertising).
contains believable, inaccurate statements of fact, the statement falls beyond the reach of a puffery defense. The determination as to whether a statement is deemed puffery must take into account the overall context, and is a question of fact to be resolved by the factfinder except in the unusual case where the answer is so clear that it may be decided as a matter of law. As to statements in non-advertising materials, the Commonwealth Court had also dismissed claims relating to patient assessments, care plans and billing statements on the basis that these materials are not advertisements, and therefore, were not actionable. Using principles of statutory interpretation, the Supreme Court of Pennsylvania concluded that false or misleading statements need not be advertising to be actionable, and therefore reversed.

Second, the Commonwealth Court held that the UTPCPL applies to oil and gas lease arrangements. The attorney general had alleged that lessees acted unlawfully by using deceptive, misleading, and unfair tactics in their efforts to secure subsurface mineral rights leases from private landowners. The lessees argued that since they merely leased subsurface mineral rights from private landowners, they were not selling or distributing anything and consequently, the UTPCPL did not apply. The Commonwealth Court disagreed and found that, per the statutory language of section 2(3) of the UTPCPL, and Pennsylvania case law, the leases were, in essence, sales. Furthermore, under section 2(2) of the UTPCPL, lessees qualified as “persons” subject to suit by the attorney general under the UTPCPL.

Third, the Commonwealth Court held that certain antitrust violations may serve as the basis for UTPCPL claims. The court stated that although the UTPCPL is not designed to render all antitrust violations actionable and the scope of actionable antitrust behavior under the UTPCPL is narrower than under federal antitrust law, the attorney

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728. Id.
729. Golden Gate, 194 A.3d at 1024.
731. Golden Gate, 194 A.3d at 1028-29.
733. Id. at 53.
734. Id. at 56.
735. Id.
736. Id. at 59.
737. Id. at 61.
general was permitted to pursue antitrust claims through the UTPCPL where the so-called “antitrust” conduct qualifies as “unfair methods of competition” or “unfair or deceptive acts or practices,” as those terms have been either statutorily defined in the UTPCPL or by the attorney general through the administrative rulemaking process. The court noted that the attorney general had so far declined to employ the rulemaking process, but allowed claims to survive when they alleged conduct amounting to “‘[u]nfair methods of competition’ and ‘unfair or deceptive acts or practices.’”

(5) Fraudulent or Deceptive Conduct

Although the Pennsylvania Supreme Court has still not definitively decided whether conduct less than common law fraud is a sufficient basis for a UTPCPL claim, the concurring opinion in Milliken v. Jacono, is one step closer. The opinion cites, approvingly, the lower court holding in Bennett v. A.T. Masterpiece Homes at Broadsprings that, under the 1996 amendment to the UTPCPL, plaintiffs no longer need to establish the elements of common law fraud. A plaintiff claiming deception is still required to prove: (1) that he justifiably relied on the defendant’s wrongful conduct or representation, and (2) that he suffered harm as a result of that reliance.

738. Id.
739. Id.
742. 73 PA. STAT. § 201-2(4) (xxi) (including “deceptive” conduct in the “catchall” provision of the statute).
743. 103 A.3d at 812 n.2 (Todd, J., concurring); see also Landau v. Viridian Energy PA LLC, 223 F. Supp. 3d 401, 418 (E.D. Pa. 2016) (“[T]he practice of treating ‘deception’ claims as common law fraud claims has fallen out of favor. Today, the vast weight of authority in Pennsylvania holds that a plaintiff can state a claim under the catch-all provision by pleading facts sufficient to support a claim for fraud or deception.”).
744. Milliken, 103 A.3d at 806 (Todd, J., concurring). See also Kern v. Lehigh Valley Hosp., 108 A.3d 1281, 1289 (Pa. Super. Ct. 2015) (noting that justifiable reliance was always a required element for private actions under the UTPCPL, but the amendment that included “deceptive” conduct did not require proof of all elements of common law fraud). On
If a claim predates the 1996 amendment, however, the Pennsylvania Supreme Court held that a plaintiff is still required to prove fraudulent misrepresentation using the common law fraud elements.745

(6) Exemptions

The Superior Court of Pennsylvania affirmed a trial court’s order determining that claims, including those under the UTPCPL, that rested solely on allegations of off-label promotion (the promotion of products for uses not approved by the Food and Drug Administration) were preempted by the Food, Drugs and Cosmetics Act.746

b. Private Enforcement and Remedies

There have been no recent developments in the wake of the 2011 U.S. Supreme Court case, AT&T Mobility LLC v. Concepcion,747 at least not with respect to the UTPCPL. However, the Pennsylvania Supreme Court has weighed in outside this context, continuing to prioritize arbitration agreements over conflicting Pennsylvania laws. In Concepcion, the Court held that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the [Federal Arbitration Act (FAA)] displaces the conflicting rule.”748 Bound by Concepcion, the Pennsylvania Supreme Court held that the FAA preempted Pennsylvania Rule of Civil Procedure 213(e), which provides for the consolidation of wrongful death and survival actions, where plaintiff had an arbitration agreement with one defendant.749 Where, however, there were

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745. Yenchi v. Ameriprise Fin., 161 A.3d 811, 816 n.4 (Pa. 2017) (“Their UTPCPL claim, which related to the 1996 whole life insurance policy, accrued on or around August 15, 1996, the date [plaintiff] purchased the policy. At that time, the catchall provision . . . prohibited one from ‘engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.’”) (emphasis added).
748. Id. at 334.
independent grounds to invalidate an arbitration agreement, the Pennsylvania Supreme Court refused to enforce it.\textsuperscript{750}

c. Government Enforcement and Remedies

Pennsylvania courts examined the UTPCPL in the context of public entities as litigants. The Supreme Court of Pennsylvania reversed the decision of the Commonwealth Court and held that the Commonwealth is a “person in interest”\textsuperscript{751} that may seek the remedies provided under section 4.1 of the UTPCPL.\textsuperscript{752} The Commonwealth Court had relied on \textit{Meyer v. Community College of Beaver County}\textsuperscript{753} where the Pennsylvania Supreme Court held that, for the purpose of determining whether a public entity is a “person” capable of being sued under the UTPCPL, “the legislature did not intend... to include political subdivision agencies.”\textsuperscript{754} From this holding, the Commonwealth Court extrapolated that, “the Commonwealth may not seek restoration under the UTPCPL.”\textsuperscript{755} However, the Supreme Court of Pennsylvania found that \textit{Meyer} was inapposite since it did not interpret the term “person in interest”, and because its analysis related to issues of sovereign immunity, which has no application where the Office of the Attorney General brings suit on behalf of the citizens of the Commonwealth.\textsuperscript{756}

\textsuperscript{750.} Wert v. Manorcare of Carlisle PA, LLC, 124 A.3d 1248, 1251-52 (Pa. 2015) (holding that an arbitration agreement was unenforceable because it relied on the void procedures of the National Arbitration Forum). In Wert, although the court presented both sides’ arguments with respect to Concepcion, the court did not ultimately address those arguments.

\textsuperscript{751.} Pursuant to 73 P A. STAT. § 201-4.1, “the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act.” The act defines “person” as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.” 73 PA. STAT. § 201-2(2).

\textsuperscript{752.} \textit{Golden Gate}, 194 A.3d at 1033.

\textsuperscript{753.} 93 A.3d 806 (Pa. 2014).

\textsuperscript{754.} \textit{Id.} at 815 (holding that a community college, a Pennsylvania political subdivision agency, was not a “person” subject to liability under the statute).


\textsuperscript{756.} \textit{Golden Gate}, 194 A.3d at 1033.
The Pennsylvania Supreme Court issued another UTPCPL decision in *Commonwealth v. TAP Pharmaceutical Products*, which did not question the Commonwealth’s ability to recover restoration under the UTPCPL. The court, however, declined to uphold the judgment against the pharmaceutical company defendants because the award failed to account for rebates received by the Commonwealth. The court explained that “[b]y the Commonwealth’s abject failure to account responsibly for rebates taken from the defendants it sued, it has proved no harm as a result of pharmaceutical-company pricing practices.”

d. Reach of the Statute

In response to a certified question from the United States Court of Appeals for the Third Circuit, the Pennsylvania Supreme Court held that a non-Pennsylvania resident can assert a lawsuit under the Pennsylvania UTPCPL against a business that is headquartered in Pennsylvania for conduct that occurs outside of Pennsylvania.

40. Rhode Island

a. Scope of the Statute and Elements of a Cause of Action

Under Rhode Island’s Deceptive Trade Practices Act (DCTPA), in addition to the multi-part definition of “unfair methods of competition and unfair or deceptive acts or practices,” any retail establishment that offers a good or service for sale engages in a deceptive trade practice if it discriminates against a prospective customer “by requiring the use of credit for purchase of goods or services.” Internet purchases are excluded from this prohibition.

Design, manufacturing, and marketing of an allegedly defective product gives rise to a viable claim under the act, at least for purposes of surviving a motion to dismiss. Additionally, a plaintiff must present evidence of an actual good or service at issue in order to state a claim under the act. A trial court held that the plaintiff borrower’s modification

758. Id. at 368.
760. R.I. GEN. LAWS §§ 6-13.1-1 et seq.
762. Id.
to a mortgage loan via defendant, Wells Fargo, constituted neither a good nor a service, which prohibited plaintiff borrower from recovery pursuant to the act.764

(1) Distinguishing Between Unfair Methods of Competition

Although the Rhode Island Supreme Court has adopted distinct tests for “unfair” trade practices and “deceptive” trade practices, the Rhode Island federal court dismissed a claim brought under the act solely based on a finding that the test for “deceptive” trade practices was not satisfied, without further discussion of the test for “unfair trade practices.”765 The court held that the standard for deceptive conduct was not satisfied when a Rhode Island attorney served the plaintiff on behalf of her client, a school, in an attempt to collect unpaid debts prior to commencing a lawsuit because the conduct at issue would not likely mislead a reasonable consumer.766

(3) Exemptions to the Act

In accordance with § 6-13.1-4 and State v. Piedmont Funding Corp.,767 claims under the act related to motor vehicle insurance policies fail as a matter of law.768

41. South Carolina

a. Scope of the Statutes and Elements of Cause of Action

The Supreme Court of South Carolina considered whether one engaged in illegal gambling can recover under the South Carolina Unfair Trade Practices Act (SCUTPA).769 The court held that the plaintiff could not recover under SCUTPA, overruling prior cases and finding that the gambling loss statutes provide the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling.770

766. Id. at *8.
770. Id. at 895.
Courts have also recognized that the SCUTPA does not apply to the business of insurance, which is expressly exempted from the act’s scope.\textsuperscript{771} Further, even a deliberate or intentional breach of contract does not constitute a violation of SCUTPA.\textsuperscript{772} The SCUTPA is not available to redress a private wrong because unfair or deceptive acts that affect only the parties to the transaction are beyond the scope of the SCUTPA.\textsuperscript{773}

In \textit{Maybank v. BB&T Corp.},\textsuperscript{774} the Supreme Court of South Carolina held that the question of whether the at-issue investment vehicle was subject to the SCUTPA was properly submitted to the jury based on the alternative theories of relief presented by the plaintiff and the defendants at trial regarding the applicability of the Securities Act.\textsuperscript{775}

In 2017, the South Carolina General Assembly deleted the section of SCUTPA addressing pyramid promotional schemes and replaced it with the Pyramid Promotional Scheme Prohibition Act.\textsuperscript{776} The act continues to provide that a pyramid promotional scheme is an unfair trade practice and prohibited pursuant to the SCUTPA.\textsuperscript{777}

In 2016, the South Carolina General Assembly revised a scope provision of the South Carolina Consumer Protection Code (SCCPC) to expressly apply to a creditor who induces a South Carolina resident to enter into a transaction by offering or advertising in South Carolina by any means, including without limitation face-to-face solicitation, mail, brochure, print, radio, television, Internet, or any other electronic means.\textsuperscript{778}

In \textit{Freeman v. J.L.H. Investments},\textsuperscript{779} the Supreme Court of South Carolina held that the plaintiff car purchaser pursued the correct cause of action under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act)\textsuperscript{780} for alleged improper closing fees, rather than utilizing the SCCPC. The court reasoned the SCCPC was intended to supplement remedies afforded to consumers in

\begin{itemize}
\item \textsuperscript{773} Woodson v. DLI Props., 753 S.E.2d 428 (S.C. 2014).
\item \textsuperscript{774} 787 S.E.2d 498 (S.C. 2016)
\item \textsuperscript{775} 787 S.E.2d at 513.
\item \textsuperscript{776} S.C. CODE ANN. §§ 39-5-710 to 39-5-730.
\item \textsuperscript{777} S.C. CODE ANN. § 39-5-730.
\item \textsuperscript{778} S.C. CODE ANN. § 37-1-201(1) (b).
\item \textsuperscript{779} 778 S.E.2d 902 (S.C. 2015).
\item \textsuperscript{780} S.C. CODE ANN. §§ 56-15-10, \textit{et seq.}
law and equity. The court found that the SCCPC provided procedural requirements for a dealer to charge the fee, but does not provide a remedy for a closing fee violation. Furthermore, the court held the plaintiff appropriately pursued a class action under the Dealers Act class action provision rather than Rule 23 of the South Carolina Rules of Civil Procedure. The court also affirmed the trial judge’s definition of “closing fee” as a predetermined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only those actually incurred by the dealer and necessary to closing the transaction.

b. Private Enforcement and Remedies

SCUTPA claims cannot be brought in a representative capacity and, consequently, SCUTPA prohibits the survival of a cause of action after a plaintiff’s death. In addition, SCUTPA’s prohibitions against class actions are substantive provisions of South Carolina law and, consequently, not trumped by Rule 23 of the Federal Rules of Civil Procedure. Furthermore, where a plaintiff recovers amounts advanced pursuant to a claim for rescission, the plaintiff has not recovered damages subject to trebling under SCUTPA.

42. South Dakota

b. Private Enforcement Remedies

A federal district court has held that the requirement of a “causal connection between the alleged violation and the damages suffered”

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781. 778 S.E.2d at 908.
782. Id. at 908-909.
783. Id. at 910.
784. Id. at 911.
787. First South Bank v. Fifth Third Bank, 631 F. App’x. 121, 126 (4th Cir. 2015).
means that “a plaintiff must have relied on the alleged misrepresentation.”

While the statute of limitations on a claim under the South Dakota Deceptive Practices and Consumer Protection Act (DPCPA) is “four years after the occurrence or discovery of the conduct which is the subject of the action,” the statute allows claims for acts occurring within four years of filing the action even if similar conduct was discovered more than four years before filing. In that situation, acts occurring more than four years prior to filing are time-barred, and those occurring within the four-year window are not time-barred.

43. Tennessee

a. Scope of the Statute and Elements of a Cause of Action

In 2016, the Tennessee General Assembly passed the Government Imposters and Deceptive Advertisements Act (GIADAA). The act expanded the Tennessee Consumer Protection Act (TCPA) to generally prohibit all representations, whether commercial or otherwise, which suggests an association with a governmental entity in absence of such a relationship. Violations include advertisements which “simulate[]” a “court, judicial, or administrative process” or which “otherwise causes a likelihood of confusion that the person using or employing the advertisement is a part of or associated with a unit of any governmental entity, when such is not true.” The act’s scope extends beyond advertisements as it further prohibits “causing a likelihood of confusion that goods or services . . . or an offer was sent or distributed by or has been approved, authorized, or endorsed, in whole or in part, by a governmental entity.” “[E]mploying language, symbols, logos, representations, statements, titles, names, seals, emblems, insignia, trade or brand names, business or control tracking numbers, web site or email

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789. S.D. CODIFIED LAWS §§ 37-24-1 et seq.
792. TENN. CODE ANN. §§ 47-18-101 et seq.
793. Id. § 47-18-131(g).
794. Id. § 47-18-131(c) (1).
795. Id. § 47-18-131(c) (2) (emphasis added).
addresses, or any other term, symbol, or content’ which similarly suggests a relationship with a government entity that does not exist is also prohibited. 796

The act recognizes that private entities may lawfully provide documents to the public “free of charge or at a lesser price” than that assessed by the government for the same or similar documents. 797 In order to distinguish a private enterprise from government services without penalizing otherwise lawful conduct, the act requires that private entities engaged in such services use a disclaimer. 798 The specific language of the disclaimer is set forth in the statute and must be displayed in “bold fourteen (14) point black type” or a larger font in statutorily defined places. 799

In 2017, the Tennessee General Assembly further amended the TCPA by expanding the non-exhaustive list of unfair and deceptive acts or practices in § 47-18-104. 800 As amended, the TCPA explicitly prohibits “[a]dvertising services for the provision of a warranty for a motor vehicle . . . in a deceptive manner that is likely to cause the owner of the motor vehicle to believe that the advertisement originated from the original manufacturer of the motor vehicle or from the dealer that sold the motor vehicle to the owner.” 801

In 2018, the Deceptive Advertisements Act expanded the TCPA to address fraudulent online ticket sales, making it a violation of the act to use the “trade name or trade mark, or a confusingly similar” name or mark of “any event, person, or entity scheduled to perform at a place of entertainment in the domain of a ticket marketplace URL.” 802

The TCPA was amended in 2018 to prohibit credit reporting agencies from charging Tennessee consumers to place, temporarily lift, or permanently remove a credit security freeze. 803

b. Government Enforcement and Remedies

The Government Imposters and Deceptive Advertisements Act does not provide a private right of action. 804 Instead, the act empowers the

796. Id. § 47-18-131(c) (3).
797. Id. § 47-18-131(4) (A).
798. Id. § 47-18-131(4) (A)-(B).
799. Id.
801. TENN. CODE ANN. § 47-18-104(b) (51).
802. Id. § 47-18-104(b) (52)
803. Id. § 47-18-2108(f).
Tennessee Attorney General and Reporter to “commence litigation as set forth in § 47-18-108, when a violation of this section has occurred.”

In addition to prosecuting violations of the act, the Attorney General and Reporter is authorized to take the following actions: “(1) Investigate potential violations of this section; (2) Issue requests for information consistent with § 47-18-106, regarding potential violations of this section; [and] (3) Settle, including entering into assurances of voluntary compliance consistent with § 47-18-107.”

Remedies for violations of the act include “[p]ayment to the state of up to one hundred dollars ($100) for each person who receives a written or electronic advertisement distributed in violation of this section; and . . . [r]eimbursement to the state for the reasonable costs and expenses of investigating and prosecuting a violation . . . including attorney’s fees.”

In 2019 the government enforcement provisions were significantly changed. Previously the Division of Consumer Affairs in the Department of Commerce and Industry held a significant role in enforcement of the TCPA. Under the amended law, effective September 30, 2019, the Division of Consumer Affairs was to be dismantled and its responsibilities, budget and staff transferred to the Office of the Attorney General.

44. Texas

a. Scope of the Statute and Elements of a Cause of Action

In construing the “general prohibition” in Texas. Bus. & Com. Code Ann. section 17.46(a) of the Texas Deceptive Trade Practices Act-Consumer Protection Act (DTPA), in suits brought by the Texas Attorney General under section 17.47(a) the DTPA provides that to the extent possible the courts are to be guided by the “laundry list” in Tex. Bus. & Com. Code section 17.46(b) and the interpretations given by the Federal Trade Commission (FTC) and federal courts to section 5(a) (1)

804. Id. § 47-18-131(d).
805. Id. § 47-18-131(d) (4).
806. Id. § 47-18-131(d) (1)-(3).
807. Id. § 47-18-131(f) (2).
809. TEX. BUS. & COM. CODE §§ 17.41 et seq.
of the Federal Trade Commission Act, 15 U.S.C. section 45(a) (1).810 However, a violation of an FTC rule does not, of itself, constitute a violation of the DTPA.811

The Texas legislature has made several additions to the laundry list, bringing the total enumerated deceptive acts or practices to thirty four. The additions include: (28) using a foreign translation of a title or word to infer that a person is authorized to practice law in the United States, if the person is not; (28-2) falsely representing that a solicitation or notice is from a governmental entity or implies a criminal penalty; (29) using solicitations that resemble a check or negotiable instrument unless a clear and conspicuous 18 point type disclosure in specified wording is made that the document is a specimen and nonnegotiable; (31) a licensed public adjuster soliciting employment for an attorney or making a contract with an insured primarily for the purpose of referring the insured to an attorney; and (33) a warrantor of a vehicle protection product warranty using, in connection with the product, a name that includes "casualty," "surety," "insurance," or any other word descriptive of an insurance business.

b. Private Enforcement and Remedies

A private litigant must prove that the act or practice complained of violates one or more sections of the laundry list, or is an unconscionable action or course of action, a breach of an express or implied warranty, a violation of Chapter 541 of the Texas Insurance Code,812 or a violation of one of the “tie-in” statutes.

A defendant has no duty to disclose material facts that it should have known but did not.813 However, when a seller makes an affirmative representation, the law imposes a duty to know whether the statement is true.814

An allegation of breach of contract, without more, does not constitute a violation of the DTPA. Where the alleged misrepresentations

810. Id. § 17.46(c).
are nothing more than representations that the defendant would fulfill a contractual duty that it failed to fulfill, breach of that duty sounds only in contract and does not support a DTPA claim.\footnote{133} If the misrepresentations only caused a consumer to enter into the contract that the defendant later breached and the consumer’s only economic loss is the subject of the contract itself, the consumer’s economic losses are governed by contract law, not the DTPA.\footnote{134}

A third party to a transaction can be a consumer if the goods or services are acquired specifically for the third party’s benefit and use, and the provider of the goods or services is aware that the goods or services are being provided specifically for the third party’s benefit.\footnote{135} However, if the goods or services are not acquired with the intent to specifically benefit a third party, the third party “incidental beneficiary” of the services is not a “consumer” and does not have standing under the DTPA.\footnote{136}

A federal district court in Texas held that a stored-value card is not a good or service under the DTPA.\footnote{137}

As noted, a consumer can base a DTPA case on a violation of Chapter 541 of the Texas Insurance Code. Chapter 541 of the Texas Insurance Code prohibits various unfair methods of competition, and unfair and deceptive acts or practices, including unfair settlement practices. Several cases and legislative amendments affect DTPA claims based on alleged violations of Chapter 541.

General claims by an insurer or insurance agent of the adequacy or sufficiency of coverage are not generally actionable.\footnote{138} However, where an insurer or agent does more than represent that a policy provides full coverage—such as representing that coverage exists in a specific

\footnote{133} Crawford v. Ace Sign, Inc., 917 S.W.2d 12, 14-15 (Tex. 1996); Shakeri v ADT Sec. Svcs, 816 F.3d 283, 295 (5th Cir. 2016); BCC Merchant Sols. v. Jet Pay, LLC (129 F. Supp. 3d 440, 469-470 (N.D. Tex. 2015).
\footnote{134} Crawford, 917 S.W.2d at 14-15; Shakeri, 816 F.3d at 295; BCC Merchant Sols., 129 F. Supp. 3d at 470.
\footnote{135} Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997).
situation when it does not—the insurer or agent may be liable for a misrepresentation under the DTPA. 821

In a recent case brought under Chapter 541 of the Texas Insurance Code, the Texas Supreme Court also noted that a misrepresentation of policy coverage can provide an exception to the general rule that an insured cannot recover policy benefits caused by an insurer’s violation of a statutory duty under the Insurance Code unless the insured had a contractual right to the benefits under the policy. 822

Though a party to a contract usually has a duty to read the contract, and is charged with knowledge of the contract the party signs, an affirmative representation of insurance coverage may support claims under the DTPA and Texas Insurance Code even though a loss falls within an exclusion. 823

The 2017 session of the Texas legislature enacted several provisions applicable to DTPA claims against a property insurer or agent, whether or not the DTPA claims are based on a violation of Chapter 541 of the Texas Insurance Code. 824 As a prerequisite to a suit under the DTPA or Chapter 541 of the Texas Insurance Code against a property insurer or agent, in addition to the notice required by the DTPA and any other notice required by law, the insured must give a written notice meeting certain statutory requirements. 825 The notice may be combined with the notice required by Tex. Bus. & Com. Code section 17.505. 826 The notice is admissible in evidence. 827 The person to whom the notice is sent has a thirty-day period from receipt of the notice to send a written request to inspect and photograph the property. 828 If the claimant fails to comply, the suit may be abated. 829 Failure to give the required notice can also limit the claimant’s claim for attorney’s fees. 830 Attorney’s fees are capped by a statutory formula. 831 If the insurer elects to assume whatever

823. Wyly, supra, 909-911.
824. TEX. INS. CODE § 542A.002(a) (3).
825. Id. § 542A.003.
826. Id. § 542A.003(f).
827. Id. § 542A.003(g).
828. Id. § 542A.004.
829. Id. § 542A.005.
830. Id. § 542A.007(d).
831. Id. § 542A.007(a)-(c).
liability its agent may have, no cause of action under the statute exists against the agent.  

c. Government Enforcement and Remedies.

A district or county attorney is not required to obtain the permission of the Texas Attorney General’s Consumer Protection Division to prosecute an action for a violation of Tex. Bus. & Com. Code section 17.46(b) (28) (use of misleading foreign translations that imply that a person is an attorney, if the person is not authorized to practice law in the United States), if the district or county attorney provides prior written notice to the Division.  Three-fourths of a civil penalty awarded by a court for such a violation is paid to the county in which the court is located. The 2019 legislature added a section to the DTPA making the charging of unconscionable prices by certain health care facilities for emergency medical care a violation of the statute. This section is enforced only by the Texas Attorney General’s Office.

45. Utah

a. Scope of the Statute and Elements of a Cause of Action

Utah courts continue to hold that the Utah Consumer Sales Practices Act (UCSPA) shall be construed “liberally” to protect consumers from suppliers who commit deceptive and unconscionable sales practices. Despite this, a plaintiff must still establish that the deceptive acts were done knowingly or intentionally.

832. Id. § 542A.006.
833. TEX. BUS. & COM. CODE § 17.48(d).
834. Id. § 17.48(c).
835. TEX. BUS. & COMM. CODE §17.464.
836. UTAH CODE ANN. §§ 13-11-21 et seq.
837. See UTAH CODE ANN. §§ 13-11-2; see also Reid v. LVNV Funding, LLC, et al., 2016 WL 247571, at *6 (D. Utah 2016); Gallegos v. LVNV Funding, LLC, 169 F. Supp. 3d 1235, 1244-45 (D. Utah 2016).
838. But see Hilgenberg v. Elggren & Peterson, 2015 WL 4077765, at *8 (D. Utah 2015) (holding evidence of debt collector law firm placing significant pressure on plaintiff without disclosing firm name or nature of repeated telephone calls created genuine issue of material fact to defeat summary judgment on element of intentional conduct).
Utah courts have had limited opportunities to address and examine the statute of limitations period for violations under the UCSPA, which requires an action to be brought “no later than five years after the day on which the alleged violation occur[ed].” The UCSPA was amended in 2018, amending the statute of limitations to five years, from its previous limitation of two years.

(2) Unconscionable Acts or Practices

Whether alleged conduct rises to the level of unconscionability under the UCSPA is a question of law because it does not require proof of specific intent. Although it is a question of law with a high burden, Utah courts are required to give the parties a “reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.” Utah courts distinguish between procedural and substantive unconscionability, with the former occurring when parties have unequal bargaining position or sophistication, and the latter occurring when conditions oppress or unfairly surprise an innocent party. At least one Utah court has held that sending debt collection letters to and filing and serving two lawsuits at an incorrect address was not unconscionable under the UCSPA.

(3) Truth in Advertising

Utah’s strongly correlated statute governing deceptive advertising, the Truth in Advertising Act (TIAA) has been narrowly interpreted to cover only false advertisements that originate in Utah and target consumers in Utah, and to false advertisements that originate outside of Utah but that specifically target Utah consumers. In 2019, the U.S.

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841. **Utah Code Ann.** § 13-11-5(2); see also Gallegos, 169 F. Supp. 3d at 1245 (holding standard for proving unconscionability is “high”).
844. Vivant, Inc. v. Alarm Prot., LLC, No. 2-14-cv-441, 2016 WL 146454, at *3 (D. Utah Jan. 12, 2016) (granting motion to dismiss TIAA claim because complaint did not allege false advertisements originated in Utah or were specifically directed at Utah consumers); see also Singer v. Am. Express Centurion Bank, 2018 WL 2138626 *5 (S.D. N.Y. 2018)
District Court for the District of Utah held that conduct covered by the TIAA is not necessarily limited by the definition of “advertising” as expressly defined by the statute, holding door-to-door conversations may also be covered by the statute.845

b. Private Enforcement and Remedies

Class actions may be brought under the UCSPA in limited circumstances. A class seeking monetary damages under the UCSPA is appropriately certified only when the alleged conduct is prohibited by an administrative rule, judicial decision, or consent judgment.846

The UCSPA provides that a court may award attorney’s fees to the defendant if the consumer complaining of an alleged violation of the act brought or maintained the action he knew to be groundless.847 For a court to award fees, it must find that the record evidence demonstrates that the case was brought without basis or brought in bad faith or for improper purpose.848

c. Government Enforcement and Remedies

Section 13-11-17 of the UCSPA governs actions brought by the enforcing authority and sets forth available remedies. In 2017, the Utah legislature amended this section to allows court to impose penalties or fines after consideration of eight enumerated factors, including the seriousness and persistence of the conduct, the harm resulting from the violation, level of corporation by the offending party, efforts by offending party to prevent future violations and mitigation of harm, and other matters as justice may require.849

846. Roberts v. C.R. England, Inc., 318 F.R.D. 457 (D. Utah 2017) (certifying class of independent contractor truck drivers because common issues of law and fact existed, including whether purchase was a consumer opportunity, whether recruiting materials were deceptive, and whether defendant concealed certain facts regarding success and pay).
847. UTAH CODE ANN. § 13-11-19(5).
46. Vermont

a. Scope of the Statute and Elements of a Cause of Action

In 2018, the Vermont legislature made various amendments to the Vermont Consumer Protection Act (the “VCPA”). In section 2480b, the legislature added further requirements surrounding credit reporting agencies’ responsibility to disclose consumer information. Section 2480h was amended to adjust rules regarding security freezes a Vermont consumer may place on his credit report. Finally, sections 2482h through 2482j were changed to address credit card terminal finance leases, including issues related to solicitation and material misrepresentations.

Also in 2018, the Vermont legislature began amending the VCPA to respond to developing issues related to online consumer protection. In section 2466c, the legislature paved the way for the attorney general to review the network practices of internet service providers and make a determination about whether the provider’s broadband internet access complies with the Federal Communications Commission’s open internet rules.

In 2019, the Vermont legislature made other significant amendments to the VCPA, prioritizing online consumer protection. The new amendments require third-party data brokers and their counterparts to be more transparent when collecting, buying or reselling consumer data.

The most significant changes are captured in subchapter 3 of the VCPA concerning fair credit reporting. Section 2480a, the definitional section of subchapter 3, grew from seven to nineteen subparts in an effort to simplify the concept of fair debt collection for consumers, in particular minors, protected persons and incapacitated persons.

Perhaps most significant, section 2480a addresses credit reports and permitted fair credit reporting practices by credit reporting

857. Id. § 2480a (14).
858. Id. § 2480a (7), (12).
859. Id. § 2480a (3).
agencies. The section establishes security freezes for consumer data and prohibits consumer reporting agencies from releasing sensitive consumer information to questionable internet sources, especially information concerning protected consumers. Section 2480a also carves out the role of representatives who can act on behalf of protected consumers and clarifies what is accepted as proper identification, sufficient proof of identification, proper authority and sufficient proof of authority in the context of anti-fraud due diligence checks. Furthermore, the section clarifies permitted treatment of consumer files by credit reporting agencies, investigative credit reports, use of personal information and records and defines identity theft. Notably, Vermont courts have not yet addressed these increased rules concerning online consumer protection.

Other significant amendments to the VCPA that went into effect as of January 1, 2019 include section 2454a, which prohibits the automatic renewal of consumer contracts without a consumer’s express consent and section 2483, which addresses credit protections for minors and prohibits consumer reporting agencies from charging fees for credit freezes requested on behalf of minors.

b. Private Enforcement and Remedies

With the addition of the credit card terminal finance lease provisions in the VCPA, consumers are provided with additional private enforcement remedies. Specifically, under section 2482i, a lessee retains

860. *Id.* § 2480a (4).
861. *Id.* § 2480a (17).
862. *Id.* § 2480a (13).
863. *Id.* § 2480a (12).
864. *Id.* § 2480a (16).
865. *Id.* § 2480a (11).
866. *Id.* § 2480a (19).
867. *Id.* § 2480a (10).
868. *Id.* § 2480a (18).
869. *Id.* § 2480a (5).
870. *Id.* § 2480a (8).
871. *Id.* § 2480a (9) (A)-(C).
872. *Id.* § 2480a (15).
873. *Id.* § 2480a (6).
874. VT. STAT. ANN. tit. 9, § 2454a.
875. VT. STAT. ANN. tit. 9, § 2483.
the right to cancel a finance lease.\textsuperscript{876} Should the lessee exercise his or her right to cancel, the lessor may retain any payments by the lessee and may impose a reasonable cancellation fee.\textsuperscript{877}

Case law confirms that other provisions in the VCPA allow for private enforcement remedies.\textsuperscript{878} The most important requirement for potential of a private enforcement remedy under the VCPA is whether the individual bringing the action is actually a consumer.\textsuperscript{879} Indeed, the purpose of the VCPA is to protect citizens from unfair and deceptive acts in consumer transactions.\textsuperscript{880} Courts in Vermont, therefore, evaluate each case to determine whether the requirements to bring a private right of action under the VCPA have been met. In \textit{MyWebGrocer, Inc. v. Adlife Marketing Communications Co.},\textsuperscript{881} the court held that a website developer sufficiently stated a claim for damages under the VCPA when he alleged that a copyright infringer was engaged in unauthorized commercial practices.\textsuperscript{882} In \textit{Du Grenier v. Encompass Insurance Co}, however, found that an insurance claim did not constitute a consumer act and could not be used to state a claim under the VCPA.\textsuperscript{883}

Vermont courts also allow monetary damages for private enforcement actions.\textsuperscript{884}

c. Government Enforcement and Remedies

The VCPA provides several mechanisms for the Attorney General to review issues related to online consumer protection and enforce acts labeled as deceptive. For example, section 2480b provides the Attorney General may revise the notice requirements for rules regarding disclosure

\textsuperscript{878} Gingra v. Think Fin., Inc., 922 F.3d 112, 124 (2d Cir. 2019) (appeal pending) (noting private enforcement is authorized under the VCPA).
\textsuperscript{879} Messier v. Bushman, 187 A.3d 882, 891 (Vt. 2018).
\textsuperscript{880} Id.
\textsuperscript{881} 383 F. Supp. 3d 307, 314 (D. Vt. 2019)
\textsuperscript{882} 383 F. Supp. 3d at 314.
\textsuperscript{884} Russo v. Navient Sols., 2018 WL 1474354, at *12 (D. Vt. 2018) (holding that economic damages can be awarded under the VCPA in absence of physical harm); see also Centrella v. Ritz-Craft Corp. of Pa., Inc., 2018 WL840041, at * 4 (D. Vt. 2018) (holding the VCPA provides for an award of reasonable attorneys’ fees to plaintiffs who demonstrate a violation of a statute).
of data to consumers. Additionally, those who violate section 2482i of the VCPA regarding credit card terminal finance leases are subject to the attorney general’s ability to impose liability on unfair and deceptive practices.

47. Virginia

a. Scope of the Statute and Elements of a Cause of Action

The Virginia Consumer Protection Act (VCPA) now prohibits sixty-two “fraudulent acts or practices committed by a supplier in connection with a consumer transaction.”

The seven prohibited practices added by amendment relate to a supplier (1) failing to give notice or disclosure to a consumer when required to do so by the Federal Trade Commission Holder Rule (the “FTC Holder Rule”), 16 C.F.R. Part 433, (2) engaging in fraudulent, improper or dishonest conduct while engaged in a transaction initiated during a declared state of emergency, or to repair damage resulting from an event that prompted the declaration of emergency, regardless of whether the supplier is a licensed contractor; (3) violating statutes pertaining to home service contract providers, including requirements relating to registration and bonding; (4) violating criminal statutes involving (i) receipt of money or other property by false pretense, (ii) receipt of money or other thing of value from someone who suffers from a mental incapacity, with intent to permanently deprive, or (iii) receipt of an advance of money or other thing of value upon a promise to perform construction services, and then failing to perform or return the advance; (5) violating statutes relating to automatic renewal and continuous service offers, including requirements for disclosure and affirmative consent; (6) violating certain advertising restrictions applicable to use of the results of any survey, inspection or investigation of a nursing home or certified nursing facility conducted by a state or

885. VT. STAT. ANN. tit. 9, § 2480b(e).
886. VA. CODE §§ 59.1-196 et seq.
887. VA. CODE § 59.1-200(A).
888. VA. CODE § 59.1-200(A) (13a).
889. VA. CODE § 59.1-200(A) (55).
890. VA. CODE § 59.1-200(A) (56).
891. VA. CODE § 59.1-200(A) (57).
892. VA. CODE § 59.1-200(A) (57)
federal agency;\textsuperscript{893} and (7) violating any provision of § 54.1-111 relating to unlicensed activity as a contractor, real estate firm, real estate broker, or real estate salesperson.\textsuperscript{894}

The Virginia Supreme Court decided a previously open question in 2015 when it concluded that “a plaintiff must prove a violation of the VCPA by a preponderance of the evidence rather than by clear and convincing evidence.”\textsuperscript{895}

In a 2016 unpublished opinion, the Virginia Supreme Court addressed the pleading requirements applicable to fraudulent conveyance claims. After noting that “Code § 55-80 allows for the voiding of conveyances completed with intent to delay or hinder in addition to those completed with fraudulent intent,” the court held that the trial court “erred in ruling that [the plaintiff] was required to plead a claim for fraudulent conveyance under Code § 55-80 with the same level of specificity as common law fraud.”\textsuperscript{896} This situation is analogous to that involving VCPA claims. By rule, the citation of judicial opinions that are not officially reported, including unpublished opinions, “is permitted as informative, but shall not be received as binding authority.”\textsuperscript{897}

Although the VCPA generally provides plaintiff consumers (and government enforcers) with claims against “suppliers” for fraudulent acts or practices committed in connection with “consumer transactions,” there is now authority that plaintiffs may pursue direct VCPA claims against the holder assignee of a supplier in situations covered by the FTC Holder Rule.\textsuperscript{898} This decision overruled a prior decision by the same judge of the same court.\textsuperscript{899}

Two circuit courts addressed the “small loan company” exclusion found in § 59.1-199(D) of the VCPA and came up with different conclusions. One court found that the exclusion applies to such companies “only if they are already regulated and supervised by the [State Corporation Commission] or a comparable federal regulating

\textsuperscript{893} Va. Code § 59.1-200(A) (59)
\textsuperscript{894} Va. Code § 59.1-200(A) (60)
\textsuperscript{895} Ballagh v. Fauber Enters., 773 S.E.2d 366, 370 (Va. 2015).
\textsuperscript{897} Rule 5:1(f) of the Rules of Supreme Court of Virginia.
body.”900 The other court construed the exclusion more narrowly concluding that the qualifying phrase at the end of § 59.1-199(D) [“regulated and supervised by the State Corporation Commission or a comparable federal regulating body”] “only applies to “insurance companies, which directly precedes it.”901

b. Private Enforcement and Remedies

As a general rule, courts must “rigorously enforce arbitration agreements according to their terms,” in accordance with a “liberal federal policy favoring arbitration.”902 There are, however, limits to this rule. Although “parties are free within bounds to use a choice of law clause in an arbitration agreement to select which local law will govern the arbitration … a party may not underhandedly convert a choice of law clause into a choice of no law clause – it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject.”903

c. Government Enforcement and Remedies

The VCPA gives various state government actors, including the attorney general, local prosecutors (known in Virginia as Commonwealth’s Attorneys), and the attorney for any city, county or town, authority to enforce its provisions.904 In addition to its enforcement role, the Commonwealth, through its attorney general, has the ability to file a brief amicus curiae, without leave of court, in private plaintiff VCPA matters (as well as all other matters) pending before the Virginia Supreme Court.905

The attorney general is authorized to issue civil investigative demands (a precomplaint subpoena) when he has “reasonable cause” to

904. VA. CODE § 59.1-203(A).
believe any person “has engaged in, is engaging in, or is about to engage in, any violation of [the VCPA].” Although a recipient may file a petition to modify or set aside the CID, one circuit court has ruled that a recipient has no ability to compel the attorney general to enter into a confidentiality agreement.

48. Washington

a. Scope of the Statute and Elements of a Cause of Action

The Washington Supreme Court has confirmed that the Consumer Protection Act (CPA) does apply extraterritorially. In *Thornell v. Seattle Service Bureau*, the Washington Supreme Court held that a non-resident of Washington can sue a Washington resident under the CPA for acts committed outside of the state of Washington and impacting only non-residents of Washington. The court arrived at that conclusion because of the liberal construction of the CPA, agreeing with the reasoning of its earlier vacated opinion that expressly required victims to be Washington residents. In *Thornell*, the Washington Supreme Court also extended the CPA’s reach to an action brought by non-residents of Washington against other non-residents for the acts of the defendant’s in-state agent. Violations can also result in civil penalties of up to $2,000 for each violation of the CPA. In *State v. Mandatory Poster Agency*, the Washington appellate court affirmed penalties in the amount of $793,540 for 79,354 misleading mailings. In *State v. Arlene’s Flowers, Inc.*, the Washington Supreme Court held that individuals may be personally liable for a CPA violation.

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906. VA. CODE § 59.1-201.1.
907. VA. CODE § 59.1-9.10(F).
909. WASH. REV. CODE §§ 19.86.010 et seq.
910. 363 P.3d 587 (Wash. 2015).
911. *Id.* at 589; cf. Trader Joe’s Co. v. Hallatt, 835 F.3d 960 (9th Cir. 2016).
914. WASH. REV. CODE § 19.86.140.
916. *Id.*
917. 441 P.3d 1203, 1236-37 (Wash. 2019).
committed by a business if the individuals participate in or approve the violating conduct, even if there are no grounds for piercing the corporate veil. Following its seminal decision in Bain v. Metropolitan Mortgage Group, the Washington Supreme Court continued to expand CPA remedies available to homeowners who go through non-judicial foreclosure proceedings. In a series of cases, the court confirmed that non-judicial foreclosure claims are actionable under the CPA even if the proceedings do not result in a foreclosure sale.

(4) Exemptions

Since its decision in Grandee v. LDL Freedom Enterprises, which effectively adopted the U.S. Supreme Court’s decision in AT&T Mobility LLC v. Concepcion, two Washington courts of appeal have applied Concepcion to require arbitration of CPA claims.

b. Private Enforcement and Remedies

In a case answering questions certified by a United States District Court, the Washington Supreme Court held that injury and causation do not need to be proved to receive damages under the CPA when there is a statutory liquidated damages provision. While acknowledging that the CPA requires proof of injury to a private plaintiff’s business or property as well as causation, the statute in question restricting unsolicited emails satisfied those elements by providing for damages in the amount of $500 or actual damages, whichever is greater.

c. Government Enforcement and Remedies

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918. Id.
921. 293 P.3d 1197 (Wash. 2013)
925. Id. at 1153-1155.
A private action to enforce a claim for damages under section 19.86.090 must be commenced within four years after the cause of action accrues. However, an action brought by the Attorney General under section 19.86.080 as parens patriae is not subject to the four-year limitation period in the CPA or Washington’s general statute of limitations.

49. West Virginia

a. Scope of the Statue and Elements of a Cause of Action

In 2015 and 2017, sections of the West Virginia Consumer Credit and Protection Act (CCPA) were amended and reenacted.

The CCPA does not apply to “acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement,” when the person “did not have knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement and did not have a direct financial interest in the sale or distribution of the advertised goods or services.” In 2015, the language “did not prepare the advertisement” was added to the requirements for exemption from the CCPA.

An additional exemption to the CCPA was added for “[t]he obligation of a property owner, lot owner or homeowner in a planned community containing no more than twelve units which is not subject to any development rights or a planned community that provides in its declaration that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed $300 as adjusted pursuant to section one hundred fourteen, chapter one, article thirty-six-b of this code, or the efforts of property owners' associations or homeowners' associations to collect the same to pay dues, assessments, costs or fees of any kind to a property owners' association or homeowners' association[.]”

926. WASH. REV. CODE § 19.86.120.
929. W. VA. CODE §§ 46A-6-101 et seq.
930. W. VA. CODE § 46A-6-105.
931. Id. § 46A-1-105(a) (3).
b. Private Enforcement and Remedies

In addition to previous requirements, in order to bring a private cause of action, the CCPA now provides that no award of damages may be made without proof of out-of-pocket loss.932

In order to maintain an action under Article 2 (Consumer Credit Protection), Article 3 (Finance Charges and Related Provisions) and Article 4 (Regulated Consumer Lender) a plaintiff must provide notice of a right to cure 45 days before filing a lawsuit. If no cure offer is made within the 45-day period, the plaintiff may file a lawsuit. If a cure offer is made, but rejected by the plaintiff, the plaintiff may only be awarded attorneys’ fees in the litigation if the plaintiff is awarded an amount at trial that exceeds the cure offer.933

The amendments also provide that claims arising from “sales, consumer leases or consumer loans, or from sales as defined in Article 6” and “regulated consumer loans” are subject to a four-year statute of limitations from the date the violation occurred, and actions to set aside a foreclosure sale are subject to a one-year statute of limitations.934

A plaintiff may recover actual damages or a $1,000 statutory penalty for a single violation of the CCPA, with an overall award not to exceed “the greater of $175,000 or the total outstanding indebtedness[.]”935 The new law adjusts an award of damages for inflation as of September 1, 2015.936

Civil actions under the CCPA shall be brought “either in the circuit court of the county in which the plaintiff has his or her legal residence at the time of the civil action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the circuit court of the county in which the creditor or debt collector has its principal place of business or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her legal residence.” The CCPA’s venue provisions are exclusive of, and supersede, the venue provisions of any other West Virginia statute or rule.937

Courts in West Virginia continue to review the enforceability of arbitration provisions and provide circumstances in which arbitration provisions are unconscionable. The West Virginia Supreme Court upheld

932. Id. § 46A-6-106(b).
933. Id. § 46A-5-108.
934. Id. § 46A-5-101(1).
935. Id.
936. Id. § 46A-5-106.
937. Id. § 46A-5-107.
a consumer arbitration provision against arguments that it was unconscionable.938 But the federal district court in West Virginia distinguished Nationstar and upheld an arbitration provision. In Goodwin v. Branch Banking and Trust Co.,939 the District Court for the Southern District of West Virginia refused to compel arbitration, holding that an arbitration provision in a Mortgage Loan Agreement was procedurally and substantively unconscionable in that it discouraged consumers from availing themselves of arbitration and “well beyond the reasonable expectations of an ordinary person.”940 The West Virginia Supreme Court has held that when a state circuit court denies a motion to compel arbitration, “the circuit court’s order must contain the requisite findings of fact and conclusions of law that form the basis of its decision.”941 To determine whether an arbitration agreement exists, the court looks to basic contract law for all of the elements of a contract: competent parties, legal subject matter, valuable consideration and mutual assent.942 In 2019, a chapter was added to the CCPA regulating the third-party litigation financing arrangements for consumer litigation.943 Contingent fee arrangements by the consumer’s attorney are not within the scope of the restrictions.944 The law includes registration requirements, numerous prohibitions, and required disclosures.945

50. Wisconsin

a. Scope of the Statute and Elements of a Cause of Action

(2) Fraudulent Representations and Deceptive Trade Practices Act

The Wisconsin Deceptive Trade Practices Act (WDTPA)946 “protect[s] consumers from untrue, deceptive or misleading representations made to promote the sale of a product.”947

940. 2017 WL 960028 at *5.
942. Id. at 92.
944. Id. § 46A-6N-1(3) (B).
945. Id. § 46A-6N-2 through 46A-6N-4.
946. Wis. Stat. §§ 100.01 et seq.
b. Private Enforcement and Remedies

An oft cited 2004 Wisconsin Supreme Court case addressed the issue of non-actionable puffery. *Tietsworth v. Harley–Davidson, Inc.* An oft cited 2004 Wisconsin Supreme Court case addressed the issue of non-actionable puffery. *Tietsworth v. Harley–Davidson, Inc.* The *Tietsworth* court ruled an advertisement claiming a motorcycle engine was a “masterpiece” of a “premium quality” was no more than a vague superlative that could not be verified as true or false. In a 2015 securities action before the Seventh Circuit Court of Appeals, the court distinguished due diligence representations from the representations made in *Tietsworth*, ruling instead that the statements could be seen as technical in nature and not non-actionable puffery.

c. Government Enforcement and Remedies

In *State v. Going Places Travel*, the State filed a forfeiture action against a travel services company and other defendants, alleging they made misrepresentations and failed to disclose required information when selling travel club memberships. Going Places Travel appealed the ordered restitution amount, arguing the amount should have been reduced due to some consumers’ use and satisfaction with the travel club. The court rejected this argument, finding:

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947. Bonn v. Haubrich, 366 N.W.2d 503, 505-06 (Wis. Ct. App. 1985) (holding that the WDTPA applied to representations made in a telephone conversation and was not only intended to apply to a printed advertisement).
948. 677 N.W.2d 233, 246.
949. *Id.*
950. CMFG Life Ins. v. RBS Sec., 799 F.3d 729, 746 (7th Cir. 2015)
951. 864 N.W.2d 885 (Wis. App. 2015).
952. *Id.*
the logical extension of Travel Services’ argument is that, in order to adequately prove the amount of pecuniary loss Travel Services’ customers sustained, the State would have to determine the precise value of any economic benefits each of the 884 club members received, and then subtract those amounts from the costs of membership. However, this would be virtually impossible to accomplish and would be inconsistent with the relaxed standard of proof set forth in Tim Torres.953

Going Places Travel also appealed the lower court’s calculation of violations, which formed the basis for the ordered forfeitures.954 The appeals court upheld the circuit court conclusion that each misrepresentation to an individual consumer, even those contained in subsequent documents obtained as a result of the consumer’s response to Going Places Travel’s mail solicitations, constituted a separate violation.955

51. Wyoming

a. Scope of the Statute and Elements of a Cause of Action

(1) Unfair or Deceptive Acts or Practices

In 2017 certain protections for consumers were added to the Wyoming Consumer Protection Act (CPA)956 to provide for storm damage repair contracts.957 Contractors who offer roof, siding and gutter repairs to owners or possessors of residential real estate must comply with certain solicitation restrictions and disclosure requirements.958 The repair contracts must include the disclosures and provide a statutorily prescribed cancellation notice.959 Consumers are given the right to cancel the repair contract within three business days of the latter of the date it was entered into, or, if the repairs are to be paid with proceeds from an insurance policy, the date that the consumer receives written notice from

953. Id. at 893.
954. Id. at 898.
955. Id. at 899.
956. WY. STAT. ANN. §§ 40-12-101 et seq.
957. WY. STAT. ANN. §§ 40-12-701 to -706.
958. Id. § 40-12-702 to -703.
959. Id. § 40-12-704 to -705.
the insurer that the claim for the intended repair has been denied. Any person who violates the article is subject to the private and class action remedies provided for under section 40-12-108. There is no explicit provision for enforcement by the Wyoming Attorney General.

In 2019, the Wyoming legislature adopted the Wyoming Utility Token Act, which regulates blockchain transactions and requires certain filings with the Wyoming Secretary of State. Blockchain is defined as “a digital ledger or database which is chronological, consensus-based, decentralized and mathematically verified in nature.” A willful failure to comply with that statute is an unlawful practice under the Wyoming Consumer Protection Act (WCPA).

b. Private Enforcement and Remedies

In 2018, the U.S. District Court for the District of Wyoming addressed in two separate orders the availability of the WCPA involving hacking of email accounts and spoofing of emails. As described in one of the court’s orders, scammers hack and monitor emails of real estate agents and title companies. At the last moment before a wire transfer is to be made, the scammers send falsified or “spoofed” emails to the holder or conduit of closing funds with instructions to send the funds to a different account controlled by the scammers. In that case, the consumer/seller sued the title company that followed the scammer’s instructions as well as their real estate agency. The claim against the real estate agency was that it had violated the WCPA when it engaged in an unfair and deceptive practice by failing to employ reasonable and appropriate measures to protect the consumer’s personal information against unauthorized access in allowing the hackers to gain information about the upcoming closing and wire transfer. The district court granted the agency’s motion for partial summary judgment as to the WCPA claim, noting that the WCPA is primarily intended to protect consumers against unscrupulous and fraudulent marketing practices, and an unfair practice is one that offends established public policy or is

960. Id. § 40-12-705(a).
961. Id. § 40-12-706.
963. Id.
964. WYO. STAT. ANN. §§ 40-12-105(a) (xvii).
966. Id. at *3.
immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.\textsuperscript{967} The district court held that the alleged conduct did not fall into those categories and that no Wyoming authority held otherwise.\textsuperscript{968}

The district court specifically distinguished \textit{FTC v. Wyndham Worldwide Corp.}\textsuperscript{969} The district court noted that the plaintiffs cited \textit{Wyndham} for the proposition that a failure to utilize adequate data security measures is an actionable unfair act. The district court stated that (1) \textit{Wyndham} was brought under the FTC Act, which is not identical to the WCPA, (2) \textit{Wyndham} included a deceptive marketing claim, which was not present in the case before it, (3) \textit{Wyndham} was brought by a government actor, and (4) there is a federal circuit split on whether lack of security measures is an "unfair act."\textsuperscript{970}

As to the title company that was alleged to have sent the funds to the scammers’ account, the district court dismissed the WCPA claim, while allowing common law claims to survive.\textsuperscript{971} The plaintiffs had alleged that the title company’s failure to verify the last-minute purported change in wire instructions was an unfair or deceptive act or practice.\textsuperscript{972} The court rejected that argument, stating that the conduct did not involve marketing practices, and was not the type of unfair practice intended to be covered by the WCPA.\textsuperscript{973}

\textsuperscript{967} Id.
\textsuperscript{968} Id.
\textsuperscript{969} 799 F.3d 236 (3d Cir. 2015). This case is discussed in the main volume of Consumer Protection Law Developments (Second) at 138.
\textsuperscript{970} \textit{Nicklas}, 2018 WL 8619646, at *3.
\textsuperscript{972} Id.
\textsuperscript{973} Id.