Litigating Franchise Cases Under Unfair Trade Practices Statutes

Leslie Smith
Foley & Lardner LLP
Miami, Florida

and

Ari N. Stern
Witmer, Karp, Warner & Ryan LLP
Boston, Massachusetts

October 18-20, 2017
Palm Desert, California

© 2017 American Bar Association
# Table of Contents

I. INTRODUCTION .................................................................................................................. 1

II. TYPES OF LITIGANTS UNDER LITTLE FTC ACTS  
    (CONSUMERS VS. COMPETITORS) .................................................................................. 2  
    A. Statutes Where There is No Private Right of Action .............................................. 2  
    B. Statutes Where a Private Right of Action Only Exists for Consumers .............................. 3  
    C. Statutes Where a Private Right of Action Exists for Both Consumers and Competitors ......................................................... 4

III. CLAIMS UNDER LITTLE FTC ACTS .............................................................................. 5  
    A. Claims for Intentional Misrepresentations .............................................................. 5  
    B. Claims for Negligent Misrepresentation ..................................................................... 14  
    C. Claims for Omissions .................................................................................................. 15  
    D. Claims Among Competitors ...................................................................................... 15

IV. INJUNCTIVE RELIEF UNDER LITTLE FTC ACTS .......................................................... 17  
    A. Criteria for Obtaining Injunctive Relief ....................................................................... 17  
    B. Standing to Obtain Injunctive Relief ........................................................................... 18

V. PROOF CHALLENGES UNDER LITTLE FTC ACTS ......................................................... 19  
    A. List of Acts and/or Practices that Are Per Se Unfair and/or Deceptive ...................... 19  
    B. Proving the Act or Practice in Question is Egregious .............................................. 20  
    C. Proving the Defendant’s Knowledge with Respect to Committing an Unfair or Deceptive Act or Practice ................................................................. 21  
    D. Proving the Plaintiff’s Reliance on the Defendant’s Act or Practice ....................... 21  
    E. Proving an Impact on the Public Interest or Good ..................................................... 22
Litigating Franchise Cases Under Unfair Trade Practices Statutes

Leslie Smith
Foley & Lardner LLP
Miami, Florida

and

Ari N. Stern
Witmer, Karp, Warner & Ryan LLP
Boston, Massachusetts

October 18-20, 2017
Palm Desert, California

© 2017 American Bar Association
LITIGATING FRANCHISE CASES UNDER UNFAIR TRADE PRACTICES STATUTES

I. INTRODUCTION

Commencing in the 1960s, consumer advocate groups claimed that traditional common-law contract and tort remedies did not adequately protect consumers. The Federal Trade Commission ("FTC"), with its limited resources and the absence of a consumer private right of action under the FTC Act, encouraged states to fill the void with the passage of legislation designed to provide consumers with a private right of action to pursue unfair and deceptive trade practices.

Since the passage of the 1964 model Uniform Deceptive Trade Practices Act by the National Conference of Commissioners on Uniform State Laws, every state has enacted one or more general consumer protection statutes with almost all of them providing a private right of action. While these "Little FTC Acts" have impacted a variety of industries, their effect on franchising has been undeniable. Franchisee counsel have consistently utilized these statutes to assist their clients in a variety of circumstances, ranging from alleged franchise sales disclosure violations to misconduct in the performance of the franchise agreement itself. Although franchisors less frequently avail themselves of these statutes' protections, there is no question that certain of these statutes can be a powerful weapon against competitors and others who a franchisor claims are improperly intruding on its business.

This paper will explore the nature of claims brought by franchisors and franchisees under these Little FTC Acts, as well as the risks and benefits faced by litigants pursing claims under them. To aid the reader, we have appended a chart to this paper detailing the salient aspects of each state's Little FTC Act for use as a quick reference guide in assessing the merits of, and the pursuit of, claims under these statutes.

---

1 The authors wish to gratefully acknowledge the contributions and assistance of Andrea Picco, Summer Associate at Foley & Lardner LLP, as well as our Forum colleagues, Gary R. Batenhorst, Howard Bundy, John Doroghazi, Bobbi Howell, Peter Lagarias, and Marc Rousseau. In accordance with the policies of the ABA Forum on Franchising, the authors note that they have been involved in the following cases discussed in this paper: Devayatan v. Travelodge Hotels, Inc., No. 6:14-cv-561-Orl-41TBBS, 2016 WL 3477205 (M.D. Fla June 24, 2016) and Le Macaron, LLC v. Le Macaron Dev. LLC, No. 8:16-CV-918-17TGW, 2016 WL 6211718, at *5 (M.D. Fla. Oct. 24, 2016). (Foley and Lardner LLP represented Travelodge Hotels, Inc. and Le Macaron Development, LLC.).


3 There are a number of excellent papers by members of this Forum addressing the nature and scope of claims under Little FTC Acts. See, e.g., Altresha Q. Burchett-Williams, Robert M. Einhorn & Paula J. Morency, Claims Under the "Little FTC Acts" The High Stakes of Risk and Reward, ABA 33rd Annual Forum on Franchising, W-6 (2010); John G. Parker & Angela M. Fifelski, Claims Under Little FTC Acts, ABA 28th Annual Forum on Franchising, W-4 (2005).


5 See Appendix.
II. TYPES OF LITIGANTS UNDER LITTLE FTC ACTS (CONSUMERS VS. COMPETITORS)

A successful Little FTC Act claim can have a significant impact on a defendant's business activities. From draining a defendant of capital on account of an award of treble or enhanced monetary damages, to preventing a defendant from engaging in one or more practices on account of a permanent injunction, a successful unfair or deceptive trade practice claim can result in considerable negative consequences for a defendant.

Additionally, and in the same breath, a successful Little FTC Act claim can provide a monetary windfall for the plaintiff that lodged the case, and in certain circumstances, can benefit others who are not directly involved. For instance, certain state statues enable a plaintiff bringing an unfair or deceptive trade practice claim to file a class action. In other instances, the state attorney general may seek to collect from a defendant on behalf of the aggrieved.

Whether a party may commence a civil action that includes a Little FTC Act claim depends exclusively on the breadth of the applicable state statute. A survey of relevant laws reveals that these statutes will generally fall into one of the following three categories: (1) statutes where there is no private right of action; (2) statutes where a private right of action only exists for consumers; and (3) statutes where a private right of action exists for both consumers and competitors. An examination of each category follows.

A. Statutes Where There is No Private Right of Action

Given the nature of the Iowa Consumer Fraud Act, namely, its role in curtailing unsavory tactics in the marketplace and promoting, by extension, the public good, the Iowa General Assembly determined that it is solely for the state attorney general to determine whether to assert an unfair or deceptive trade practice claim against a particular defendant.

Such is also the case with the Tennessee Consumer Protection Act's "catch-all" provision, where the Tennessee General Assembly determined to vest enforcement "exclusively in the office of the attorney general and reporter and the director of the division."

An individual wishing to have an unfair or deceptive trade practice claim brought against a particular defendant under Iowa law or under the "catch-all" provision of Tennessee law should contact the respective state attorney general's office directly, or preferably, should seek out counsel for the purpose of representing his or her interests before the attorney general's office. Counsel, where appropriate, may also advise an individual to file a parallel case involving relevant common law claims, such as for breach of contract, unjust enrichment, and violation of the covenant of good faith and fair dealing.

Further, and specifically with regard to the "catch-all" provision under Tennessee law, plaintiff's counsel should consider whether the unfair or deceptive trade practice took place prior to October 1, 2011. This date is significant because Tennessee's "catch-all" provision had a private right of action up until that time. If the plaintiff only recently discovered the unfair or deceptive trade practice, and that recent discovery was reasonable under the circumstances, the plaintiff should not be barred from bringing a claim under the statute's "catch-all" provision.

---

6 IOWA CODE § 714.16.
7 TENN. CODE ANN. § 47-18-104(b)(27).
B. Statutes Where a Private Right of Action Only Exists for Consumers

Most state legislatures have determined that not only should a state attorney general have the right to bring a claim pursuant to a Little FTC Act, but so should a private consumer. One such statute, the Idaho Consumer Protection Act, is aptly and concisely described by the U.S. District Court for the Northern District of Indiana in Lynch v. Math-U-See, Inc.9:

The Idaho Consumer Protection Act (ICPA), like the Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 41-77, outlaws certain "unfair methods of competition and unfair or deceptive acts or practices." Idaho Code § 48-603. Idaho Code § 48-603 includes a catchall provision forbidding "[e]ngaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer." Id. § 48-603(17). While the ICPA gives the Idaho Attorney General enforcement powers, id. at § 48-606, 610-12, 616, similar to those given the Federal Trade Commission under the FTCA, 15 U.S.C. § 45-50, 56, the ICPA also provides for a private cause of action under certain circumstances. Idaho Code § 48-606 ("[a]ny person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter, . . . may bring an action to recover actual damages.").9

In Lynch, the defendants contended that the plaintiffs failed to state a claim under the ICPA because of their failure to allege a sale of goods and/or materials to the plaintiffs.10 The magistrate judge, as part of his report and recommendation, nevertheless found that the plaintiffs stated a claim for relief under the ICPA because they alleged that that the defendants not only sold them a franchise in contravention of state disclosure obligations, but that the defendants subsequently proceeded to employ deceptive practices with respect to goods and services that would be provided.11 The district court adopted this part of the magistrate judge's report and recommendation.12

Similarly, in In re Carroll,13 the United States Bankruptcy Court for the Northern District of Texas ruled that the plaintiff was a consumer covered by the Texas Deceptive Trade Practices Act ('TDTPA').14 Under the law, a "consumer" is "an individual . . . who seeks or acquires by purchase or lease, any goods or services . . . "15 The law also defines "goods" as "tangible

---

10 Id. at *7.
11 Id. at *8.
12 Id.
14 Id. at 324-327.
15 Id. at 324 (quoting TEX. BUS. & COM. CODE ANN. § 17.45(4) (West 2007)).
chattels or real property purchased or leased for use," and "services" as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods."

The defendant contended that the plaintiff was not a "consumer" because he purportedly sought an "option" to buy a particular franchise and nothing else. The United States Bankruptcy Court for the Northern District of Texas found otherwise. The court rested its decision, in part, on the fact that the plaintiff's objective in entering into the option contract was for the purchase of a franchise with other goods and services, including "a real property lease, equipment, and services" from the franchisor.

These two decisions, and those like them, do not stand for the proposition that each franchisee is necessarily a consumer that can bring an unfair or deceptive trade practices claim against a franchisor. For instance, in 859 Boutique Fitness LLC v. Cyclebar Franchising, LLC, the United States District Court for the Eastern District of Kentucky considered whether the plaintiff-prospective franchisee had failed to state a claim under the Kentucky Consumer Protection Act where the defendant-franchisor refused to execute the franchise agreement that the plaintiff had signed and revoked its offer of sale. Under Kentucky law, only an individual "who purchases or leases goods or services primarily for personal, family or household purposes" has a private right of action. The district court, based on the express terms of the statute, found in favor of the defendant-franchisor and dismissed the claim. The Sixth Circuit affirmed the district court's decision.

In sum, a plaintiff bringing a private action against a defendant under a statute that falls in this second category should make sure that it meets the requisite criteria for being a consumer. Otherwise, the plaintiff's private action will be subject to dismissal for failure to state a valid claim.

C. Statutes Where a Private Right of Action Exists for Both Consumers and Competitors

The final category of statutes, those where there is a right of action not only for the state attorney general but also for both consumers and competitors, consists of many more statutes than the two present in the first category. Nevertheless, these statutes are fewer in number than those found in the second category. Competitors, therefore, have fewer opportunities to lodge unfair or deceptive trade practices claims as compared to consumers.

---

16 Id. (quoting TEX. BUS. & COM. CODE ANN. § 17.45(1) and (2) (West 2007)).
17 Id. at 325.
18 Id. at 325-27.
20 Id. at *1, *3.
21 Id. at *3 (quoting KRS § 367.220(1)).
22 Id.
A competitor, no different from a consumer, needs to make sure that it meets the requisite criteria for being able to commence a private action. In BABA Lodging, Inc. v. Wyndham Worldwide Operations, Inc.,\textsuperscript{24} for example, the plaintiff-franchisee failed to meet the requisite criteria under the Louisiana Unfair Trade Practices and Consumer Protection Law for commencing a suit against the corporate parent of its franchisor. The law in question is quite expansive, stating, in pertinent part:

Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.\textsuperscript{25}

The plaintiff-franchisee, however, failed to state a claim upon which relief could be granted because it was not an individual consumer or business competitor that was entitled to relief.

In this case, to be more specific, the plaintiff-franchisee commenced an action in the United States District Court for the Western District of Louisiana where it alleged that employees of the corporate parent of its franchisor manipulated certain software that forced the plaintiff-franchisee to pay fees it did not owe or that were excessive, and also diverted customers from the franchisee to others in the system. The district court found that the plaintiff-franchisee, in addition to not being an individual consumer, had not alleged that it was a current (or even potential) rival to the defendant-corporate parent. The plaintiff-franchisee competed against other franchisees in the system, not the corporate parent. Thus, the plaintiff-franchisee did not have standing to bring its unfair or deceptive trade practice claim.

Accordingly, even expansive statutes like Louisiana's Little FTC Act will not allow any type of plaintiff to commence a private action. Defense counsel should closely scrutinize a pleading to determine whether a plaintiff has standing to bring such a lawsuit.

III. CLAIMS UNDER LITTLE FTC ACTS

While the nature of the claims that franchisees and franchisors pursue under Little FTC Acts are as varied as franchises themselves, they fall into four broad categories: (1) intentional misrepresentations; (2) negligent misrepresentations; (3) omissions; and (4) competitor claims.

A. Claims for Intentional Misrepresentations

While the franchise sales process is fertile territory for Little FTC Act claims,\textsuperscript{26} courts often place a high bar on the type of conduct required to successfully mount one of these statutory claims. One strategy franchisee counsel have employed is filing claims under more than one state’s Little FTC Acts to ensure they are not foregoing any available remedies and are


\textsuperscript{25} id. at *4 (quoting LA. REV.STAT. 51:1409(A)).

\textsuperscript{26} See Bethany L. Appleby, Robert S. Burnstein, and John M. Doroghazi, Cause of Action Alchemy: Little FTC Act Claims Based on Alleged Disclosure Violations, 36 Franchise L.J., No. 3 (Winter 2017).
maximizing their chances for success. Even that strategy, however, is not a guarantee of success.

For example, in *Qdoba Rest. Corp. v. Taylors, LLC,* 27 a Florida area developer franchisee sued Qdoba, a Colorado-based franchisor, under both the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") 28 and the Colorado Consumer Protection Act ("CCPA"). 29 Qdoba and its franchisee had entered into 14 franchise agreements as part of their area developer agreement. The franchisee initially opened 11 of the intended 14 restaurants, but later closed seven due to unprofitability. Qdoba filed suit for breach of contract and the franchisee counterclaimed for, *inter alia,* damages under the FDUTPA and CCPA.

The franchisee based its statutory claims, in part, upon alleged misrepresentations appearing on the franchisor's website that "Qdoba restaurants offer an excellent sales-to-investment ratio" and that "Qdoba has seen 33 consecutive quarters of single restaurant growth." The franchisee also alleged that projections provided by Qdoba's real estate representative based on demographic statistics of various locations misrepresented potential sales. In addition, the franchisee alleged that Qdoba's franchise sales representative made statements to the franchisee that it would increase sales because the then-current operating restaurants of the franchisee were underperforming and poorly managed.

Qdoba successfully moved for summary judgment on the franchisee's FDUTPA and CCPA claims. With respect to the website statements, the court found that the franchisee failed to demonstrate that they were false when made or even related the franchisee's locations. Furthermore, the mere fact that franchisee's restaurants were unprofitable was insufficient to support those claims. As for the franchisee's contentions concerning the falsity of the projections, the court ruled that the simple fact that the franchisee's restaurants did not perform commensurate with the projections did not mean that the projections themselves were false. Finally, the court ruled that sales representative's statement regarding increased sales could not support the franchisee's misrepresentation claims because a party may not support a fraud claim by relying on opinions unless the alleged speaker had superior knowledge and knew the opinion was untrue. The court found that even if Qdoba's sales representative possessed superior knowledge, the franchisee's presentation of comparative sales revenues with the average sales by existing franchisor-owned restaurants was deficient.

The importance of careful pleading of claims under *Little FTC Acts* cannot be understated. In *Yumilicious Franchise, L.L.C. v. Barrie,* 30 a frozen yogurt franchisor, Yumilicious, sued its South Carolina-based franchisee, Why Not LLC, for breach of their two franchise agreements. Why Not counterclaimed under a number of theories, including the Texas Deceptive Trade Practices Act. Specifically, Why Not alleged that (1) Yumilicious failed to provide updated disclosures or an updated FDD; (2) the FDD Yumilicious provided did not

---


28 To establish a FDUTPA claim, a plaintiff must prove three elements: (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages. FLA. STAT. § 501.203.

29 To establish a claim under the CCPA, a private citizen must prove five elements: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the deceptive trade practice occurred in the course of the defendant's business; (3) the deceptive trade practice significantly impacted the public as actual or potential customers of the defendant's business; (4) the plaintiff suffered an injury to a legally protected interest; and (5) the deceptive trade practice caused the plaintiff's injury. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).

30 819 F.3d 170 (5th Cir. 2016).
contain disclosures regarding approved vendors or distributors for required products; (3) the FDD underestimated start-up costs; and (4) the FDD included some, but not all, financial performance information. Why Not further alleged that Yumilicious’ CEO advised that the company was preparing “to go national and supply products to stores outside Texas” and gave repeated assurances that Yumilicious was in the process of negotiating a contract with a national distributor who would offer fair shipping costs. Yumilicious moved to dismiss the TDTPA claim because it failed to state a claim under the Act. The district court agreed.

In upholding the dismissal of the claim, the Fifth Circuit Court of Appeals noted that the TDTPA “makes it illegal for a seller or franchisor to ‘represent[] that goods or services have ... characteristics [or] benefits ... which they do not have’ or to ‘fail[] to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.” As such, the TDTPA bans both misrepresentations and omissions. Despite the broad reach of the Act, the appellate court held that Why Not had failed to allege a deceptive trade practice because its complaint did not assert that Yumilicious knew any details about the costs and financial performance items in the FDD that it failed to disclose. Moreover, since Why Not was aware that it would have to obtain supplies from the franchisor's current supplier in pallet size orders, Why Not had not adequately alleged any illegal omissions. Finally, the court observed that the CEO’s statements regarding the negotiations with a national supplier were true at the time they were made, and merely because those negotiations ultimately failed did not render the statements regarding them false at the time of their making.

The Fifth Circuit summed up the franchisee’s further pleading deficiencies as follows:

Even if Yumilicious’ conduct during negotiations did constitute a deceptive trade practice under the Texas DTPA, Why Not would also have to show that: (1) Why Not is a consumer protected by the DTPA; (2) Why Not relied on the information provided by Yumilicious in the Franchise Disclosure Documents; and (3) Why Not suffered injury as a result of its reliance on the information. Tex. Bus. & Com.Code § 17.50. Why Not pleaded none of these elements required for a valid cause of action. Dismissal with prejudice was appropriate. 33

Another challenge for parties seeking redress under Little FTC Acts are legislatively imposed limits on the intended reach of these statutes. One such example is Free Green Can, LLC v. Green Recycling Enters., LLC, 34 which involved a franchisor of dual purpose trash and recycle bins. Free Green Can franchisees would place the bins for free at "host sites" and sell advertising rights on the bins to third parties who would receive a share of the advertising revenues. Free Green Can became embroiled in a dispute with its Nebraska franchisee who claimed it had a right of first refusal to establish franchises in other states. The franchisee further claimed that Free Green Can had misrepresented to it that it could place the bins in any

31 Id. at 175.
33 Id. at 176.
other state where Free Green Can did not already have a franchise. Free Green Can filed suit in the U.S. District Court for the Northern District of Illinois and alleged its franchisee was in violation of the Lanham Act, was engaging in unfair competition, and further had breached its contract. Free Green Can sought injunctive relief and damages, as well as declaratory relief concerning the parties’ franchise agreement.

The franchisee counterclaimed and alleged violations of, *inter alia*, the Nebraska Consumer Protection Act ("NCPA") and the Nebraska Deceptive Trade Practices Act ("NDTPA") for failure to complete franchise disclosures required under Nebraska law. The franchisee further claimed that it was induced to become a Free Green Can franchisee based upon alleged misrepresentations made by the franchisor concerning its rights to place bins outside of Nebraska. Free Green Can moved to dismiss the NCPA claim.

The district court noted that Nebraska’s Supreme Court had held that the NCPA only reaches conduct that “directly or indirectly affect[s] the people of the State of Nebraska.” Because the franchisee had failed to allege that any purported wrongdoing by Free Green Can had any direct or indirect impact on Nebraska consumers as required under the NCPA, the court dismissed the claim. The franchisee’s NDPTA was similarly doomed. Although Free Green Can had informed the franchisee that it could not place cans in Minnesota, this allegation, standing alone, was insufficient to establish how the act of doing so was fraudulent. Accordingly, the franchisee’s NDPTA claim was likewise dismissed.

Even conduct that can appear quite egregious may still not meet the sometimes high bar of a particular state’s Little FTC Act. Such was the case in *Schwartzco Enters. LLC v. TMH Mgmt., LLC*.35 Schwartzco, the franchisee of an upscale butcher franchise, Meat House, along with its principal Arnold Schwartzco, sued its franchisor, Meat House Franchising, LLC ("MHF"), a New Hampshire-based franchisor and its managing member, Thomas Brown. Schwartzco purchased a MHF franchise along with area developer rights and invested more than $2 million in the business, but its only location in Roslyn, New York failed after less than ten months of operations.

After unsuccessfully invoking the franchise agreement’s alternative dispute clause, Schwartzco filed suit in the Eastern District of New York and brought a number of claims, including under New York’s Consumer Protection Act ("NYCPA"). Although MHF defaulted, Brown moved to dismiss the plaintiffs’ claim under Federal Rule of Civil Procedure 9(b) for failure to plead with the requisite particularity. The plaintiffs amended their complaint, and Brown again moved to dismiss, challenging the amended complaint’s “group pleading” allegations.

The plaintiffs alleged that the defendants “used false, inflated, and misleading cherry-picked information, and generated numerous fraudulent financial spreadsheets and financial statements about the Meat House’s current business and profitability (including false earnings claims), and what Plaintiffs could expect to generate in New York, with [the] Defendants operating the business.”36 In examining whether Brown’s acts or practices were materially misleading under the NYCPA, the court stated that in order to state a claim under the Act, a plaintiff must allege: (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result. The court noted that a plaintiff is not required to demonstrate that the defendant acted intentionally or with

---

35 60 F. Supp. 3d 331 (E.D.N.Y. 2014).
36 Id. at 340-341.
scienter because the Act was designed to extend “well beyond common law fraud to cover a broad range of deceptive practices.” As such, it is not necessary to plead with the particularity requirements of Rule 9(b), as long as the claim meets the notice pleading requirements of Rule 8(a). Despite the lesser pleading standard, the court found that the plaintiffs failed to state a claim under the Act. Even though they alleged that the defendants’ conduct “impacted[ed] the public” and “damaged other similarly situated New York consumers,” the court held that such broad statements failed to state with particularity how the public was injured. Moreover, the court observed that because the franchise was purchased as an investment, rather than as a good or service to be consumed, it fell outside the Act’s protections.

The district court also dismissed the plaintiffs’ claim under the New Hampshire Consumer Protection Act (“NHCPA”). While noting that the statute provided a non-exclusive list of prohibited conduct, the statute only precludes those “types” of acts that fall within the ambit of the enumerated categories. In this case, the court observed that the essence of the amended complaint was that the defendants “pitched certain investment ventures directly to the Plaintiffs, and induced them to invest by making false and misleading representations about the financial profitability of The Meat House franchise system and the Plaintiffs’ ability to obtain a return on those investments.” From the court’s perspective, these allegations failed because they did not fall within ‘the type’ of conduct proscribed by the NHCPA.

Like the litigants in Schwartzco, the public versus private harm that many Little FTC Acts seeks to redress was a challenge for franchise investors in Ammirato v. Duraclean Int’l, Inc. In Ammirato, the franchisor of the Duraclean system found itself entangled in a lawsuit brought by five private lenders. One of Duraclean’s franchisees, Steven Diaz (“Diaz”) had obtained loans from four teachers and coaches at the school district his children attended that totaled $750,000.00. As part of his pitch to these lenders, Diaz claimed to be building a “National Team of Duraclean Specialists” for large scale cleaning projects. At the time he solicited these loans, Diaz was a 50% shareholder in Duraclean International, the franchisor, in addition to operating his own Duraclean franchise. After the franchisee defaulted under the loans, the plaintiff lenders filed suit for breach of contract, RICO, and violation of the New York Deceptive Trade Practices Act (“NYDTPA”). Duraclean International moved for summary judgment on all claims. The U.S. District Court for the Eastern District of New York found issues of facts as to whether Duraclean International was either the recipient or ultimate beneficiary of the loan proceeds that precluded summary judgment on the contract claim. The court, however, entered summary judgment in favor of Duraclean International on the plaintiffs’ other claims. With respect to the NYDTPA claim, the court noted that the statute provides that “deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state are hereby declared unlawful.” As such, the statute contains a “consumer-oriented” requirement that mandates “harm to the public at large.” Since the NYDPTA claim asserted here involved solely

37 Id. at 359.
38 Id. at 360.
39 Id. at 364.
40 Id.
42 N.Y. GENERAL BUSINESS LAW § 349(a).
43 Id. at 221.
private transactions, the court ruled that it was a “private contract dispute unique to the parties” and would therefore not “fall within the ambit of the statute.” The court further held that the complaint failed to allege sufficient facts to support a RICO claim.

Another common challenge claimants face when asserting claims under Little FTC Acts is one frequently faced by claimants asserting common law fraud claims: a difference between representations of facts versus mere opinion. The failure to appreciate this difference was fatal to a franchisee’s Little FTC Act claim in ProShred Shredding of Wls., Inc. v. ProShred Franchising Corp. ProShred franchisees James and Teresa Klemes (“the Klemes”) entered into a franchise agreement to operate a paper shredding business in North Carolina. The business was unsuccessful, and the Klemes filed a complaint against ProShred in the U.S. District Court for the Southern District of New York alleging a host of claims including violations of North Carolina Deceptive Trade Practices Act (“NCDTPA”).

Underlying their claims were allegations that ProShred made various pre-sale representations as to how many franchises the system would have in the future, the financing that ProShred would provide, that ProShred franchisees could expect a positive return on their investment in eighteen months, that the ProShred system was “proven and perfected,” that ProShred imposed a minimum performance level on franchisees, that the franchisee would be debt-free in forty-eight months, and that the franchisee could expect to have thirty sales a month per salesperson.

After analyzing each of these statements, the court concluded that none of them supported a claim under NCDTPA because they were either future predictions or “puffery.” The court held that only current and past facts, not future predictions, could form the basis for either fraudulent or negligent misrepresentation claims. Because the Klemes’ claims were not based on the misrepresentation of current or past facts, the court dismissed the NCDTPA claim.

When franchisees pursue Little FTC Act claims against their out-of-state franchisors, they are often surprised to discover that their home state’s Little FTC Act may not protect them. In Sherman v. PremierGarage Sys., LLC, the Arizona district court engaged in a classic choice of law analysis to bar a Florida based franchisee’s claim under FDUTPA and the Florida Franchise Act. The franchisee, the Shermans, purchased a PremierGarage franchise, in part, based on representations made by PremierGarage executives that its floor coating product had been “thoroughly tested,” that it could be installed in one day, and that it would not peel, flake, or fail to adhere to garage floors. However, shortly after they purchased a second Florida franchise, the Shermans began experiencing issues with PremierGarage’s products. As a result of these issues, the Shermans claimed that the amount of revenues that had to be directed to correct these issues led to severe operating losses. The Shermans filed suit in the U.S. District Court for the District of Arizona for, *inter alia*, violations of FDUTPA and the Florida Franchise Act.

Arizona-based PremierGarage contended that the franchisee’s Florida statutory claims were precluded by the choice of law provision under the parties’ agreements, which called for them to be interpreted and governed under Arizona law. The Shermans urged the court to

---

44 *Id.*
consider that under the Restatement (Second) of Conflict of Laws § 187, application of Arizona law would be contrary to the fundamental public policy of Florida to protect franchisees within that state’s boundaries. The court disagreed, finding that despite FDUTPA’s language impliedly prohibiting liability limitations, if the agreements’ choice-of-law provisions were enforced, the Shermans could bring suit for the same alleged misconduct under Arizona’s Consumer Fraud Act.47 As further support for its holding, the court observed that the majority of the alleged misrepresentations took place in Arizona or Nevada, and that the parties’ franchise agreements were signed in Arizona. The court observed that the Florida Franchise Act did not contain an anti-waiver provision, and thus the parties could contractually agree to the application of another state’s laws. For these reasons, the court dismissed the Sherman’s Florida statutory claims.

Even when franchisees seek to avail themselves of the protections of Little FTC Acts in their franchisor’s home state, favorable results are not necessarily assured. In Red Lion Hotels Franchising, Inc. v. MAK LLC,48 the Ninth Circuit examined the interplay between the Washington Franchise Investment Protection Act (“FIPA”), which prohibits certain unfair or deceptive acts and practices and unfair methods of competition, and Washington’s Consumer Protection Act (“CPA”). Under the CPA, FIPA violations are deemed to be per se unfair trade practices. This dispute arose after Red Lion terminated one its California franchisees and filed suit to collect damages under the franchise agreement and personal guarantees. The franchisee counterclaimed for violations of FIPA’s “franchisee bill of rights” and of the CPA, as well as breach of the franchise agreement, which contained a Washington choice of law provision.

The issue before the district court was whether an out-of-state franchisee could assert a claim against Red Lion, a Washington-based franchisor, under the “bill of rights” section of FIPA. The district court ruled that an out-of-state franchisee may not assert such a claim against a Washington franchisor.49 The franchisee appealed the district court’s grant of summary judgment to Red Lion on the FIPA counterclaim based on its finding that the “FIPA does not apply extraterritorially.” The district court further granted Red Lion’s summary judgment on the CPA counterclaim because it was predicated on the FIPA. Following a bench trial, Red Lion also prevailed on its breach of contract claim.

On appeal, the Ninth Circuit reversed in part, noting that unlike other provisions of FIFA that expressly apply to actions “in this state,” “FIPA’s bill of rights does not contain . . . language limiting its application to the relation between a franchisor and franchisee ‘in this state.’”50 The court further noted that other FIPA provisions contain an express statement indicating that they apply to actions “in this state,” meaning the state of Washington. Finding that “the inclusion of explicit territorial limitations in the sale-related provision and the failure to include such a limitation in the bill of rights” suggested “that the Washington legislature made a deliberate choice to impose territorial limitations on some, but not all, of FIPA’s provisions.”51 From a policy standpoint, the court said it was “easy to see why the Washington legislature might have wanted to apply FIPA’s bill of rights to all . . . franchisees of Washington franchisors,” and gave as an

47 ARIZ. REV. STAT. § 44-1522, et seq.
48 663 F.3d 1080 (9th Cir. 2011).
49 id. at 1083.
50 id. at 1087.
51 id. at 1089.
example the desire "to reassure potential out-of-state franchisees that they [would] be fairly treated by, and thereby encourage them to do business with Washington franchisors."\(^{52}\)

In remanding the case, the appellate court directed the district court to consider the merits of the franchisee’s FIPA counterclaim and determine whether the franchisee is entitled to relief under the CPA, which provides the sole remedy for a violation of FIPA’s bill of rights. Significantly, the appellate court noted that although the Washington Supreme Court had held that claims under the CPA are "limited to claims brought by Washington residents," that court had later withdrawn that portion of its opinion, and therefore the territorial scope of the CPA remained "an open question."\(^{53}\)

While not an insurmountable obstacle, some Little FTC Acts have pre-suit notice requirements that a plaintiff must meet prior to commencing litigation. In *Patel v. Holiday Hospitality Franchising, Inc.*,\(^{54}\) a terminated franchisee filed suit against the franchisor of the Holiday Inn system under the Texas DTPA. The franchisee claimed that the franchisor intentionally misrepresented during pre-sale negotiations that the franchisor would waive certain property improvement requirements under franchise agreement. After the agreement became effective, the franchisee claimed that the franchisor ignored the promised waivers and pretextually terminated the agreement in an effort to collect liquidated damages.

Prior to reaching the merits of the Texas DTPA claim on the franchisor’s motion to dismiss, the district court observed that the statute requires a plaintiff to provide a defendant with written notice at least 60 days prior to filing suit.\(^{55}\) Since neither of the two statutory exceptions applied (where the statute of limitations would run and the Texas DTPA claim is raised as a counterclaim), the court held that the proper remedy was not dismissal, but abatement.

While most franchisee claims pursued under Little FTC Acts concern the franchise sales process, claims arising under the performance of the franchise agreement also occur. In *Broussard v. Meineke Discount Muffler Shops, Inc.*,\(^{56}\) the plaintiff class was comprised of Meineke franchisees whose franchise agreements required them to pay a portion of their revenues into an advertising account to be used solely for franchisee advertising. Despite the contractual limitations on the use of the funds, Meineke allegedly removed funds from the account and used them for other purposes, including its own purposes.\(^{57}\) The action proceeded to a jury trial, including the franchisees’ claim under the North Carolina UTPA, which ultimately resulted in a judgment of $590,869,788.00 being entered against Meineke.

Meineke appealed to the Fourth Circuit, which reversed. The appellate court held that the district court erred when it allowed the plaintiffs “to advance tort and UTPA counts

\(^{52}\) *Id.* at 1091.


\(^{54}\) 172 F. Supp. 2d 821 (N.D. Tex. 2001).

\(^{55}\) TEX. BUS. & COM. CODE § 17.505(a).

\(^{56}\) 155 F.3d 331 (4th Cir. 1998).

\(^{57}\) *Id.* at 335.
paralleling their breach of contract claims. In reviewing North Carolina law, the appellate court observed that the law in the state is different between contract and deceptive trade practice claims, and relegates claims regarding the existence of an agreement, the terms contained in an agreement, and the interpretation of an agreement to the arena of contract law. Because Meineke’s use of the franchisees’ funds for extra-contractual purposes constituted claims sounding fundamentally in contract, rather than tort, the appellate court reversed and remanded for further proceedings. In so doing, the appellate court warned the district court that “[i]f Meineke has failed to fulfill its contractual obligations, the remedy is contract damages, not the blank check afforded to juries when they are authorized to return a punitive award.”

The contract versus fraud prism through which the Meineke court viewed the franchisee’s claim was equally evident in Cooper v. Primary Care Solutions, Inc. In Cooper, the plaintiffs alleged that they were induced to enter into a franchise agreement without receiving the FTC Franchise Rule’s required disclosures, and they asserted claims for, inter alia, violations of the Federal Trade Commission Act, as well as the Louisiana Unfair Trade Practices Act (“LUTPA”). In response, the defendants moved to dismiss the complaint, including the LUTPA claim on the grounds that it failed to state a claim.

The court noted that while the LUTPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...” the determination of what is an ‘unfair trade practice’ has been left largely to the courts to decide on a case-by-case basis. Louisiana courts have held that a party bringing a LUTPA claim must prove “some element of fraud, misrepresentation, deception, or other unethical conduct” on the part of the defendant. The court was persuaded that under case law from both the Louisiana Supreme Court and Fifth Circuit, that “the range of prohibited practices under LUTPA is extremely narrow,” and that “the statute does not provide an alternate remedy for simple breaches of contract. There is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes for simple breaches of contract.”

Against this legal backdrop, the district court found that the plaintiffs’ reliance on the franchisor’s alleged failure to provide an FDD as a basis for their LUTPA claim was still insufficient to support their claim. The court noted that “although Federal Trade Commission regulations provide that it is an unfair or deceptive act or practice for a franchisor to fail to provide the franchisee with a disclosure document”, the court would be “bound to follow the

58 Id. at 346.
59 Id.
60 Id. at 347. Cf. Hometown Pub’g, LLC v. Kidsville News!, Inc., No. 5:14-CV-76-FL, 2015 U.S. Dist. LEXIS 318 (E.D.N.C. January 5, 2015) (Allowing claim under the NC UTPA to survive a motion to dismiss where the defendants’ failure to provide an FDD did not require the plaintiff to allege aggravating or egregious circumstances as the “disclosures required under the [FTC] Franchise Rule do not form part of the underlying contract. Instead, the disclosure requirement arises from federal law, which provides that the failure to disclose is in itself an unfair or deceptive act.” 18 C.F.R. § 436.2).
62 LA. REV. STAT. § 51:1405(A)
63 Id. at 8.
64 Cheramie Servs., Inc. v. Shell Deepwater Production, Inc., 35 So. 3d 1053, 1060; Turner v. Punna Mills, Inc., 989 F.2d 1419, 1422 (5th Cir. 1993).
holding of *Leblanc*\(^{65}\) that the failure to provide a disclosure document is not *per se* violative of [LUTPA] because an unfair trade practice requires a showing of fraud, misrepresentation, deception, or unethical conduct.\(^{66}\) Finding that the plaintiffs’ compliant did not allege that they were “coerced” into signing the contracts with the franchisor, the court held that they failed to allege specific fraudulent, deceptive or unethical conduct in the negotiation of their contracts with the franchisor. Instead, the court viewed their allegations as “more akin to a breach of contract claim than the sort of “egregious” behavior contemplated by LUTPA.\(^{67}\) In addition, the district court summarily dismissed the plaintiffs’ claim under FTCA on the grounds that the Act does not provide a private right of action.

**B. Claims for Negligent Misrepresentations**

Although Little FTC Acts brought by franchisees most often assert claims for intentional misconduct, franchisees who believe their franchisors’ negligent conduct has unfairly impeded their success also look to Little FTC Acts for their remedy. Such was the case in *Devayatan LLC v. Travelodge Hotels, Inc.*\(^{68}\) Devayatan, a Florida franchisee, sued franchisor Travelodge Hotels, Inc. (“THI”) alleging negligent misrepresentation and violations of FDUTPA. The complaint alleged that during the negotiations leading up to the execution of the transfer franchise agreement, Devayatan’s representatives stayed in the hotel, but failed to inspect all of its rooms and other parts of the hotel. In addition, an architect Devayatan retained to develop a renovation plan for the hotel warned Devayatan of the hotel’s poor condition, but Devayatan did not otherwise hire anyone to inspect the hotel prior to purchasing the hotel from the former operator. THI’s FDD estimated costs to convert the hotel ranged up to $1.4 million for a 100-room facility. At the time of contracting, THI notified Devayatan that the 134-room hotel was not in compliance with its standards, that the current operator was in default of its franchise agreement and had not cured the defaults, and further provided Devayatan with a punch list for repairs and improvements. The punch list did not disclose any code violations at the hotel.

After execution of the franchise agreement, Devayatan discovered several code violations at the hotel and directed its resources towards bringing the hotel into compliance. It also expended funds on a new clubhouse that was not among THI’s required improvements. After the hotel failed three consecutive quality inspections, THI terminated the franchise agreement. Devayatan brought suit in the Middle District of Florida and alleged negligent misrepresentation and violations of FDUTPA. THI counterclaimed against Devayatan for unpaid fees and liquidated damages, and brought a third-party complaint against the guarantors. After both sides cross moved for summary judgment, the district court denied Devayatan’s motion for summary judgment and granted in part and denied in part THI’s motion for summary judgment. The court ruled THI was entitled to summary judgment on Devayatan’s complaint but not on its counterclaim, as genuine issues of material fact remained on THI’s counterclaim and third-party complaint and Devayatan’s affirmative defenses.

The district court noted that while Devayatan claimed that THI negligently misrepresented the scope of work required to bring the hotel into compliance with brand standards and the code, Devayatan’s presumptions were unreasonable in light of express statements THI

---

\(^{65}\) *Leblanc v. Belt Center, Inc.*, 509 So. 2d 134, 137 (La. App. 1st Cir. 1987).

\(^{66}\) *Id.*

\(^{67}\) *Id.* at 10.

disclosed regarding the condition of the hotel during negotiations, and the fact that the punch list affirmatively stated that it was conducted based upon “a random sample” of the hotel’s rooms and that the franchisee was expected to comply with all applicable laws, ordinances and codes. Although New Jersey law governed the franchise agreement, the court considered and rejected Devayatan’s FDUPTA claim, ruling that Devayatan had failed to establish that THI’s statements were likely to mislead and that Devayatan had failed to demonstrate that THI acted unethically in any manner other than making representations that Devayatan simply misunderstood.

C. **Claims for Omissions**

Another frequent theory of recovery franchisees utilize to support their Little FTC Act claims are those founded on omissions. However, what may appear to be “material information” to a prospective franchisee may still not be actionable. In *7-Eleven, Inc. v. Spear,* 69 an Illinois district court found that the failure to provide an earnings claim in a disclosure document did not amount to a violation of state statutes. The suit arose after 7-Eleven, Inc. terminated a long-time franchisee’s franchise agreement for failure to meet the minimum net worth requirement. 7-Eleven moved for a preliminary injunction after the franchisee failed to de-identify and adhere to its post-termination obligations. The franchisee counterclaimed and alleged that 7-Eleven violated the Illinois Franchise Disclosure Act and the Illinois Consumer Fraud and Deceptive Business Practices Act when it failed to provide material information concerning the historical performance of the franchisee’s store prior to her purchase of the franchise. The parties executed the franchise agreement in March, 2008, prior to the amendment of the current FTC Franchise Rule. The court granted 7-Eleven’s motion to dismiss the franchisee’s counterclaims, noting that 7-Eleven was not required by the FTC’s Franchise Rule or the applicable UFGC Guidelines70 to disclose earnings information for any of its stores. Moreover, the court observed that the franchisee’s store has been operating for less than one year. Because 7-Eleven’s UFGC affirmatively disclosed that the franchisor was not providing earnings information for stores that had been opened for less than twelve months, the franchisee was informed prior to her purchase that 7-Eleven would not provide such information. Although the franchisee asserted that 7-Eleven should have provided her with information on her store’s historical poor performance in order to correct a misimpression created by the provided earnings claim, the court disagreed. The court found that the earnings claim made by the franchisor could only be deemed misleading if the franchisee ignored the express terms of the earnings claims in the UFGC. As a result, the court held that because the franchisor had no legal duty to provide such information, it was neither deceptive nor fraudulent for the franchisor not to give the franchisee exactly what 7-Eleven told the franchisee she would not receive. With no duty to disclose the store’s historical financial performance, the franchisee’s claims failed as a matter of law.

D. **Claims Among Competitors**

*Edible Arrangements International, Inc. v. Notaro,*71 involved an unusual clash between two edible fruit bouquet franchisors. The plaintiff franchisor obtained a preliminary injunction to prevent the defendant franchisor from marketing its franchise system in California prior to completing the state’s franchise registration process. Notably, the plaintiff franchisor had

---


70 7-Eleven and Spear entered into the franchise agreement in March, 2008, prior to the enactment of the current version of the FTC Franchise Rule, and therefore, 7-Eleven furnished Spear with a UFGC rather than an FDD.

previously sued the defendant franchisor in Connecticut for a variety of claims including misappropriation of trade secrets, conversion, and cyberpiracy after the defendant franchisor had posed as a prospective franchisee to obtain alleged proprietary information. The California district court found that because the earlier Connecticut lawsuit involved alleged deceptive practices, the defendant franchisor's failure to disclose the lawsuit in its UFOC was a violation of the mandatory disclosure requirements under California's Code of Regulations. The court also found that the defendant franchisor's financial statements were not as represented, as they were prepared by a family member, and not independently audited. Finally, the court found that selling and offering franchises in California before registering them was a violation of the California Unfair Competition Law (UCL) and an unfair business practice.

Original Rex, LLC v. Beautiful Brands Int'l, LLC\(^7\) involved a dispute among competitors over the use of the Rex Chicken trademark. Vernon McFarland originally used the mark to market his boneless chicken nuggets. McFarlane's company, McFarland Distributors, Inc. ("MDI") entered into franchise agreements, including with Ballard Drive-In, Inc. ("Ballard"), which obtained a license to sell Rex Chicken products. MDI later sent notice to Ballard that MDI would not renew the franchise agreement when it expired in 1992. Following expiration, Ballard began marketing its own chicken nugget products. The following year, MDI sold all of its assets, including the franchise system and the Rex Chicken marks, to Rex Chicken LLC. However, Rex Chicken LLC ceased to operate the Rex Chicken franchise and sold all of its assets to Magnum Foods, Inc. ("Magnum"). Magnum canceled the Rex Chicken mark and replaced it with a new mark, which it also later canceled in 2006.

In 2008, Beautiful Brands International, LLC ("BBI") began selling its own boneless chicken nuggets under the Rex Chicken name. It applied for but was denied a federal trademark registration for likelihood of confusion. Nonetheless, BBI began operating a website to solicit franchise sales and to advertise its Rex Chicken products. Two years later, in 2010, Rex Chicken LLC and Ballard assigned their rights in the mark to McFarlands' children, who founded Original Rex LLC. Upon learning of BBI's sales of products and franchises under the Rex Chicken name, Original Rex filed suit in the Northern District of Oklahoma for trademark infringement, false advertising, and unfair competition under the Lanham Act, common law, and the violation of the Ohio Deceptive Trade Practices Act.

The district court denied Original Rex's summary judgment motion and instead granted the BBI's summary judgment on its claims for trademark infringement, false advertising, and unfair competition because plaintiff had abandoned the trademark. Although Original Rex, LLC argued that it had a valid assignment of the mark from Rex Chicken LLC, the court disagreed and held that the assignment was invalid because the prior owner, Magnum, clearly canceled the mark before Original Rex, LLC filed for registration of the Rex Chicken mark. Moreover, Magnum's termination of the entire franchise and closing of all franchisee restaurants four years before Original Rex's use of the mark indicated that Magnum did not intend to resume use of the mark. With respect to the dismissal of the plaintiff's Ohio Deceptive Trade Practices claim, the court noted that Original Rex had never operated any actively competing franchises or restaurants, and therefore failed to meet its burden with respect to Ohio's Little FTC Act.

While less common than claims by franchisees against franchisors, claims between competing franchisors under Little FTC Acts offer claimants a basis to turn common law unfair

\(^7\) 792 F. Supp. 2d 1242 (N.D. Okla. 2011).
competition claims into statutory claims that carry enhanced remedies otherwise unavailable at common law.

**IV. INJUNCTIVE RELIEF UNDER LITTLE FTC ACTS**

Arguably the most potent remedy to a defendant’s unfair or deceptive trade practice is a court’s issuance of injunctive relief. While an award of treble or enhanced monetary damages provides a plaintiff with actual redress for the harm inflicted by the defendant, and while a sizeable award may serve to deter the defendant from engaging in the same conduct in the future, only an injunction will legally prohibit the defendant from engaging in the unfair or deceptive trade practice at issue.

There are two types of injunctions: one issued on a preliminary basis at the outset of a case, and a permanent injunction issued as part of a final judgment. To obtain a permanent injunction, a plaintiff must establish: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” Issuance of such equitable relief is thus reserved for the most egregious circumstances; it is not entered in each and every matter involving an alleged unfair or deceptive trade practice.

**A. Criteria for Obtaining Injunctive Relief**

No uniform law exists with respect to the factors that a court is to consider when deciding on whether an injunction is appropriate. Variations exist between certain state common laws, though such differences tend to be minimal in nature.

A court considering a motion for injunctive relief will generally give considerable weight to the equities associated with the principles of “good faith” and “fairness”, as well as to whether the issuance of an injunction serves the public good. Particularly with regard to a motion for a preliminary injunction, a court will pay close attention to whether a plaintiff is likely to succeed on the merits at the end of a case. Obtaining a preliminary injunction is typically more difficult than obtaining a permanent injunction, for a plaintiff is seeking relief without the benefit of discovery that takes place during the course of a proceeding.

The fact that a court issues a preliminary injunction does not mean that the injunction will become permanent. A court, at the conclusion of a matter, will consider relevant evidence to determine whether the injunction should be made permanent, be modified, or entirely dissolved. Similarly, a court may decide not to issue an injunction at the outset of a matter, only to determine at the final stage of a case that a permanent injunction is, in fact, appropriate.

Even if a plaintiff files an unopposed motion for preliminary injunction, the plaintiff still must satisfy the applicable criteria for injunctive relief, and must establish that the injunction is reasonable in scope. A court will review the sufficiency of a motion for injunctive relief irrespective of whether the defendant submits an opposing brief.

---

For instance, in *Edible Arrangements Int’l v. Notaris*, the U.S. District Court for the Central District of California carefully reviewed an unopposed application for preliminary injunction filed by the plaintiff-franchisor against the defendant-competing franchisor and other related defendants. The court found that while the plaintiff met the requirements for issuance of a preliminary injunction, the scope of the injunction sought was “too severe”. The court ruled, in pertinent part, as follows:

"The Court does not deem it necessary to require the defendants to affirmatively notify every person to whom they offered a franchise or distributed a franchise circular that they have been enjoined from making “further attempts to offer for sale or to sell franchises in California until they have duly registered with the State a new offering circular that complies with all applicable statutory and regulatory requirements.” Such a notice would cause the defendants to incur a level of opprobrium disproportionate to the material but relatively minor regulatory infractions they have committed and would unduly chill potential interest in the defendants' franchises. It is [also] not required to protect the public interest or the plaintiff.

The defendants were thus free from the draconian scope of relief requested by the plaintiff, even without submitting any opposing materials.

In sum, a plaintiff seeking to obtain injunctive relief should ensure that all applicable criteria are met under relevant state law before proceeding forward. Failure to do so could lead to denial of injunctive relief.

**B. Standing to Obtain Injunctive Relief**

As explained in Section II, the ability to bring an unfair or deceptive trade practice claim does not extend to all types of plaintiffs under each and every state statute. For example, and as previously noted, there is no private right of action in Iowa. Other state statutes, by comparison, empower only consumers to bring such substantive claims. There are also broad state statutes that empower both consumers and competitors to lodge such actions.

The fact that a private right of action exists under a respective state statute does not necessarily mean that the statute affords any plaintiff the ability to obtain equitable relief. For instance, under the Louisiana Unfair Trade Practices and Consumer Protection Act, both consumers and competitors have the right to assert an unfair or deceptive trade practice claim, but neither have the right to seek injunctive relief. That power resides exclusively in the hands of the state attorney general.

Accordingly, regardless of whether a plaintiff has an affirmative obligation under a statute to give notice of an unfair or deceptive trade practices action to the attorney general of a respective state, it is still in the plaintiff's interest to do so. Such notice may very well trigger the state attorney general to intervene in the matter and seek injunctive relief where a plaintiff lacks the requisite power.

---

74 Supra, n. 71.

75 LA. REV. STAT. ANN. § 51:1405 et seq.
V. PROOF CHALLENGES UNDER LITTLE FTC ACTS

As explained in section II, a plaintiff lodging an unfair or deceptive trade practice claim may face a challenge at the outset of a case to its standing to bring the claim. Each state statute specifies whether a given party has the right to proceed with such a private action. A plaintiff must ensure that it meets the applicable criteria.

In addition to a standing challenge, a plaintiff may face jurisdictional challenges, as well as challenges on account of other grounds enumerated in Federal Rule of Civil Procedure 12 and state analogs. A plaintiff must also survive these challenges to get to the merits of its case.

Each “Little FTC Act” specifies the elements that a plaintiff must meet to prove an unfair or deceptive act or practice on the part of the defendant. For instance, state statutes typically contain a list of per se acts and/or practices that constitute a violation. A plaintiff that establishes one or more of these per se acts or practices prevails, without question. Additionally, and of great significance, state statutes typically contain a “catch-all” provision for conduct that is unfair and/or deceptive, but that does not fall within the list of per se violations. This is where “proof challenges” are of major concern.

This section focuses on obstacles that a plaintiff needs to overcome to establish liability where a per se violation has not occurred. These obstacles include:

- Proving the act or practice in question is egregious;
- Proving the defendant’s knowledge with respect to committing an unfair or deceptive act or practice;
- Proving the plaintiff’s reliance on the defendant’s act or practice; and
- Proving an impact on the public interest or good.

A discussion of each of these obstacles follows.

A. List of Acts and/or Practices that Are Per Se Unfair and/or Deceptive

A plaintiff’s burden is arguably the least onerous when seeking to prove the existence of act or practice that is per se unfair or deceptive. That is the case because the state legislature has already decided that the act or practice is one that would subject a defendant to liability.

Importantly, an act or practice that is per se unfair and/or deceptive under one state statute may not be per se unfair and/or deceptive under another state statute. Indeed, such an act or practice may not even fall within a broad “catch-all” provision.

For example, in Le Macaron, LLC v. Le Macaron Dev. LLC, the U.S. District Court for the Middle District of Florida considered whether the plaintiffs had failed to state a claim when they alleged, in part, that the defendant violated Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”) by not make certain disclosure in its franchise disclosure document. The district court ruled that the plaintiffs had stated a claim for relief, explaining, in pertinent part:

With respect to the violation of the FTC’s franchise rule, Plaintiffs adequately state a claim. Pursuant to Fla. Stat. § 501.203, a per se violation of FDUTPA is established by the violation of any rule promulgated pursuant to the Federal Trade Commission Act, and by the violation of any statute, rule, or regulation proscribing unfair or deceptive practices. Fla. Stat. § 501.203(3)(a), (c). Courts routinely hold that a violation of the FTC’s franchise disclosure rule alleges a plausible per se violation of FDUTPA. E.g., KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008); Beaver v. Inkmart, LLC, No. 12-60028, 2012 WL 3822264, at *3-4 (S.D. Fla. Sept. 4, 2012). The Complaint in this case plausibly allege[s] a violation of the FTC’s rule, and it also plausibly alleges that the violation caused damage.\textsuperscript{77}

The district court thus denied that part of the defendant’s motion to dismiss.\textsuperscript{78}

The Louisiana district court in Cooper, in contrast, came to a different conclusion when evaluating a similar circumstance.\textsuperscript{79} In that case, the court explained:

To the extent Plaintiffs rely on the alleged failure to provide franchise disclosure documents as a basis for their LUTPA claim, the only Louisiana court to consider this issue has found that “the failure to comply with the FTC disclosure regulations did not constitute an unfair trade practice" where there was “no element of fraud, misrepresentation, deception or unethical conduct in the confection of the franchise agreement.

(citations omitted).\textsuperscript{80}

The district court, upon careful analysis, stood by Louisiana precedent and granted the defendants’ motion to dismiss the plaintiffs’ LUTPA claims.\textsuperscript{81}

B. \textit{Proving the Act or Practice in Question is Egregious}

As explained above, a plaintiff-franchisee will often bring an unfair or deceptive trade practice claim within the context of lawsuit that includes other claims, such as breach of contract and violation of the covenant of good faith and fair dealing. Simply because a plaintiff-franchisee prevails on one or more of the aforementioned claims does not mean that the plaintiff-franchisee will prevail on the unfair or deceptive trade practice claim.

In Carolina Rest. Group, Inc. v. Pepsico Sales, Inc.,\textsuperscript{82} the U.S. District Court for the Western District of North Carolina assessed certain contractual claims along with a claim under

\textsuperscript{77} Id. (citations omitted).

\textsuperscript{78} Id. at *6.

\textsuperscript{79} Supra, n. 61.

\textsuperscript{80} Id. at *8.

\textsuperscript{81} Id. at *9.

\textsuperscript{82} No. 3:14-cv-668, 2015 WL 4250395, *5-6 (W.D.N.C. July 13, 2015).
North Carolina's Unfair and Deceptive Trade Practices Act. The district court ruled that the complaint failed to state a claim for breach of contract, and even if a breach had existed, it would need to have been "aggravated" in order to be actionable under the relevant North Carolina statute. More specifically, the district court found that the defendant's unwillingness to grant a "Permitted Termination" under the agreement was not "unfair or deceptive," was not "immoral, unethical, oppressive, or unscrupulous," and did it "offend public policy." The reason: because the plaintiff had the right, at any point, to terminate the agreement.

C. Proving the Defendant's Knowledge with Respect to Committing an Unfair or Deceptive Act or Practice

Certain state statutes require a plaintiff to establish that a defendant knew that it was committing an unfair or deceptive act or practice; others do not.

For instance, under Section 6-1-105(1) of the Colorado Consumer Protection Act ("CCPA"), a plaintiff must establish that the defendant "knowingly ma[de] a false representation." Accordingly, to sustain a claim under this section of the CCPA, a plaintiff must allege facts that detail one or more false representations that led to inducement. The plaintiffs in *Bonanno v. The Quizno's Franchise Co. LLC* did just that, and they were able to survive a Rule 12(b)(6) motion to dismiss.

By comparison, the Texas Deceptive Trade Practices Act (the "Texas DTPA") enables a plaintiff to establish a defendant's liability even if the defendant did not know that the "complained-of representations were false . . . ." Under the Texas law, the plaintiff does not bear the burden of proving the defendant's intent at inducement. The U.S. District Court for the Eastern District of Missouri referenced these principles when sustaining a Texas DTPA claim in *Armstrong v. Curves Int'l, Inc.*, where the issue involved the renewal of a long-time contract.

D. Proving the Plaintiff's Reliance on the Defendant's Act or Practice

Reliance is another essential element that a plaintiff bringing a claim under certain state statutes must establish, while a plaintiff bringing a claim under other, similar statutes do not.

---

83 Id. at *5-6.
84 Id. at *6.
85 Id.
86 Id.
87 COLO. REV. STAT. § 6-1-105.
89 Id. at *3-4.
91 Id.
92 Id. at *12-14.
The U.S. District Court for the District of Minnesota identified “reliance” as an essential element under Minnesota law in *Moua v. Jani-King of Minn., Inc.* The district court noted: “To prove their claims for fraudulent misrepresentation and for violation of the [Minnesota Franchise Act] and the [Minnesota False Statement in Advertising Act], Plaintiffs must prove, among other elements, that they relied on the alleged false statements, misrepresentations, omissions, or deceptive conduct.” On account of this element, the district court found that common issues would not predominate over individual ones and that class certification was not appropriate.

Conversely, in *De Giovanni v. Jani-King Int'l, Inc.*, the U.S. District Court for the District of Massachusetts found, in part, that claims brought under Chapter 93A, the Commonwealth’s “unfair or deceptive practices” statute, that related to excessive fees could proceed as a class once the plaintiffs amended their complaint and “identif[ied] typical class representatives for these claims.” The district court held:

> [T]he plaintiffs allegations with respect to the fees Jani-King charges its franchisees can be adjudicated on a class-wide basis. A fact-finder can determine for all class members whether the amount or types of fees charged by Jani-King are inherently unfair under Chapter 93A. Causation, injury, and damages could be proved through Jani-King's own business records. Further, the Court holds that adjudicating this claim as a class action would be superior to individual lawsuits; the potential amounts lost by the franchisees as a result of allegedly excessive fees would not be sufficient to support individual actions. As a result, plaintiffs' claims that the fees charged by Jani-King violate Chapter 93A satisfy Rule 23(b)(3)'s predominance requirement.

Thus, reliance would not be an obstacle to class certification in this case.

E. **Proving an Impact on the Public Interest or Good**

Under certain state statutes, a plaintiff must establish that the defendant's act or practice negatively impacted the public interest or good. In other words, the fact that the plaintiff was subject to an unfair or deceptive act or practice is not, in and of itself, proof that the public interest or good sustained harm.

---

93 No. 08-4942 ADM/JSM, 2010 WL 935758 (D. Minn. Mar. 12, 2010).

94 Id. at *5 (citations omitted).

95 Id. at *5-6.


97 Id. at 83-84, 87.

98 Id. at 84.

99 A further discussion on this topic can be found at pages 9-10, above.
VI. DAMAGES AWARDABLE UNDER LITTLE FTC ACTS.

Despite being based on a uniform act, damages available under state Little FTC Acts can vary greatly by state. While most states permit the recovery of compensatory damages, others allow enhanced damages awards, and some even permit an award of punitive damages.

In *Grout Doctor Global Franchise Corp. v. Groutman, Inc.*, the franchisor sued a former franchisee, seeking to enjoin Groutman, the franchisee, from continuing to use Grout Doctor’s trademark and trade secrets following Groutman’s decision to voluntarily cease operating as a Grout Doctor franchise. Underpinning the injunction were claims for breach of contract, trade secret infringement, trademark infringement, and violations of North Carolina’s Unfair and Deceptive Trade Practices Act (“NCUDTPA”). After Groutman defaulted, Grout Doctor moved for a default judgment on all claims, including NCUDTPA. Under North Carolina law, the court noted that the elements of a claim under NCUDTPA are (1) that the defendant committed an unfair or deceptive act or practice; (2) that the action that was in or affecting commerce; and (3) the act proximately caused injury to plaintiff. Here, the court noted that a misappropriation of trade secrets constituted an unfair or deceptive act or practice as a matter of law and, moreover, that a breach of contract accompanied by aggravating circumstances also constitutes an unfair and deceptive trade practice.

In reviewing Groutman’s conduct, the district court observed that it had sold copies of Grout Doctor’s policy manuals to purchasers over the internet following Groutman’s abandonment of the franchise relationship. In addition, Groutman had made fraudulent representations to the USPTO regarding their ownership of the Grout Doctor trademarks, had harassed and threatened Grout Doctor’s personnel, and had interfered with Grout Doctor’s relationships with its other franchisees. Taken together the court found that Groutman’s actions “constitute aggravating circumstances and make it clear that defendants committed an unfair or deceptive trade act or practice. By preventing [Grout Doctor] from providing its services to consumers in the Wilmington area and disseminating [Grout Doctor’s] trade secrets, defendants’ actions impacted the marketplace in a manner that affects commerce.” Based upon its findings, the court awarded Grout Doctor treble damages for violations of NCUDTPA totaling $107,726.19.

*Century 21 v. Hometown Real Estate Co.*, illustrates that damages awards under Little FTC Acts often depend upon the defendant’s level of scienter. This dispute arose after

---

100 See, e.g., FLA. STAT. ANN. § 501.211, which permits a prevailing party to recover its “actual damages” and IND. CODE ANN. § 24-5-0.5-4 (a) which permits a party to recover its “damages actually suffered.”

101 *Cf.* N.J. STAT. ANN. § 56:8-19 (“In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest.”) with Ala. Code 8-19-10(a)(2) (“Any person who commits one or more of the acts or practices declared unlawful under this chapter and thereby causes monetary damage to a consumer... shall be liable to each consumer...for: Up to three times any actual damages, in the court’s discretion.”

102 The Connecticut General Statutes § 42-110g(a) provides that “[t]he court may, in its discretion, award punitive damages ... as it deems necessary or proper,” while the New York DTPA imposes a $1000 cap on punitive damages, N.Y. GEN. BUS. LAW §§ 349(h), 350-e (2016).

103 No. 7:14-CV-105-BO, 2015 WL 2353698 (E.D.N.C. May 14, 2015).

104 *Id.* at *5.

105 890 S.W.2d 118 (Tex. App. 1994).
Hometown purchased a Century 21 franchise and became one of the system's most successful franchisees. Century 21 had an unwritten policy of not placing additional franchises in an area served by a franchise having a 30% to 40% market share. Several years after purchasing its first franchise, Hometown executed a new franchise agreement. Both the new franchise agreement and the UFOC specifically stated that the franchise agreement did not include any territorial rights or protected areas, which contradicted Century 21's "unwritten rule." Shortly after the execution of the second franchise agreement, Century 21 located an additional franchise within Hometown's market.

Hometown sued Century 21 alleging violations of the Texas DTPA. Following a jury trial, the jury rendered a verdict for Hometown awarding actual damages against Hometown totaling $337,900.00 and further awarded damages against two Century 21 affiliated entities totaling an additional $500,000. Century 21 appealed the verdict.

The Texas Court of Appeals determined that there was evidence to support a finding that Century 21's action took advantage of Hometown to a grossly unfair degree. In support of this finding the court cited to the admission of a Century 21 representative who admitted that Hometown had 40% of the market share in its county and that Century 21 "may have pulled the trigger way too fast on this one." Based on these facts, the court found sufficient evidence of unconscionable actions to support the jury verdict of damages. With respect to the Century 21 affiliates, however, the appellate court noted that these entities placement of the new franchise in Hometown's market was a mistake rather than a deliberate act and that their actions appeared to be inadvertent rather than intentional. Because under the Texas DTPA "a finding that the defendants acted knowingly is a prerequisite to recovering an award of additional damages," the court modified the trial court's judgment to delete the awards of additional damages against these entities because the court concluded that there was no evidence to support jury's finding that these defendants "knowingly" engaged in the misconduct. 106

A cautionary tale for any franchisor can be found in Autobahn Imports, L.P. v. Jaguar Land Rover North America, LLC. 107 This lawsuit arose following a dispute between the franchisee, Autobahn, and its franchisor, Jaguar Land Rover, over the manufacturer's incentive-based sales program that paid its dealers a percentage of the manufacturer's suggested retail price ("MSRP") on each Land Rover the dealers sold, assuming certain requirements were met. Autobahn took the position that sales of vehicles to leasing companies qualified Autobahn to receive the incentives contemplated under the program. After the manufacturer conducted a routine sales audit of Autobahn, Jaguar Land Rover charged back $317,204.80 for the incentives it had paid to Autobahn for sales to leasing companies.

Following an administrative proceeding before the Texas Motor Vehicle Board that found for Autobahn, Jaguar Land Rover filed a notice of appeal to the Texas Court of Appeals. While the appeal was pending, Autobahn initiated a separate action in the U.S. District Court for the Northern District of Texas for among other claims, a violation of the DTPA, for damages of $317,204.80, trebled to $951,614.40.

After resolving Jaguar Land Rover's challenge to Autobahn's claims on the grounds of failure to exhaust administrative remedies in favor of Autobahn, and finding the Texas Motor Vehicle Board's findings' were proper, the district court turned its attention to the relief Autobahn

106 Id. at 131.

sought for its claims. With respect to the Texas DTPA, the district court concluded that
Autobahn could recover 
“(1) the amount of its economic damages, (2), if the conduct of the
defendant was committed knowingly...three times the amount of economic damages, and
(3) attorneys' fees.”

Finding that Autobahn suffered economic damages of $317,204.80
associated with the chargebacks, the district court further found that because Jaguar Land
Rover’s conduct was “committed knowingly,” Autobahn was entitled to statutory treble damages
totaling $951,614.40.

VII. ATTORNEYS’ FEES

Attorneys’ fees provisions are present in many Little FTC Acts. Most provide for the
recovery of fees at the court’s discretion, although in some cases a fee award is mandatory. Awarding attorneys’ fees to prevailing parties not only gives compensation for victims, but also potentially discourages further fraud.

Chicago’s Pizza, Inc. v. Chicago’s Pizza Franchise, Ltd., while not technically a
franchise case, analyzed the nature of deceptive trade practices required to obtain a fee award.
The plaintiffs owned Chicago’s Pizza, Inc. which operated a number of “Chicago’s Pizza”
locations throughout the city and had a loyal following. The plaintiffs noticed a decline in their
sales in certain areas of the city which it attributed to the opening of an unaffiliated restaurant
also named “Chicago’s Pizza” by the defendants. The plaintiffs sued the defendants for inter alia,

During the jury trial that followed, the plaintiffs adduced evidence that in addition to the
defendants’ use of the “Chicago Pizza” name, the defendants’ menus, coupons, and ads falsely
advertised numerous locations when it only operated a single location. The ads urged customers to “call for your nearest location” and used different phone numbers for the different “locations” so defendants appeared to have locations in different parts of the city. Two of defendants’ “locations” actually corresponded to the plaintiffs’ locations, and adding to the confusion, many of the ads and coupons that referred to multiple “locations” did not even have the defendants’ own address on them.

The defendants appealed the judgment against them to Illinois Court of Appeals, including the award of attorneys’ fees under the IDTPA. The appellate court found that attorney
fees may be assessed against a defendant “only if the court finds that he has willfully engaged
in a deceptive trade practice.” Citing to Black’s Law Dictionary, the court noted that that
“Willful” is defined as ‘voluntary and intentional, but not necessarily malicious.’ Although the
defendants denied being aware of the plaintiffs’ restaurants until the filing of the lawsuit, the

108 TEX. BUS. & COM. CODE §17.50(b)(1) & (d).

109 Cf. TEX. BUS. & COM. CODE, § 17.50(d) (“Each consumer who prevails shall be awarded court costs and
reasonable and necessary attorneys' fees.”) with (providing for a mandatory award of attorneys’ fees), with MD.
CODE ANN., COM. LAW § 13-408(b) (2016) (“Any person who brings an action to recover for injury or loss under this
section and who is awarded damages may also seek, and the court may award, reasonable attorney's fees.”)

110 See generally Debra Pogrund Stark and Jessica M. Chaplin, Does Fraud Pay - An Empirical Analysis of Attorney’s


112 815 ILCS 510/3 (West 2004).

113 Id. at 995.
court pointed to uncontroverted customer testimony was that the defendants continued to mislead consumers about their association with the plaintiffs’ restaurants even after the complaint was filed. Accordingly, the court ruled that because the defendants “willfully engaged in a deceptive trade practice,” the plaintiffs were entitled to an award of their reasonable attorneys’ fees.

In *Autobahn Imports L.P. v. Jaguar Land Rover North America, LLC*,\(^{114}\) the franchisor was saddled not only with paying its franchisee’s treble damages, but also with the prospect of paying its franchisee’s attorneys’ fees for three different proceedings. As discussed above, the franchisee, Autobahn, brought an administrative proceeding before the Texas Motor Vehicle Board in connection with the franchisor’s alleged improper chargebacks on a sales incentive program by its franchisor, Jaguar Land Rover. The board found in Autobahn’s favor, and Autobahn brought suit in federal court to recover its damages and attorneys’ fees under the Texas Deceptive Trade Practices Act (“DTPA”). Prior to the commencement of the district court action, Jaguar Land Rover had filed an appeal of the Texas Motor Vehicle Board’s ruling with the Texas Court of Appeals. After finding for Autobahn and awarding it treble damages under the statute, the district court analyzed Autobahn’s attorneys’ fees request and Jaguar Land Rover’s opposition to it as follows:

Jaguar contends that the DTPA may, at most, entitle Autobahn to an award of fees incurred in this action, but does not entitle Autobahn to an award of fees incurred in the underlying administrative proceeding. The court disagrees with Jaguar. Autobahn is entitled to reasonable attorney’s fees incurred by it in this action and in the underlying administrative proceeding because both were necessary to prevail in an action for damages under the DTPA. Before instituting a DTPA action for Code-based claims in this court, Autobahn was required to exhaust administrative remedies before the Board. It has done so, and is entitled to reasonable attorney’s fees incurred while it exhausted administrative remedies as well as attorney’s fees incurred in the prosecution of this action.

The court is inclined to think that Autobahn should also recover whatever attorney’s fees it incurs in the future by reason of the judicial review by the Austin Court of Appeals of the Board’s final order, which Jaguar set in motion in an attempt to set aside the findings and conclusions of the Board that are ingredients in Autobahn’s successful pursuit of its claims against Jaguar. However, a final resolution of the issue of attorney’s fees is premature at this time. The court has concluded that the best course of action at this time would be to sever Autobahn’s claim for attorney’s fees into a separate action, to be resolved at an appropriate time in the future.

\(^{114}\) *Supra*, n. 71.
VIII. CONCLUSION

An unfair or deceptive trade practice claim is a potent weapon in any litigation or arbitration. The mere assertion of such a claim provides a plaintiff with a degree of leverage over its adversary, given the “heightened stakes” associated with a finding of liability. Indeed, a determination that a given defendant engaged in an unfair or deceptive trade practice can be costly and present a public relations challenge to a company or individual’s goodwill or reputation.

But proving an unfair or deceptive trade practice claim is not always an easy path. A plaintiff must be careful to meet all criteria of the applicable Little FTC Act, including, as a preliminary matter, establishing the plaintiff’s standing to assert the claim. Absent this careful attention to meeting all criteria, a claim may be susceptible to dismissal under one of the Rule 12 grounds. Further, even if the claim survives dismissal at the early stage of the case, the claim may be subject to defeat on summary judgment, and in some states, subject the losing party to payment of the prevailing party’s attorneys’ fees and costs.

The law of many states continues to evolve in this area. Beyond consulting this paper and the sources cited within it, a practitioner should perform independent research for recent developments in the law. With the stakes so high, both a plaintiff and defendant deserve nothing less.
Biographies

LESLIE SMITH
Foley & Lardner LLP
Miami, Florida

Leslie Smith is a partner with Foley & Lardner LLP, and a member of the firm’s Distribution & Franchise Practice Group, and chair of the Miami, Florida office’s litigation department. Ms. Smith litigates a range of commercial matters at both the trial and appellate levels in both federal and state courts. Her franchising and distribution practice provides clients with counseling and litigation services, from initial negotiations through resolution, including mediation, arbitration and trial. She has represented franchisors in a variety of commercial disputes involving trademarks, trade secrets, covenants not to compete and vicarious liability claims. Ms. Smith was named to BTI Consulting Group’s coveted Client Service All Star Team in 2017. This honor is bestowed upon individual attorneys who deliver outstanding client service according to corporate counsel interviewed at large organizations with $1 billion or more in revenue. Ms. Smith has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell’s peer review rating system. Ms. Smith has been recognized in the trade press, most recently by her peers in the 2016 edition of The International Who’s Who of Franchise Lawyers. Chambers USA: America’s Leading Lawyers for Business also recognized her as one of the top franchise attorneys nationwide (2010 - 2016) and she was selected by her peers for inclusion in The Best Lawyers in America® since 2013. In addition, Ms. Smith was selected for inclusion in the 2014 - 2016 Florida Super Lawyers® lists, and the South Florida Legal Guide named her a Top Lawyer - Franchise in the 2015, 2016, and 2017 editions.

Ms. Smith earned her J.D., with honors, from the University of Florida, an M.A. from the London School of Economics, and a B.A., cum laude, from Southern Methodist University.

ARI N. STERN
Witmer, Karp, Warner & Ryan LLP
Boston, Massachusetts

Ari N. Stern is an attorney and mediator at Witmer, Karp, Warner & Ryan LLP. He specializes in representing franchisees, franchisors, and franchisee associations in a wide range of commercial and employment disputes, including matters in litigation and arbitration involving claims under state unfair trade practices acts. He also represents clients with regard to negotiating and drafting agreements, performing internal investigations, and counseling on risk management.

Prior to joining Witmer, Karp, Warner & Ryan LLP, Mr. Stern litigated cases as a Special Assistant District Attorney in Roxbury, Massachusetts, and as an attorney at a prominent international law firm. He also previously acted as an Assistant General Counsel to an international company, and served as General Counsel to an MIT-affiliated start-up.

Mr. Stern received his B.S., with honors, in Policy Analysis and Management from Cornell University. While at Cornell, he was a member of the Meinig Family Cornell National Scholars. Mr. Stern subsequently earned both his J.D. and M.A. in International Affairs from American University.
APPENDIX
### Comparison of State Little FTC Acts*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>Alabama Deceptive Trade Practices Act (&quot;ADTPA&quot;); Ala. Code. §§ 8-19-1 – 8-19-15.</td>
<td>Only Consumers</td>
<td>26 per se deceptive acts or practices and &quot;catch all&quot; provision</td>
<td>Undecided, though likely not required</td>
<td>No, but Defendant’s lack of knowledge is a defense</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>AK</td>
<td>Alaska Unfair Trade Practices and Consumer Protection Statute, AS § 45.50.471-.561 (the “Statute”).</td>
<td>Only Consumers and Competitors</td>
<td>57 per se deceptive acts or practices and &quot;catch all&quot; provision.</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes (only if seeking injunction)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>AZ</td>
<td>Arizona Consumer Fraud Act (&quot;ACFA&quot;), Ariz. Rev. Stat. §§ 44-1521 – 44-1534.</td>
<td>Only Consumers</td>
<td>No</td>
<td>Undecided, though likely required</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes, if conduct “wanton or reckless”</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>AR</td>
<td>Arkansas Deceptive Trade Practices Act (&quot;ADTPA&quot;), Ark. Code Ann. § 4-88-101 et seq.</td>
<td>Consumers and Competitors</td>
<td>List of per se deceptive acts or practices and &quot;catch all&quot; provision</td>
<td>Undecided, though likely not required</td>
<td>Mixed (some subsections require intent knowledge, but general prohibitions do not)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>CA - 1</td>
<td>Unfair Competition Law (&quot;UCL&quot;), Cal. Bus. &amp; Prof. Code § 17200.</td>
<td>Consumers and Competitors</td>
<td>Four potential theories of liability; broad, sweeping language</td>
<td>Yes, depending on theory of liability</td>
<td>No, depending on theory of liability</td>
<td>No, unless seeking attorneys' fees and costs</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>CA - 2</td>
<td>Consumers Legal Remedies Act (&quot;CLRA&quot;), Cal. Civ. Code § 1750.</td>
<td>Only Consumers</td>
<td>23 per se deceptive acts or practices and &quot;catch all&quot; provision</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary punitive damages</td>
<td>Yes</td>
<td>Mandatory</td>
</tr>
<tr>
<td>CO</td>
<td>Colorado Consumer Protection Act (&quot;CCPA&quot;), CRS § 6-1-101 et seq.</td>
<td>Consumers and Competitors</td>
<td>List of per se deceptive acts or practices</td>
<td>Yes, depending on theory of liability</td>
<td>Yes, depending on theory of liability</td>
<td>Yes</td>
<td>No</td>
<td>Yes, if &quot;bad faith conduct&quot; proved by &quot;clear and convincing&quot; evidence</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>CT</td>
<td>Connecticut Unfair Trade Practices Act (&quot;CUTPA&quot;), Conn. Gen. Stat. Ann. §§ 42-110(a), et seq.</td>
<td>Consumers and Competitors</td>
<td>30 per se violation and a broad &quot;catch all&quot; provision</td>
<td>No</td>
<td>No, unless seeking punitive damages</td>
<td>No</td>
<td>No</td>
<td>Discretionary punitive damages</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>DE - 1</td>
<td>Consumer Fraud Act (&quot;CFA&quot;), 6 Del. Code § 2511 et seq.</td>
<td>Only Consumers</td>
<td>Broad &quot;catch all&quot; statement</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>DE</td>
<td>Uniform Deceptive Trade Practices Act (&quot;DTPA&quot;), Tit. 6 §2531, et seq.</td>
<td>Only Competitors (Consumers may bring suit if business or trade interest at stake)</td>
<td>12 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>FL</td>
<td>Florida Deceptive and Unfair Trade Practices Act (&quot;FDUTPA&quot;); Fla. Stat. §501.201, et. seq.</td>
<td>Consumers and Competitors</td>
<td>Broad “catch all” provision</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>GA</td>
<td>Fair Business Practices Act (&quot;FBPA&quot;), O.C.G.A. § 10-1-391(a) et. seq.</td>
<td>Consumers Only</td>
<td>17 per se deceptive acts or practices; General prohibition against certain general business practices</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (if intent to deceive proven)</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>HI</td>
<td>Hawaii Unfair Practices and Unfair Competition Statute HRS § 480-2.</td>
<td>Consumers (for unfair or deceptive acts or practices); Consumers and Competitors (for unfair methods of competition)</td>
<td>Broad “catch all” provisions; no list of per se violations in HRS § 480-2, but other statutes create per se violations of relevant law</td>
<td>Undecided, though likely not required</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>ID</td>
<td>Idaho Consumer Protection Act (&quot;ICPA&quot;), I.C. § 48-601 et. seq.</td>
<td>Consumers Only</td>
<td>Broad “catch all” provisions</td>
<td>Undecided</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes (in certain circumstances)</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>IL - 1</td>
<td>Illinois Consumer Fraud Act (&quot;CFA&quot;), 815 ILCS 505/1-505/12.</td>
<td>Consumers Only</td>
<td>Broad “catch all” provision and list of deceptive acts and practices found in UDTPA</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Discretionary (if actual economic loss demonstrated)</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>IL - 2</td>
<td>Uniform Deceptive Trade Practices Act (&quot;UDTPA&quot;), 815 ILCS 510/1-505/7.</td>
<td>Consumers and Competitors</td>
<td>12 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary (if Defendant “willfully engaged” in deceptive practice)</td>
</tr>
<tr>
<td>IN</td>
<td>Indiana Deceptive Consumer Sales Act (&quot;IDCSA&quot;), Ind. Code. §§ 24-5-0.5-1 to -12.</td>
<td>Consumers Only</td>
<td>37 per se deceptive acts or practices and “catch all” provision</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>IA</td>
<td>Iowa Consumer Fraud Act (&quot;CFA&quot;), Iowa Code § 714.16.</td>
<td>No private right of action</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>KS</td>
<td>Kansas Consumer Protection Act (&quot;KCPA&quot;), Kan. Stat. Ann. § 50-623 et seq.</td>
<td>Consumers Only</td>
<td>14 per se deceptive acts or practices and &quot;catch all&quot; provisions</td>
<td>No</td>
<td>Mixed (specific prohibitions require knowledge; general prohibition does not)</td>
<td>No</td>
<td>No</td>
<td>Yes (Discretionary)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KY</td>
<td>Kentucky Consumer Protection Act (&quot;KCPA&quot;), KRS § 367.110 - §367.360.</td>
<td>Consumers Only</td>
<td>Broad provisions</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>ME 1</td>
<td>Maine Unfair Trade Practices Act (&quot;UTPA&quot;), 5 M.R.S.A. §§ 205-A-214.</td>
<td>Consumers Only</td>
<td>Broad provision</td>
<td>Undecided, though likely not required</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>ME 2</td>
<td>Uniform Deceptive Trade Practices Act (&quot;UDTPA&quot;), 10 M.R.S.A. §§ 12-11-1216.</td>
<td>Consumers and Competitors</td>
<td>12 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MD</td>
<td>Maryland Consumer Protection Act (“MCPA”), Md. Code, Commercial Law § 13-301 et seq.</td>
<td>Consumers Only</td>
<td>15 prohibited acts and practices.</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No (only by Attorney General)</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>MA</td>
<td>Massachusetts Regulation of Business Practice and Consumer Protection Act (“Chapter 93A”), M.G.L. ch. 93A, §§ 1 – 11.</td>
<td>Consumers and Competitors</td>
<td>List of per se deceptive acts and practices and broad provisions</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes (for consumers)</td>
<td>Yes (for knowing or willful violations)</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>MI</td>
<td>Michigan Consumer Protection Act, (“MCPA”), Mich. Comp. Laws §§ 445.901 – 445.922.</td>
<td>Consumers and Competitors</td>
<td>List of per se deceptive acts and practices and broad provisions</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>MI</td>
<td>Michigan Unlawful Trade Practices Act, Mich. Comp. Laws § 445.101, et seq</td>
<td>Consumers and Competitors</td>
<td>Broad provisions</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>MN</td>
<td>Minnesota Uniform Deceptive Trade Practices Act (“UDTPA”), Minn. Stat. §§ 325D.43-325D.48.</td>
<td>Consumers and Competitors</td>
<td>13 per se deceptive acts and practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MS</td>
<td>Mississippi Consumer Protection Act (&quot;MCPA&quot;), Miss. Code Ann. § 75-24-1, et seq.</td>
<td>Consumers Only</td>
<td>13 per se deceptive acts and practices (broad provision only enforced by Attorney General)</td>
<td>Undecided</td>
<td>No</td>
<td>No</td>
<td>Yes (participation in AG approved informal dispute settlement program)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>MO</td>
<td>Missouri Merchandising Practices Act (&quot;MMPA&quot;), Mo. Rev. Stat. 407.010 et seq.</td>
<td>Consumers Only</td>
<td>Broad provision</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>NE-1</td>
<td>Nebraska Consumer Protection Act (&quot;CPA&quot;); Neb. Rev. St. §§59-1601 to §59-1623.</td>
<td>Only Consumers</td>
<td>5 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>NE-2</td>
<td>Nebraska Uniform Deceptive Trade Practices Act (&quot;UDTPA&quot;); Neb. Rev. St. §§87-301 to 87-306.</td>
<td>Only Consumers</td>
<td>22 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>NV-1</td>
<td>Nevada Deceptive Trade Practice Act (&quot;DTPA&quot;); Nev. Rev. Stat. §598.0977.</td>
<td>Only Consumers</td>
<td>30 per se deceptive acts or practices</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>NV-2</td>
<td>Nev. Rev. Stat. §41.600.</td>
<td>Consumers and Competitors</td>
<td>5 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>NH</td>
<td>New Hampshire Regulation of Business Practices for Consumer Protection; §358-A.1 et seq.</td>
<td>Consumers and Competitors</td>
<td>16 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>NJ</td>
<td>New Jersey Consumer Fraud Act; (&quot;NJCFA&quot;); N.J. Stat. Ann. §56:8-1 et seq.</td>
<td>Only Consumers</td>
<td>6 per se deceptive acts or practices</td>
<td>No</td>
<td>No (Omissions must be knowing)</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>NM</td>
<td>New Mexico Unfair Practices Act (&quot;UPA&quot;); N.M. Stat. §57-12-1 et seq.</td>
<td>Only Consumers</td>
<td>17 per se deceptive acts or practices</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>NY-1</td>
<td>New York State General Business Law; N.Y. Gen. Bus. §350.</td>
<td>Only Consumers</td>
<td></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>NY-2</td>
<td>New York State General Business Law; N.Y. Gen. Bus. §349.</td>
<td>Only Consumers</td>
<td>10 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Discretionary</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>NC</td>
<td>North Carolina Unfair and Deceptive Trade Practices Act (&quot;UDTPA&quot;); N.C. Gen. Stat. §75-1.1.</td>
<td>Only Consumers</td>
<td></td>
<td>Discretionary</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ND</td>
<td>North Dakota Unfair Trade Practices Law; N.D. Cent. Code §§51-10-01 through 51-15-08.</td>
<td>Consumers and Competitors</td>
<td>4 per se deceptive acts or practices</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>OH</td>
<td>Ohio Consumer Sales Practices Act (&quot;OCSPA&quot;); R.C. §1345.01 et seq.</td>
<td>Only Consumers</td>
<td>10 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>OK</td>
<td>Oklahoma Consumer Protection Act (&quot;OCPA&quot;); Okla. Stat. tit. 15 §751 et seq.</td>
<td>Only Consumers</td>
<td>32 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>OR</td>
<td>Oregon Unlawful Trade Practices Act (&quot;UTPA&quot;) §646.605 et seq.</td>
<td>Only Consumers</td>
<td>11 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>PA</td>
<td>Pennsylvania Unfair Trade Practices and Consumer Protection Law (&quot;UTPCPL&quot;); §201-1 et seq.</td>
<td>Only Consumers</td>
<td>21 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Discretionary</td>
</tr>
<tr>
<td>RI</td>
<td>Rhode Island Unfair Trade Practices and Consumer Protection Act; R.I.G.L. §6-13.1-1 et seq.</td>
<td>Only Consumers</td>
<td>20 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
</tr>
<tr>
<td>SC</td>
<td>South Carolina Unfair Trade Practices Act (&quot;UTPA&quot;); §§39-5-10 to 39-5-160.</td>
<td>Only Consumers</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SD</td>
<td>Deceptive Trade Practices and Consumer Protection Law; §37-24-1 through §37-24-48.</td>
<td>Consumers and Competitors</td>
<td>14 per se deceptive acts or practices</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>TN-1</td>
<td>Tennessee Consumer Protection Act (&quot;TCPA&quot;); Tenn. Code Ann. §47-18-101 through §47-18-125.</td>
<td>Only Consumers</td>
<td>51 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>TN-2</td>
<td>Tennessee Trade Practices Act (&quot;TTPA&quot;); Tenn. Code Ann. §47-25-101, et seq.</td>
<td>Only Consumers</td>
<td>2 catch all per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>TX</td>
<td>Texas Deceptive Trade Practices—Consumer Protection Act (&quot;DTPA&quot;); Tex. Bus. &amp; Com. Code §§17.41-63.</td>
<td>Only Consumers</td>
<td>31 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>UT</td>
<td>Utah Consumer Sales Practices Act (&quot;UCSPA&quot;); Utah Code Ann. §13-11-1 to 23.</td>
<td>Only Consumers</td>
<td>24 per se deceptive acts or practices</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Mandatory court costs; discretionary attorneys’ fees.</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state’s attorney general.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>VT</td>
<td>Vermont Consumer Fraud Act (&quot;VCFA&quot;); §2451-2480n.</td>
<td>Only Consumers</td>
<td>2 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>VA</td>
<td>Virginia Consumer Protection Act (&quot;VCPA&quot;); Va. Code § 59.1-196 et seq.</td>
<td>Only Consumers</td>
<td>8 per se deceptive acts or practices</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>No</td>
<td>Discretionary</td>
</tr>
<tr>
<td>WA</td>
<td>Washington Consumer Protection Act (&quot;CPA&quot;); RCW §19.86.010 et seq.</td>
<td>Consumers and Competitors</td>
<td>Catch all provision; board sweeping language</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>WV</td>
<td>West Virginia Consumer Credit and Protection Act (&quot;WVCCPA&quot;); W. Va. Code §§46A-6-101 through 46A-6-110.</td>
<td>Only Consumers</td>
<td>Catch all provision; board sweeping language</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Discretionary</td>
</tr>
<tr>
<td>WI</td>
<td>Wisconsin Deceptive Trade Practices Act (DTPA); Wis. Stat.§100.18.</td>
<td>Only Consumers</td>
<td>11 per se deceptive acts or practices</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Discretionary</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The information provided by this chart relates to litigation between private parties, and does not necessarily apply to litigation commenced by a state's attorney general.