CLAIMS UNDER THE “LITTLE FTC ACTS”
THE HIGH STAKES OF RISK AND REWARD

Altresha Q. Burchett-Williams
Haynes and Boone, LLP

Robert M. Einhorn
Zarco Einhorn Salkowski & Brito, P.A.

Paula J. Morency
Schiff Hardin LLP

October 13 – 15, 2010
The Hotel Del Coronado
San Diego, CA

©2010 American Bar Association

*The authors express their appreciation for the assistance and suggestions provided by Aphrodite Kokolis and Jeannice D. Williams of Schiff Hardin LLP in the preparation of this paper.
Table Of Contents

I. THE FAMILY TREE OF PROTECTIONS AGAINST FRAUDULENT OR DECEPTIVE ACTS ..................................................................................................................... 1

A. Types Of Little FTC Acts ........................................................................... 1

1. The FTC And Uniform Deceptive Trade Practices Act Models ....................... 2

2. Consumer Fraud Act Models ........................................................................ 3

B. Application To Franchising ........................................................................ 4

II. THE PROTECTIVE REACH AND LIMITATIONS OF LITTLE FTC ACTS TODAY ............................................................................................................. 4

A. There Can Be Considerable Variation In What Constitutes "Unfair Or Deceptive" Conduct .................................................................................. 5

B. Sciener Requirements Vary Widely ............................................................... 8

C. Reliance May Or May Not Be Required ....................................................... 9

D. Causation/Injury Requirements Differ State to State ................................... 11

III. KEY DEFENSES .......................................................................................... 11

A. Standing ........................................................................................................ 11

1. Some Statutes Limit Relief To "Consumers" ............................................. 12

2. Some Statutes Do Not Apply If The Dispute Has A "Contractual Center" ........................................................................................................ 15

B. Waiver, "No Reliance" And Release Provisions May Bar The Claim ........... 16

C. Limitation Periods May Bar The Claim ....................................................... 17

IV. THE RANGE OF AVAILABLE REMEDIES MAKES LITTLE FTC ACTS APPEALING AND DANGEROUS, IN EQUAL MEASURE .................................. 18

A. Actual Damages And Statutory Damages .................................................. 18
B. Punitive And Enhanced Damages ................................................................. 19
C. Attorney's Fees ......................................................................................... 20

V. CLASS ACTIONS INCREASE THE RISKS OF LITTLE FTC ACT CLAIMS ...... 20
   A. Class Certification Requirements ............................................................... 21
   B. Timing Of Class Certification ................................................................... 22

VI. THE SPLITS BETWEEN ALLOWING AND DISALLOWING CLASS
    TREATMENT OF LITTLE FTC AND CONSUMER FRAUD CLAIMS .......... 23
   A. Deceptive Trade Practices Act Claims By Franchisees Against
      Franchisors .............................................................................................. 23
   B. Deceptive Trade Practices Claims By Consumers Against
      Franchisors Or Franchisees ....................................................................... 24
   C. Multi-Jurisdictional Disputes ................................................................... 25

CONCLUSION ..................................................................................................... 27
CLAIMS UNDER THE “LITTLE FTC ACTS”
The High Stakes of Risk and Reward

The class of protective statutes known as “little FTC Acts,” like other consumer protection laws, can have significant effects on both franchisors and franchisees. State anti-fraud legislation can impact not only the commercial dealings between a franchised system’s participants and their ultimate customers, but also the relationships between franchisors and franchisees. Rooted in the common law, and designed to address unfair and deceptive behavior, these statutes frequently grant private rights of action, a characteristic commentators have described as “their power – and their danger.”1 Recent decisions permitting class-wide relief underscore the importance of understanding these key state requirements, together with the defenses that determine who may benefit or be bound by their terms.

Despite their common power, there are substantial variations among the states in their application of these anti-fraud principles. These differences provide new reasons for care in the choice of law and forum in drafting franchise agreements, as well as in a plaintiff’s selection of a venue and even class representatives for little FTC Act disputes. This paper will examine the way in which legislatures and courts have defined unfair or other actionable conduct, the most common requirements for obtaining the protection of these acts, potential defenses against such claims, and the range of remedies available to injured parties. In the course of that analysis, we will contrast some of the most permissive jurisdictions with those that impose more rigorous requirements for little FTC Act relief.2

I. THE FAMILY TREE OF PROTECTIONS AGAINST FRAUDULENT OR DECEPTIVE ACTS

Many franchise practitioners are thoroughly familiar with the protections and requirements of the Federal Trade Commission Act (the “Act”). Section 45(a) of the Act, 15 U.S.C. § 45(a)(1), prohibits “unfair or deceptive acts or practices in or affecting commerce,” while the FTC’s Trade Regulation Rule specifies the disclosures required as part of the creation of a franchised relationship.3 Although the Act is a potent tool for actions by federal regulators, it lacks a private right of action, and thus cannot be used by individual claimants to address perceived violations. To bring a private civil suit for unfair or deceptive treatment, a plaintiff therefore must turn to state common law and/or the state consumer fraud and deceptive trade practices statutes designed to provide redress for such behavior.

---

1 See, e.g., A. Brown and L. Hepler, “Comparison of Consumer Fraud Statutes Across the Fifty States,” FDCC Quarterly, Vol. 55, No. 3 (Spring 2005).

2 In accordance with the policies of the ABA Forum on Franchising, the authors note that they or other members of their firms have been involved in the following cases that are addressed in this paper: Burger King Corp. v. H&H Restaurants, LLC, No. 99-2855, 2001 WL 185098, at *8-9 (S.D. Fla. Nov. 30, 2001) and Burger King Corp. v. Ashland Equities, Inc., 161 F. Supp. 1331, 1335 – 1338 (S.D. Fla. 2001) (Mr. Einhorn’s firm); Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 856 (Ill. 2005) and Broderick v. 119TCbay, Baymont Franchise Systems, Inc., 670 F. Supp. 2d 612, 614-15 (W.D. Mich. 2009) (Ms. Morency’s firm).

A. Types Of Little FTC Acts

There are basically three types of relevant state statutes, all designed to address unfair and deceptive behavior. The wording of these laws is usually drawn from the FTC Act, the Uniform Deceptive Trade Practices Act, or the Uniform Consumer Sales Practices Act. They offer a range of potential remedies, including actual damages, enhanced damages, injunctive or declaratory relief, attorneys' fees, court costs, and rescission, for unfair and deceptive practices committed in the conduct of trade or commerce.

While little FTC Acts often codify common law concepts, as discussed below they are usually more liberal in permitting causes of action that would fail to satisfy the rigorous requirements of a common law claim for fraud or misrepresentation. The legislative history of many such statutes reveals an intention that they be liberally construed, in order to provide "broader protection to consumers than an action for common law fraud." As the Oregon courts have observed, "Had the legislature intended that a consumer prove all the elements of common law fraud in order to recover damages, it would have been unnecessary to create a cause of action by statute." Accordingly, some little FTC Acts allow more relaxed burdens of proof, and may be satisfied by a "preponderance of the evidence", rather than clear and convincing evidence. Still others will presume traditional common law elements like reliance from actions "likely" to deceive, rather than requiring evidence of actual reliance or deception. These factors can make little FTC Acts much more useful to a plaintiff, and dangerous to a defendant, than the stricter common law doctrines.

The law in this area continues to evolve, however, through legislation, voter propositions and judicial interpretation. It is therefore extremely important to conduct more than a Shepard's or Westlaw search to make sure that your facts permit a claim, or a challenge, under the law of a particular jurisdiction. For example, Proposition 64 amended California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200, after a series of cases had concluded that a claim under § 17200 did not require evidence of actual reliance or actual deception. Proposition 64, passed by California voters, was intended to limit the statute's use in "shakedown" suits, and confirmed a requirement of actual reliance and damages. Accordingly, as the California Supreme Court recently explained, in a 17200 putative class action the named plaintiff must demonstrate that reliance on the truth of the alleged fraudulent misrepresentation "played a substantial part, and so [was] a substantial factor, in influencing his decision."

---


5 Wright, at *3 (citations omitted).


1. **The FTC And Uniform Deceptive Trade Practices Act Models**

   Little FTC Acts based on the federal statute contain the same prohibition against “unfair or deceptive acts or practices,” but usually allow a private right of action, and broader relief. The statutes modeled on the Uniform Deceptive Trade Practices Act, for example, frequently go further than the Act by listing a series of specific prohibited behaviors, as well as a catch-all clause proscribing “other” deceptive acts.\(^{10}\) As discussed below, state statutes can vary significantly, though, in their description of prohibited behaviors. For example, while Illinois prohibits 12 categories of activities (including the catch-all “other conduct”), some states list far more than that, including Colorado's interdiction against 43 practices.\(^{11}\)

2. **Consumer Fraud Act Models**

   Some states have chosen to use the Uniform Consumer Sales Practices Act as the prototype for their prohibitions, either in addition to or in place of statutes forbidding deceptive trade practices. The consumer fraud language is frequently similar to the New Jersey statute:

   "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in

---

\(^{10}\) For example, the Illinois Deceptive Trade Practices Act provides, in relevant part:

   (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

   (1) passes off goods or services as those of another;
   (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
   (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;
   (4) uses deceptive representations or designations of geographic origin in connection with goods or services;
   (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
   (6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
   (7) represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another;
   (8) disparages the goods, services, or business of another by false or misleading representation of fact;
   (9) advertises goods or services with intent not to sell them as advertised;
   (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
   (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
   (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

815 ILL. COMP. STAT. ANN. 510/2(a) (West 2010).


-3-
connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice ... \(^{12}\)

The breadth of this kind of model gives substantial latitude to courts and juries in determining what kind of behavior will entitle a plaintiff to relief, as illustrated by the examples below.

B. Application To Franchising

Whether based upon the FTC Act, the Uniform Deceptive Trade Practices Act, or the Uniform Consumer Sales Practices Act, these anti-fraud statutes have been applied in many ways to franchised businesses and their relationships. For example, litigants have invoked little FTC Acts in disputes between franchisor and franchisee. Many franchisors will add such claims to a Lanham Act suit against a terminated franchisee who persists in using the marks after losing his license to display them. Some franchisees, on the other hand, have alleged claims against their franchisor or former franchisor, claiming that violations of the federal registration and/or disclosure requirements constitute deceptive or unfair practices, in violation of state statutory authority.

Finally, a franchisor and/or franchisee may experience the effect of little FTC Acts as a defendant (or as co-defendants) in consumer fraud litigation. In each of these settings, it will be essential to understand the scope and risks presented by these statutes and related case law, as well as the requirements and defenses available to oppose little FTC Act claims.

II. THE PROTECTIVE REACH AND LIMITATIONS OF LITTLE FTC ACTS TODAY

Because the little FTC Acts often are designed to expand common law doctrines, for the protection of consumers, they may prohibit a much wider range of conduct than common law fraud.\(^{13}\) Little FTC Acts thus are often drafted in sweeping language, broadly prohibiting all conduct that is "unfair" or "deceptive." Many state statutes also include a nonexclusive, but sometimes extensive, list of prohibited practices with a catch-all provision to prohibit "other" conduct that creates a likelihood of deception or confusion.\(^{14}\) Other states have simply enacted broad wording without further definition, leaving to courts or juries the task of establishing more precise contours for the statutory prohibition. Under Florida law, for example, a deception takes place when there is a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment," while an unfair

---


\(^{14}\) See, e.g., supra n. 5, Illinois Deceptive Trade Practices Act, 815 ILL. COMP. STAT. ANN. 510/2; see also ALASKA STAT. §§ 45.50.471(b) (2010); ARIZ. REV. STAT. ANN. §§44-1522 (2010); ARK. CODE ANN. §§ 4-88-107, et seq. (West 2010); GA. CODE § 10-1-393(b) (West 2010); IOWA CODE §§714.16(2); MD. CODE ANN., COM. LAW §13-301 (West 2010); MISS. CODE ANN. § 75-24-5(2) (West 2009); TENN. CODE ANN. §47-18-104(b) (West 2010); TEX. BUS. & COM. CODE ANN. §17.46(b) (2009); WYO. STAT. ANN. §40-12-105(a) (2010); W. VA. CODE, ANN. § 46A-6-102(7) (West 2010).
practice is "one that ‘offends established public policy’ and . . . is ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’”¹⁵

The breadth of little FTC Acts thus present a contrast to the meticulous (and often challenging) prerequisites for recovery under a common law fraud theory: intentional misrepresentation of material facts, reliance by the recipient, causation, and damages.¹⁶ By comparison, statutes like the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) require far less. To establish a claim, a plaintiff must show: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.¹⁷ Even more specific statutes, though, require less than the rigorous proof required to establish a claim for common law fraud or misrepresentation.

Within the more limited requirements of state consumer fraud statutes, the degree of scienter, standing, and other traditional hurdles may be lower as well. In the segments below, we address the most common ways in which little FTC Acts broaden their protections, in comparison to common law fraud requirements.

A. There Can Be Considerable Variation In What Constitutes “Unfair Or Deceptive” Conduct

While each state and the District of Columbia has at least one statute aimed in some way at prohibiting unfair and/or deceptive trade practices,¹⁸ their provisions vary substantially in the scope and strength of the protection they provide. Because the determination of what is “unfair” or “deceptive” may differ substantially from jurisdiction to jurisdiction, and from jury to jury, it is pivotally important to understand the scope of prohibited behavior in all the jurisdictions relevant to a franchise or franchised system.

As set forth above, several state consumer protection acts prohibit “unfair . . . acts or practices” in general terms, without identifying specific conduct that violates the act.¹⁹ Others


¹⁹ For example, the Idaho statute defines an unfair practice as “an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.” IDAHO CODE ANN. § 714.16(1)(n) (West 2010). The Oklahoma statute defines a deceptive trade practice as “a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person” and an unfair trade practice as “any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” OKLA. STAT. ANN. tit. 15, § 752(13) & (14) (West 2010); see also David A. Belt, The Standard for Determining “Unfair Acts or Practices” Under State Unfair Trade Practices Acts, 80 CONN. B.J. 247, 249 (2006). See also, e.g., FLA. STAT. § 501.204 (West 2010), HAW. REV. STAT. § 480-2(8) (2009), LA. REV. STAT. ANN. § 51:1405(A) (2009), ME. REV. STAT. ANN. tit. 5, § 207 (2009), MONT. CODE ANN. § 30-14-103 (2009), NEB. REV. STAT. § 59-1602
incorporate statutes and rules by reference, prohibiting behavior that violates “[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices.” While some of these statutes provide additional guidance for determining what conduct is prohibited, most offer only limited practical guideposts. Accordingly, in many jurisdictions the standards for determining whether a practice is unfair and/or deceptive have developed largely through judicial interpretation, on a case by case basis.

For example, under Massachusetts law, the definition of an “unfair trade practice” has been left “to the finder of fact, subject to the court’s performance of a legal gate-keeping function.” As the First Circuit has explained:

Massachusetts courts, in considering whether a particular act or practice violates the unfairness prong of Chapter 93A: ‘look to (1) whether the practice ... is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).’

It is frequently probative that the allegedly deceptive behavior violates other state or federal statutes. For example, violations of the Washington Franchise Investment Protection Act (“FIPA”) are considered per se unfair trade practices under the Washington Consumer Protection Act (“WCPA”). Accordingly, Washington courts allow plaintiffs to bring claims under both statutes. While a violation of the FIPA does not automatically establish a violation of the WCPA, it does create a presumption that the practice is unfair or deceptive, thus establishing one of the threshold elements of a WCPA claim.

20 Fla. Stat. § 501.203(3)(c). See also Fla. Stat. § 501.203(3)(a)-(b), Mo. Code Rgs. tit. 15, § 60.8.020 (2010) (defining an unfair practice as “any practice which either offends any public policy established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or [i]s unethical oppressive or unscrupulous; and [p]resents a risk of, or causes, substantial injury to consumers”).


26 Id.
Franchise Act are considered *per se* unfair trade practices under the Connecticut Unfair Trade Practices Act (“CUTPA”). According, like the Washington courts, the Connecticut courts allow plaintiffs to bring claims under both statutes. The Connecticut courts have also held that violations of the federal franchise disclosure laws, or of the federal antitrust laws, will support a claim of unfair competition under the CUTPA.

In jurisdictions that do not incorporate examples of deceptive trade practices, or draw by reference from the prohibitions in other statutes, little FTC Acts frequently leave much to the imagination. For example, the consumer protection acts of fifteen states and the District of Columbia include a broad prohibition against “unconscionable” acts. Because there is very little case law defining or interpreting “unconscionability” in the context of franchise or other commercial relationships, an accusation of unfair or deceptive trade practices may create a jury issue in those jurisdictions. Unfortunately, the words that courts have applied to define unconscionability are often as vague as the statutory provision itself. One recent federal district court opinion recently addressed unconscionability in an exclusive distribution relationship, and defined an unconscionable act under the Arkansas Deceptive Trade Practices Act to mean one that “affront[s] the sense of justice, decency or reasonableness.” The court denied the defendant’s motion for summary judgment, holding that the issue of whether its conduct rose to the level of unconscionability was a question to be answered at trial, by the finder of fact.

A New Jersey court examined a franchisee’s allegations of “unconscionable” commercial practices, holding that the New Jersey’s Consumer Fraud Act created a cause of action for such practices in a franchise relationship, but only when the practices are not covered by the New Jersey Franchise Practices Act. Despite that ruling, the borders of the New Jersey

---


28 Id.


32 **ARK. CODE ANN.** § 4-88-107(a)(10).


Consumer Fraud Act, like those of other state statutes proscribing “unconscionable” behavior, remain largely undefined.

There are some limits, however, on what representations or omissions can be characterized as actionably unfair or deceptive. Many states limit redress to situations beyond merely private contracts, where the “public” may be misled. As set forth in Sections III(A)(1)-(2) below, the state little FTC and consumer fraud laws will frequently apply to benefit “consumers,” and will not provide a remedy for a dispute that has a “contractual center.” For example, the Washington statute is meant to deal with situations that transcend mere private party contracting disputes, and have affected or will affect consumers generally. In evaluating a potential WCPA claim, then, the Washington courts have examined whether the defendant made representations to, or solicited, the public. In Abbouds’ McDonald’s, LLC v. McDonald’s Corp., the court focused on the fact that McDonald’s did not actively solicit members of the public to become franchisees, in granting summary judgment in favor of McDonald’s on a plaintiff’s WCPA claim. The Court reasoned that the plaintiff failed to establish how the alleged unfair and deceptive acts affected the public interest. Other WCPA cases confirm that the most difficult element for a plaintiff to establish may be the requisite effect on the public interest. Similarly, under Florida’s little FTC Act, a district court has held that a franchisee who attempted to sell a franchised restaurant was not a consumer for the purpose of making claims against its franchisor. (Please see further discussion infra at Sections III(A)(1)-(2)).

B. Scienter Requirements Vary Widely

Because individuals rarely admit to an intention to mislead, plaintiffs pursuing fraud claims typically have had to establish scienter by circumstantial evidence. State consumer protection statutes drafted to expand potential liability often have done so by limiting, and in some cases eliminating, the common law requirement that a plaintiff prove an intentional misrepresentation or omission of a present material fact, by the defendant. These statutes differ substantially as to what type of scienter must be proven, if any. Several states do not require


39 Id.

40 See, e.g., Noyes v. State Farm Gen. Ins. Co., No. C08-5032, 2009 WL 927706, at *8 (W.D. Wash. Apr. 1, 2009) (granting summary judgment for defendant where plaintiff failed to present any evidence showing that the termination of its franchise had an impact on the public interest, even if the termination had been unfair or deceptive); see also Saunders v. Lloyd’s of London, 779 P.2d 249, 256 (Wash. 1989) (plaintiff must show that “an act or practice has a capacity to deceive a substantial portion of the public”); Cassan Enterprises, Inc. v. Dollar Systems, Inc., Nos. 96-35695, 96-35634, 96-35905, 1997 WL 753394, at *2 (9th Cir. 1997) (holding franchisor’s refusal to honor a promise made to a franchisee did not have the capacity to deceive the public and therefore could not give rise to a claim under the WCPA).

41 Burger King Corp. v. H&H Restaurants, LLC, No. 99-2855, 2001 WL 1850888, at *8-9 (S.D. Fla. Nov. 30, 2001) (citing Burger King Corp. v. Ashland Equities, Inc., 161 F. Supp. 1331, 1335 – 1338 (S.D. Fla. 2001), and holding that statute had “no application to entities complaining of tortious conduct which is not the result of a consumer transaction”).
that a plaintiff make any showing with regard to *scienter*\(^{42}\) or demonstrate that the defendant knew his conduct was deceptive,\(^{43}\) in order to invoke consumer protection laws. For example, the Minnesota Consumer Fraud Act, *Minn. Stat.* § 325F.69, does not require that one who makes a misrepresentation know that it is false, but instead allows a showing of conduct equivalent to negligent misrepresentation, thereby broadening the scope of the act in comparison to common law fraud.\(^{44}\) In applying the Minnesota Act, the court in *Carllock v. Pillsbury Co.* held that the intent element of the statute is satisfied by conduct that might accurately be described as a form of indifference, or negligent misrepresentation: making a statement without knowing whether it is true or false, which turns out to be false.\(^{45}\) Similarly, in Nevada, the statute expressly provides that proof of a violation of its consumer protection statute constitutes evidence of the intent to injure a competitor.\(^{46}\)

Several other states are closer to the common law tradition, requiring that a claimant prove either a willful,\(^{47}\) knowing,\(^{48}\) or intentional\(^{49}\) violation of their respective little FTC Acts. Others have required a plaintiff to establish intent only in cases involving an omission or concealment of material facts,\(^{50}\) or other specific violations.\(^{51}\)

**C. Reliance May Or May Not Be Required**

It is a fundamental principle of common law fraud that, in order to secure redress, the person to whom the representations were made must have relied upon the representations.\(^{52}\)

---

\(^{42}\) See, e.g., *Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001); *McRae v. Bolstad*, 676 P.2d 496, 500 (Wash. 1984) ("[P]roof of intent to deceive or defraud is not necessary if the action 'has the capacity to deceive a substantial portion of the purchasing public.'" (quoting *Haner v. Quincy Farm Chems., Inc.*, 649 P.2d 828, 831 (Wash. 1982)); *Duhl v. Nash Realty Inc.*, 429 N.E.2d 1267, 1277 (III. App. Ct. 1981) (noting that "the Act affords even broader consumer protection than does the common law action of fraud" and therefore "under the Act the intention of the seller (his good or bad faith) is not important").

\(^{43}\) *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990) ("That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under N.C.G.S. § 75-1.1."); *Henry S. Miller Co. v. Bynum*, 797 S.W.2d 51, 55 (Tex. App. 1990) ("When a seller makes representations to a buyer, it is under a duty to know if the representations are true").


\(^{47}\) See, e.g., *Or. Rev. Stat.* 646.605(10), -638(1) ("willful").

\(^{48}\) See, e.g., *Wyo. Stat. Ann.* 40-12-105(a) ("knowingly").


\(^{52}\) 64 A.L.R.3d 6 § 9 (2009).
This common law requirement narrowed the field of potential plaintiffs to those to whom a statement was addressed, and therefore has become analogous to a privity requirement.

Some state consumer protection statutes have loosened that common law requirement, and do not regard traditional "reliance" as an element of a little FTC Act or consumer fraud claim. This more elastic approach had its roots in the early days of consumer fraud statutes, when state attorneys general, rather than members of the public, were the ones authorized to bring claims for injunctive relief against practices that were likely to harm consumers. In that setting, it made legislative and judicial sense to allow the prevention of harm without awaiting proof that it had in fact already occurred. As private rights of action were granted, some jurisdictions continued to dispense with an actual reliance requirement. However, many courts found other ways to require proof of reliance under different labels, by insisting upon evidence of materiality and causation.

Today, only a few states explicitly require, in the text of the statute, that a plaintiff demonstrate actual reliance.\textsuperscript{53} Some require proof of reliance only for certain violations, but are not consistent with each other. For example, the Iowa statute requires reliance only for the "concealment, suppression or omission of [a] material fact."\textsuperscript{54} Courts in a number of other states require a showing that the reliance on the alleged unfair or deceptive act was "reasonable" or "justifiable."\textsuperscript{55} Kansas courts have interpreted their statute to require that a claimant be "aggrieved" in order to show reliance.\textsuperscript{56} In others, the defendant's action must have "materially induced" the plaintiff to sustain a pecuniary loss.\textsuperscript{57}

In jurisdictions with more elastic requirements, plaintiffs may establish that the underlying representation simply had the capacity or tendency to deceive.\textsuperscript{58} This approach substantially increases the range of potential deceptive conduct claims, by allowing individuals who were not the direct recipient of a misrepresentation to bring an action under a consumer protection statute. In particular, it opens the field of potential plaintiffs not only to those addressed by a particular statement, but also to anyone else who might reasonably be

\textsuperscript{53} See, e.g., Ind. Code Ann. 24-5-0.5-4(a); Tex. Bus. & Com. Code Ann. 17.50(a)(1)(B) (requiring that the deceptive act or practice be "relied on by a consumer to the consumer's detriment"); Wyo. Stat. Ann. 40-12-108(a) ("A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer or as a result of such unlawful deceptive trade practice.").

\textsuperscript{54} Iowa Code § 714.16(7); see also Wright v. Kia Motors America, Inc., No. Civ. 06-6216, 2007 WL 316351 (D. Or. Jan. 29, 2007)(applying Oregon law, and dispensing with reliance requirement for a failure to disclose).

\textsuperscript{55} For example, in interpreting New York's General Business Law § 349, courts have adopted "an objective definition of 'misleading,' under which the alleged misleading act must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007). Accordingly, "[A] private action brought under § 349 does not require proof of actual reliance. The plaintiff, however, must show that the defendant's 'material deceptive act' caused the injury." Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742, 2010 WL 3119452, at *5 (S.D.N.Y. Aug. 5, 2010) (citations omitted).


\textsuperscript{57} See, e.g., Schmidt v. Bassett Furniture Indus., No. 08-C-1035, 2009 WL 3380354, at *9 (E.D. Wis. Oct. 20, 2009) (citing Novell v. Migliaccio, 749 N.W.2d 544 (Wis. 2008)).

\textsuperscript{58} Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 170 P.3d 10, 18 (Wash. 2007).
anticipated to rely upon it. In some other states, reliance is essentially a component of causation.\(^{59}\) Given the variety of approaches, the parties should examine carefully whether a reliance element, or an analogous causation requirement, exists in the particular jurisdiction where a dispute arises.

D. Causation/Injury Requirements Differ State to State

Little FTC Acts vary as well with regard to the requirement of causation and injury. Under some statutes, the requirements of actual injury and proximate cause are embedded within the descriptions of who has standing to sue.\(^{60}\) Other consumer protection laws, however, allow claimants to recover without a showing of causation or injury. Some require a plaintiff to prove only that there is a likelihood of damage,\(^{61}\) or that an act had a tendency to deceive consumers or was capable of being interpreted in a misleading manner. Under the Georgia Fair Business Practices Act and other statutes, for example, plaintiffs must prove that the actions described in the complaint have the potential to harm the public.\(^{62}\) As discussed below, in addition to broadening the scope of potential liability, many of these statutes may also permit class actions, and may provide for statutory, enhanced, treble, and punitive damages, and even for the recovery of attorneys' fees.

III. KEY DEFENSES

Once a plaintiff has raised a claim for violation of a little FTC or other anti-fraud statute, defendants are well-advised to assess whether there may be a basis to assert that the plaintiff lacks standing to bring the claim, whether plaintiff's claims may have been waived or released, and whether the relevant statute of limitations may have run.

A. Standing

Some states' little FTC Acts require that any private plaintiff be a "consumer" in order to seek redress for the unfair or deceptive act or practice.\(^{63}\) Within those statutes and judicial interpretations, there is substantial variation on the assessment of whether businesses, including franchisees, can meet the definition of "consumer." Generally, little FTC Acts and consumer fraud statutes have taken one of three approaches to the question of a franchisee's

---

\(^{59}\) See, e.g., Avery, 216 Ill. 2d at 157 (because plaintiff was not deceived, he failed to establish the proximate causation necessary to recover under the Illinois Consumer Fraud Act).

\(^{60}\) See, e.g., Ind. Code Ann. §24-5-0.5-4; Neb. Rev. Stat. §87-302; Nev. Rev. Stat. §598.0903(1); see infra § II(C)(1) for a discussion on the standing requirement across state consumer protection statutes.


standing to sue: (1) the franchisee is not considered a consumer, and is completely barred from bringing a claim under the consumer fraud or little FTC Act;\(^64\) (2) the franchisee, either statutorily or by a judicial interpretation of the act, is considered a consumer, and may bring a claim under the state;\(^65\) or (3) the statute is silent, in which case franchisees will be permitted to bring a claim if certain criteria are met for that particular suit, with the criteria varying by state.

Where there is no clear legislative direction on the issue of whether a franchisee has standing to sue under the particular protective legislation, the analysis may turn on whether the dispute itself has a "contractual center." That approach may preclude a private deceptive trade practices act claim for a dispute that is fundamentally a contractual one.

1. **Some Statutes Limit Relief To “Consumers”**

A number of states provide statutory protections to "consumers." That term is sometimes, but not always, defined to mean someone who purchases or leases goods or services for "personal, family, or household" purposes.\(^66\) In other states, the definition is broader, and may either include or exclude one who purchases a franchise. For example, the Michigan Consumer Protection Act, prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce."\(^67\) The term "trade or commerce" is defined to exclude the purchase or sale of a franchise:

Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. "Trade or commerce" does not include the purchase or sale of a franchise but does include pyramid and chain promotions.\(^68\)


\(^66\) ALA. CODE § 8-19-3(2); CAL. CIV. CODE § 1761(d); IND. CODE 24-5-0.5-2(a)(1); KY. REV. STAT. ANN. 367.220 (1); ME. REV. STAT. TIT. 5, § 213; MISS. CODE ANN. 75-24-15(1); MO. ANN. STAT. § 407.025(1) (West 2010); MT. CODE ANN. 30-14-102; OHIO REV. CODE ANN. § 1345.01(A); 73 PA. CONS. STAT. ANN. § 201-9.2(a) (West 2010); R.I. GEN. LAWS 6-13.1-5.2(a) (2010); UTAH CODE ANN. 13-11-3(2); WIS. STAT. § 421.301(17) (West 2009); WYO. STAT. § 40-12-102(a)(6).

\(^67\) MCLS § 445.901-903 (2010).

\(^68\) Id. at 902(d).
In some jurisdictions, a business may bring a little FTC Act or consumer fraud claim if it is behaving as a consumer in a particular transaction, or allegedly suffered harm from “consumer-oriented conduct.” In New York, a plaintiff may establish such conduct by showing that defendant’s acts or practices have “a broader impact on consumers at large,” in that they are “directed to consumers” or “potentially affect similarly situated consumers.”

Accordingly, courts have examined closely whether a plaintiff meets the standing requirements for a claim of consumer fraud or deceptive trade practices. In some cases, either the underlying statute or interpretive decisions have determined that a franchisee falls within the definition of “consumer,” or is otherwise protected by the relevant statute. In other cases, they have not. For example, the Texas Deceptive Trade Practices Act (“DTPA”) defines a consumer as one who (1) seeks or acquires, (2) goods or services, by (3) purchase or lease. A plaintiff has the burden of pleading and proving his consumer status. In Miller v. KFC Corp., the court considered whether to allow a DTPA claim filed by the plaintiff franchisees after KFC refused to grant them an additional location. While noting that franchise agreements can involve the transfer of goods or services, the court emphasized that the complaint must have arisen from that transfer in order to state a claim under the DTPA. Because the failure to grant additional territory did not arise from the franchisees’ purchase of goods or services under their franchise agreement, the court held that the plaintiffs were not consumers within the meaning of the DTPA. Similarly, in interpreting the statutes of other states, other courts have held that franchisees are not consumers within the meaning of the consumer protection act.

---

69 See, e.g., Fla. Stat. Ann. §501.203(7)(“consumer” may include a business entity); S.O.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp., 84 F.3d 629, 636 (2d Cir. 1996) (Second Circuit appeared to leave open the possibility that the term “consumer” could include businesses, stating “[i]t is unclear whether franchisees qualify as consumer for the purpose of this statute”).


71 See, e.g., Flower World of America v. Wenzel, 594 P.2d 1015, 1019-20 (Ariz. Ct. App. 1978) (holding that Arizona’s Consumer Fraud Act applied to a transaction involving a franchise agreement); Morgan v. Air Brook Limousine, Inc., 510 A.2d 1197, 1205-06 (N.J. Super Ct. Law Div. 1986) (holding that a franchise or business opportunity venture is merchandise within the intendment of New Jersey’s Consumer Fraud Act; noting that by enactment of the New Jersey Franchise Practices Act, New Jersey’s legislature had declared that franchise arrangements in New Jersey vitally affect the general economy of the State, the public interest and the public welfare); Tex. Cookie Co. v. Hendricks & Perotta, Inc., 747 S.W.2d 873, 877 (Tex. App. 1988) (holding that a franchise agreement involved the transfer of goods or services for purposes of the Texas Deceptive Trade Practices Act); Connolly v. WeCare Distrib., Inc., 541 N.Y.S.2d 163, 164-65 (N.Y. Sup. Ct. 1989) (holding that a distributor was covered under the New York Consumer Protection from Deceptive Acts and Practices Law).


74 Id.; compare Brock v. Baskin Robbins, USA, Co., No. 5:99-CV-274, 2003 WL 21309428 (E.D. Tex. Jan. 17, 2003) (court held that plaintiff franchisees were not consumers because purchasers of intangible rights were usually not consumers under the Texas DTPA).

75 See, e.g., PCJ Franchising Co., LLC v. Newsome, No. 7:08-CV-41, 2008 WL 4772191, at *2 n.10 (E.D.N.C. Oct. 24, 2008) (applying South Carolina Unfair Trade Practices Act, S.C. Code Ann §39-5-140, requirement that the unfair or deceptive act have an adverse impact on the public interest meant that statute “is not meant to govern franchises, but rather is meant to protect consumers from businesses engaging in unfair dealings with the public as a whole”); Layton v. AAMCO Transmissions, Inc., 717 F. Supp. 368 (D. Md. 1989) (holding that a franchise was not a consumer under the Maryland Consumer Protection Act); Paulson, Inc. v. Bronar, Inc., 775 F. Supp. 1329, 1337 (D.
For example, in *Lui Ciro, Inc. v. Ciro, Inc.*, the plaintiff franchisees argued that they had a private right of action under Hawaii's little FTC Act (Chapter 480) for allegedly unfair or deceptive acts or practices, notwithstanding Hawaii's requirement that only a "consumer" could bring such a claim. They noted that Hawaii's Franchise Investment Law ("FIL") provides that "the commission of any unfair or deceptive acts or practices ... shall constitute an unfair or deceptive act or practice under chapter 480." The district court held that Hawaii's FIL did not create a private cause of action for franchisees with respect to deceptive practices. Although the FIL provided that the commission of a prohibited practice is a deceptive act under Hawaii's deceptive trade practices statute, the court viewed the "consumer" requirement as a prerequisite to a private suit under Chapter 480. Nonetheless, the court held, the interrelationship between the two statutes were not meaningless -- the attorney general or director of the office of consumer protection could still enforce the franchisor's alleged violations of the deceptive practices act.

On the other hand, some states' little FTC Acts specifically prohibit unfair or deceptive practices in actions involving franchises. States such as Alabama, Oregon, and, due to a recent amendment, Tennessee, expressly include franchise transactions within the reach of the protections afforded by their little FTC Acts.

Some courts have ruled differently over time on the question of whether a franchisee has standing to sue, even in applying the same state act. For example, in *Morgan v. Air Brook Limousine, Inc.*, a New Jersey state court found that a franchisee could pursue a claim against its franchisor, for providing allegedly misleading data, under the New Jersey little FTC Act. The court concluded that the franchisor "should have known that prospective purchasers, particularly those not sophisticated in business matters, would rely upon what was furnished them." Applying the same statute eight years later, though, the Third Circuit found that the act

---

Haw. 1991) (holding that a distributor was barred from suing because the statute limits potential plaintiffs to consumers and the Attorney General); *J & R Ice Cream Corp. v. Cal. Smoothie Licensing Corp.*, 31 F.3d 1259, 1272 (3d Cir. 1994) (holding that although a corporation may qualify as a person under the New Jersey Consumer Fraud Act when it finds itself in a consumer oriented situation, the Act did not apply to a terminated franchisee because an individual or corporation purchasing a franchise is not a person in a consumer oriented situation; "it is the character of the transaction rather than the identity of the purchaser which determines if the Act is applicable").


77 HAW. REV. STAT. § 482E-9(a).


79 Id. at 1387-88.

80 ALA. CODE § 8-19-3(3) ("goods" include any franchise, license, and distributorship); OR. REV. STAT. § 646.605(6) ("goods or services" include franchises, distributorships and other similar business opportunities); Tenn. Code Ann. 47-18-103(5)("goods" include a franchise, distributorship agreement, or similar business opportunity).


82 Id. at 1210.
was "intended to protect persons engaging in ‘consumer’ transactions, not those acquiring businesses." 83

Other states have continued to struggle with whether businesses have standing to sue under their respective little FTC Acts. After the Supreme Court of Tennessee finally ruled that business were intended to have standing under the state statute, (by examining the "plain language" of provision that limited claims to those arising from acquisitions for "personal, family, or household use"), 84 Tennessee updated its statute to include a franchise as a type of "good" and to confirm that transactions between franchisors and franchisees fell within the protective reach of the statute. 85

A clearer statute has not necessarily produced clearer results. Although the Maryland Act expressly includes "businesses" in the definition of the persons it protects, 86 Maryland courts have held that businesses cannot sue other businesses under the little FTC statute. 87

2. Some Statutes Do Not Apply If The Dispute Has A “Contractual Center”

Some jurisdictions have concluded that little FTC Acts cannot be used to create an additional remedy for what is fundamentally a contract dispute. The reasoning varies, including assessments that businesses dealing with each other were not the intended beneficiaries of these protective statutes, and/or a reluctance to alter the contractual remedies and expectations that the parties incorporated into their relationship. Accordingly, a deceptive trade practices act claim may be unavailable for a dispute that has a "contractual center." As the Fourth Circuit explained, in the dispute between Meineke and its franchisees, "If 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." 88 Similarly, the Illinois Supreme Court has held,

A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act ....We believe that a “deceptive act or practice” involves more than the


84 ATS Southeast, Inc. v. Carrier Corp., 18 S.W.3d 626, 627-630 (Tenn. 2000).


88 Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998); see also Innovative Sales LLC v. Northwood Mfg, Inc., No. 07-30598, WL 3244114, at * (5th Cir. Aug. 5, 2008) (Louisiana Unfair Trade Practices Act "does not provide an alternate remedy for simple breaches of contract .... [t]here is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes.") (citations omitted).
mere fact that a defendant promised something and then failed to do it.\textsuperscript{89}

Other jurisdictions have allowed such claims to proceed, most commonly where the allegations are that the basis for the contract was tainted by a misrepresentation or omission. For example, in \textit{KC Leisure, Inc. v. Haber},\textsuperscript{90} the Florida appellate court held that an alleged failure to provide disclosures required by the FTC Act stated a claim for violation of the Florida Deceptive and Unfair Trade Practices Act (the “FDUTPA”). The plaintiff KC Leisure was a licensee of Relay Transportation, a system for the retail sale and rental of electric cars. Plaintiff sued one of Relay Transportation’s principals, alleging that he personally participated in the franchisor’s efforts to evade the FTC Rule by titling the investment as a “license,” rather than as a “franchise,” by failing to make the disclosures required by the FTC Rule, and by providing pro formas that misrepresented the prospects of the venture. The lower court had dismissed four efforts by the plaintiff to state a claim under FDUTPA, reasoning that an individual should not be liable for the alleged corporate misbehavior. The appellate court examined closely the FDUTPA’s prohibition against “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”\textsuperscript{91} The appeals court observed that a FDUTPA claim could be based on rules promulgated pursuant to the FTC Act, or the standards set by the FTC or federal courts in determining the scope of the Act. Because the FTC Act permitted individual liability of a franchisor’s officers and shareholders, the court concluded that the Florida DUTPA would allow such liability as well.\textsuperscript{92}

B. Waiver, "No Reliance" And Release Provisions May Bar The Claim

Traditional affirmative defenses like waiver and release may apply to a little FTC Act claim, depending on the law of the applicable jurisdiction. A limited number of states permit express waivers, provided that certain protections exist.\textsuperscript{93} For example, in Texas, a waiver by a consumer of the Texas little FTC is valid and enforceable only if: (1) the waiver is in writing and signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel at the time of seeking or acquiring the goods or services.\textsuperscript{94} Tennessee’s Consumer Protection Act, on the other hand, basically codifies the common law and states that a waiver must be knowingly and intelligently made and lists relevant facts to consider in determining if the waiver was made knowingly and intelligently.\textsuperscript{95}

\textsuperscript{89} \textit{Avery v. State Farm Automobile Insurance Company}, 835 N.E.2d 801, 844 (Ill. 2005) (citations omitted).

\textsuperscript{90} 972 So. 2d 1069, 1073 (Fla. Dist. Ct. App., 2008).

\textsuperscript{91} Fla. Stat. § 501.204.

\textsuperscript{92} \textit{KC Leisure}, 972 So. 2d at 1073-73; see also discussion in J. Buckberg and J. Suwanski, “Disclosure Law Violations: Understanding the Penalties,” Franchising World (August 2008).


\textsuperscript{94} Tex. Bus. & Com. Code § 17.42 (a).

\textsuperscript{95} TENN. CODE ANN. § 47-18-113 (c).
Some states have concluded that corporate entities are often a more sophisticated "consumer," and therefore should be permitted to waive the provisions of consumer protection acts.\textsuperscript{96} However, courts will not likely enforce a waiver provision in a franchise agreement where the deception induced the contract, where the harm is caused intentionally or recklessly, or where the application of the waiver would offend public policy.\textsuperscript{97} For example, some states have determined that waivers of willful misconduct like fraud, and/or future behavior, are unenforceable as a policy matter.

C. Limitations Periods May Bar The Claim

The statutes of limitation for little FTC Acts vary from state to state, generally ranging from one to six years.\textsuperscript{98} A one year limitation is unusually short, even when coupled with a discovery rule.\textsuperscript{99} Most applicable statutes of limitations are three to four years,\textsuperscript{100} and generally begin to run when the alleged violation was or should have been discovered.\textsuperscript{101} For example, Tennessee has a one year statute of limitations from the time of discovery, but also incorporates a statute of repose: "in no event shall an action under § 47-18-109 be brought more than five (5) years after the date of the consumer transaction" that initially gave rise to the claim.\textsuperscript{102}

In the franchise context, many disputes involve whether the clock starts running at the time of contract formation, or whether it begins at some other point. In \textit{Maltz v. Union Carbide Chemicals & Plastics Co., Inc.}, for example, the court held that the statute of limitations commenced from the time the franchisee discovered the fraud, even though that was before the execution of the contract.\textsuperscript{103} In \textit{S&S Sales, Inc. v. Pancho’s Mexican Foods, Inc.}, the district

\begin{footnotesize}
\item[96] See, e.g., \textit{First Mut. Inc. v. Rive Gauche Apparel Distrib., Ltd.}, No. 90-10899-Z, 1990 WL 235422, at *3 (D. Mass. Dec. 21, 1990) (holding that Massachusetts consumer protection law could be waived where the dispute is essentially a private one arising between two commercial entities and the waiver would not frustrate the public policies underlying the statute).


\item[101] See \textit{generally}, 18 A.L.R. 4th 1340.


\end{footnotesize}
court held that Arkansas’s five-year statute of limitations had not run on the plaintiff’s deceptive trade practices act claim because the summary judgment record did not show that the plaintiff’s direct sales violated the exclusive distributorship agreement as a matter of law. 104

In MRW, Inc. v. Big-O Tires, LLC, the plaintiff franchisees brought their sole claim under California’s Unfair Competition Law, California Business and Professions Code section 17200, et. seq. (the “UCL”). 105 The franchisees alleged that the franchisor misrepresented the expected profitability of the franchise. The franchisees argued that these representations were fraudulent or deceptive within the meaning of the UCL. 106 The franchisees argued in part that the statute of limitations should have been tolled because they could not be sure that the representations regarding profitability were inaccurate until the business had been in operation for two years. 107 The district court rejected the franchisee’s argument. The district court held that the franchisee’s claim was barred by the UCL’s four-year statute of limitations. Because the franchisees had evidence of the alleged deceptive acts in August 2003, and waited to assert their claim until July 2008, the franchisees failed to show that discovery of the basis for their claims was delayed, in justification of their tolling request. 108

IV. THE RANGE OF AVAILABLE REMEDIES MAKES LITTLE FTC ACTS APPEALING AND DANGEROUS, IN EQUAL MEASURE

The scope of potential remedies makes consumer fraud and little FTC Acts appealing to plaintiffs, and dangerous to defendants. While some afford only equitable relief, 109 others allow for actual damages, an election of statutory or actual damages, punitive damages, enhanced damages, and attorneys’ fees. The choice of law, forum and statute therefore make a tremendous difference in the risk and size of a potential award.

A. Actual Damages And Statutory Damages

The relevant provisions of some consumer protection statutes limit ordinary recovery to actual damages. 110 Actual damages may include the difference between the market value of


106 Id. at *7.

107 Id. at *8.

108 Id. at *8.

109 See, e.g., CAL. BUS. & PROF. CODE § 17203.

110 E.g., ARK. CODE ANN. §§ 4-88-107 & 113 (2004); IND. CODE ANN. § 24-5-0.5-4(a), (g), & (h) (2004).
the good or service and either its value as received or the cost of repairing the goods.\textsuperscript{111} Some states allow damages for pain and suffering or emotional distress.\textsuperscript{112}

Other states, however, provide a formula for damages, authorizing the recovery of the greater of either actual damages or an amount specified in the statute (ranging from $25 in Massachusetts to $2000 in Utah).\textsuperscript{113} Some states allow plaintiffs to receive the statutory minimum without proving actual damages. For example, the New Hampshire Consumer Protection Act states that “if the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater,” and the plaintiff “shall be awarded the costs of the suit and reasonable attorney’s fees, as determined by the court.”\textsuperscript{114} These provisions alleviate the requirements of pleading and proving damages and attorney’s fees.\textsuperscript{115} Instead, the statute mandates that prevailing plaintiff receive a minimum of $1,000 in damages plus costs and reasonable attorney’s fees.\textsuperscript{116} The statutory minimum award operates as a penalty imposed upon those who perform an unlawful act as declared under the New Hampshire Act.\textsuperscript{117} It requires no evidence of damages, but only a finding that a violation occurred.\textsuperscript{118}

\textbf{B. Punitive And Enhanced Damages}

In order to punish conduct that violates consumer protection statutes, many states have provided for punitive and enhanced damages in other ways. In order to establish a right to such an enhancement, some jurisdictions require a claimant to show intent, ranging from recklessness to intentional behavior\textsuperscript{119} or even ill-will.\textsuperscript{120} Other jurisdictions permit punitive


\textsuperscript{114} \textit{N.H. REV. STAT. ANN. § 358-A:10 (2010)}.


\textsuperscript{116} \textit{Id.} (citing Whispering Springs Tenant Assoc. v. Barrett, 624 A.2d 1345 (1993)).

\textsuperscript{117} \textit{Id.} at 720.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{GA. CODE ANN. 10-1-399(a) (2000) (authorizing exemplary damages for intentional violations)}.

\textsuperscript{120} \textit{Schmidt v. Am. Leasco}, 679 P.2d 532, 535 (Ariz. Ct. App. 1983) (finding that the jury has discretion to award punitive damages under Arizona’s CPA if the defendant’s conduct is reckless or shows spite or ill will).
damages in cases involving flagrant or repeated violations. Some statutes impose a cap on punitive damages.

In addition, consumer protection statutes of many states provide for enhanced damages in the form of treble damages. In some jurisdictions, the award of treble damages is mandatory, while it is discretionary in others. In many other jurisdictions, treble damages are available when a defendant acted intentionally, willfully and knowingly, or in bad faith. Some statutes impose a cap on the recovery of enhanced damages, as they do with respect to punitive damages.

C. Attorney’s Fees

In civil litigation in the United States, parties are normally required to pay their own costs and attorney’s fees unless there is a statutory provision or a contract term permitting an award of fees and costs to the prevailing party. Most little FTC Acts provide such authorization under varying standards throughout the jurisdictions. Some states make the award mandatory while others leave it within the discretion of the court. These statutes are created, in part, in an effort to encourage plaintiffs’ lawyers to act as “private attorneys general,” by bringing consumer protection lawsuits in situations where the actual damages, or the circumstances of the potential plaintiff, would otherwise not authorize a suit.

V. CLASS ACTIONS INCREASE THE RISKS OF LITTLE FTC ACT CLAIMS

Class actions present defendants with a level of economic risk and procedural complexity not present in many other civil suits. Those risks increase where the underlying liability may be trebled or augmented with punitive damages. As one court observed, a

---

121 See Idaho Code Ann. 48-608(1) (2003) (authorizing the court to impose punitive damages in cases of flagrant or repeated violations.


125 See, e.g., Ala. Code 8-19-10(a)(2) (2002) (providing the court with discretion to award up to three times actual damages based in part on "the amount of actual damages awarded, the frequency of the unlawful acts or practices, the number of persons adversely affected thereby and the extent to which the unlawful acts or practices were committed intentionally.").


defendant faced with a certified class may be forced to place its financial fate in the hands of a single jury. That prospect can impose intense pressure to settle: “They may not wish to roll these dice. That is putting it mildly.”

Given the pressure a class action can apply, and the enhanced remedies available under many consumer fraud and deceptive trade practices act statutes, little FTC Act claims consistently draw the attention of plaintiffs’ class action lawyers. As the Fourth Circuit observed, in one of the largest class actions ever litigated between franchisees and a franchisor,

... [B]ecause “proof of unfair or deceptive trade practices entitles a plaintiff to treble damages,” a UTPA count constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina.

Accordingly, “[t]o correct this tendency, and to keep control of the extraordinary damages authorized by the UTPA,” courts have scrutinized little FTC Act and consumer fraud claims carefully to determine whether class treatment is truly justified under F.R.C.P. 23 or state class action statutes.

A. Class Certification Requirements

In evaluating whether to certify a class, the federal courts apply the standards set forth in Rule 23 of the FRCP. If a class action is brought in the state courts, the defendant will evaluate whether to remove the action under traditional principles of diversity, or in light of a federal question, or under the Class Action Fairness Act of 2005 (“CAFA”).

The decision to remove (or not) can result in substantial differences in class certification criteria, even in states where the class certification requirements purport to parallel those of the federal courts. By way of comparison, meeting the requirements of F.R. Civ. P. 23 requires a plaintiff to establish that the claims presented satisfy two sets of criteria. The analysis is a two-step process. First, plaintiffs seeking class certification bear the burden of demonstrating that: 1) The class is so numerous that joinder of all members is impracticable; 2) There are questions of law or fact common to the class; 3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) The representative parties will fairly and

---

130 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298, 1299 (7th Cir. 1995) (Posner, J.); see generally Cynthia Scherb and Paula Morency, “Consumer Class Actions And Suits By State Attorneys General Against Franchisors And Franchisees” (ABA Forum on Franchising, 2008).

131 Broussard v. Meineke, 155 F.3d 331, 347 (4th Cir. 1998).

132 Id.

133 Pub. L. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C. §§1332, 1335, 1453, 1603, 1711-1715, and 2074) was signed and effective on February 18, 2005. With some exceptions, CAFA expanded diversity jurisdiction to allow a federal forum for class actions in which 1) the matter in controversy exceeds $5,000,000, rather than requiring that each individual claim meet the $75,000 threshold previously required for jurisdiction; 2) the citizenship of any member of the plaintiff class is different from the citizenship of any defendant; and 3) the number of putative class members is 100 or more. CAFA also expanded the rights of defendants to remove class actions filed originally in state courts, by allowing resident defendants to remove; by permitting any one defendant to remove without seeking the consent of all other defendants; and by modifying the one-year limitations period for removal. As a further protection, CAFA provided for expedited, discretionary appellate review of remand orders. Id.
adequately protect the interests of the class. Failure to satisfy any of these threshold requirements should defeat a motion for class certification.

If federal plaintiffs establish all four prongs of Rule 23(a), then they also must demonstrate that the potential class satisfies one of the provisions of Rule 23(b). Rule 23(b) requires that plaintiff establish one of the following conditions:

- that prosecuting separate actions by individual class member plaintiffs would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the defendant, or, as a practical matter, be dispositive of the interests of the other members not parties to those proceedings, or would otherwise substantially impair or impede their ability to protect their interests; or

- that the defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole; or

- that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, making a class action superior to other available methods for the fair and efficient adjudication of the dispute.

B. Timing Of Class Certification

For decades, the Federal Rules called for a decision on the issue of class certification “as early in the proceedings as may be practicable.” In 2003, Rule 23 was amended to require instead that the determination whether to certify a class be made “at an early practicable time.” The change recognized that there are “many valid reasons that may justify deferring the initial certification decision.” One of those reasons is to permit the court to consider early dispositive motions, whether motions to dismiss or motions for summary judgment. As the courts and the Manual for Complex Litigation have explained, consideration of summary judgment is appropriate at the early stages of a putative class action, if a dispositive issue

---

135 Fed. R. Civ. P. 23(b). A body of law has developed in the Quizno’s franchise class actions and other suits, confirming that it is the decision of the court, not the agreement of the parties, that determines whether a class action is the appropriate vehicle for the evaluation of disputes. See, e.g., Martrano v. Quizno’s Franchise Co., LLC, No. 08-0932, 2009 WL 1704469, at *14 (W.D. Pa. June 15, 2009); Bonanno v. Quizno’s Franchise Co., LLC, No. 06-cv-02358 2009 WL 1068744, at *12 (D. Colo. Apr. 20, 2009) Accordingly, even if there is a contractual class action waiver, or conversely an agreement to seek class treatment, “the Courts, not the parties, determine whether a suit should proceed on a class basis. Courts make this decision as a matter of judicial efficiency.” Id.
136 Rule 23(c)(1) Advisory Committee Notes, 1966 Amendments.
137 Rule 23(c)(1) and Advisory Committee Notes, 2003 Amendments.
138 Id.
exists. The dismissal of an insufficient or unsupported claim at the outset of the litigation can save the parties and the judicial system substantial litigation expenses, including the burdens of complying with electronic discovery and briefing class certification issues. In addition, the reduction of risk at an early point can reduce reporting requirements, especially for publicly-held defendants, and restore a privately-held defendant’s ability to raise capital on favorable terms.

VI. THE SPLITS BETWEEN ALLOWING AND DISALLOWING CLASS TREATMENT OF LITTLE FTC AND CONSUMER FRAUD CLAIMS

Upon close examination of little FTC Act claims, many recent decisions have determined that class treatment is not justified where the underlying claim is one for breach of contract, raises individualized issues like reliance or lost profit damages, or invokes the laws of multiple jurisdictions.

A. Deceptive Trade Practices Act Claims By Franchisees Against Franchisors

Since the Meineke decision, the cases reflect a consistent judicial reluctance to convert contract disputes into class claims, whether under tort theories or state statutes prohibiting tortious behavior. In Meineke, for example, the Fourth Circuit ultimately reversed certification of the unfair trade practices claims brought by franchisees against the franchisor under the North Carolina Unfair Trade Practices Act, as well as other causes of action. The appellate court noted the repeated holdings of North Carolina courts that “a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [the UTPA].” Accordingly, where a claim has a “contractual center,” allegations of unfair trade practices may be unfounded. As the Fourth Circuit explained, in the dispute between Meineke and its franchisees, “If 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.”

Frequently, deceptive trade practices act claims raise so many individualized issues that common issues of law or fact simply do not predominate. In that circumstance, a class action is not the superior method of deciding those claims. This has been the reasoning of several recent denials of class certification, both in disputes between franchisors and franchisees, and in consumer class actions against them both.

In De Giovanni v. Jani-King, the parties presented the court with two basic categories of claims. The first category included what the court called the “unfair business practices”

---


140 Meineke, 155 F.3d at 347.

141 Id.

142 Id.

claims, consisting of breach of contract, misrepresentations, violation of the Massachusetts unfair trade practices act, unjust enrichment and quantum merit allegations. The second category consisted of allegations that the plaintiff franchisees were improperly categorized as independent contractors rather than employees, in violation of Massachusetts employment laws. The court certified the employment classification claims, but denied class treatment for the unfair business practices claims. In a lengthy opinion, the court noted that the unfair business practices claims presented “intractable individualized evidentiary and legal issues that render class certification ... inappropriate” for any of those causes of action.\footnote{Id. at 76-77.}

The core contentions were plaintiffs' allegations under Chapter 93A. Fundamentally, the court explained, Jani-King was required by the franchise agreement to offer its new franchisees certain cleaning opportunities within a specified period of time (the “Initial Business”).\footnote{Id. at 75.} Plaintiffs complained that the franchisor offered unappealing contracts that it knew the franchisees would reject or refuse to service, on short notice, and without inspection rights, thereby technically counting toward the contract requirements without allowing the franchisees a real opportunity to generate revenue.\footnote{Id. at 80.} Plaintiffs contended that the Initial Business contract provision was inherently unfair, that they generated revenue far below their expectations, and were subjected to charges that were “excessive and unconscionable.”\footnote{Id.}

Because the Massachusetts deceptive trade practices act requires proof of a “causal nexus” between an allegedly unfair practice and the injury alleged suffered by a plaintiff, the individualized issues overwhelmed the common questions of fact. The court believed it would have to examine each cleaning contract, determine whether it was offered in good faith, and then distinguish between injuries caused by the franchisor and financial results that were “self-inflicted” by rejecting appropriate opportunities or other reasons.\footnote{Id.}

B. Deceptive Trade Practices Claims By Consumers Against Franchisors Or Franchisees

A review of case filings reveals that franchised and other distribution systems are frequent targets for consumer class actions that assert claims under little FTC Acts. While many are dismissed before a class certification, others present franchisors, franchisees and distributors with the risk of class-wide claims of inadequate disclosure or misrepresentations regarding the products or services provided (or not provided) to the consumer.\footnote{See, e.g., Marshall v. H&R Block Tax Services, Inc., 564 F.3d 826 (7th Cir. 2009) (reversing remand of CAFA consumer class action that asserted deceptive franchisor practices in selling “Peace of Mind” insurance against mistakes that increased consumer tax liabilities); Pinero v. Jackson Hewitt Tax Service, Inc., 594 F. Supp. 2d 710 (E.D. La. 2009) (permitting amendment of consumer claim alleging violation of Louisiana Unfair Trade Practices Act after disposal of old tax returns and other personal information in franchisee dumpster, and denying class certification motion as premature).} For example,
in Schmidt v. Bassett Furniture Industries,\textsuperscript{150} the federal district court denied a motion to dismiss a putative class action against furniture manufacturer Bassett, brought by licensee customers who never received the items they brought at a liquidation sale. Among the surviving claims were allegations of breach of contract and violations of Wisconsin’s Deceptive Trade Practices Act.\textsuperscript{151} Plaintiffs relied on theories of actual and apparent agency in naming the franchisor, claiming that the franchisor failed to comply with Wisconsin law requiring “conspicuous” signs to advise consumers of the entity that actually owns the merchandise being offered for sale, despite the franchisor’s authority under the Dealer Agreement to specify “signs and other identification elements” for each licensed store.

In such consumer class actions, the plaintiffs will likely have standing to invoke a consumer fraud or deceptive trade practices claim, and in some jurisdictions will be excused from the full force of any contractual waiver or warranty. In other respects, though, the analysis of pleading requirements, certification requirements, and available defenses is as discussed above. Depending on the jurisdiction, plaintiffs will have to demonstrate that they were the victims of conduct that was deceptive or unfair, that the representation or omission was material and/or misled them, or was likely to mislead a reasonable person, and that the resulting injury should entitle them to compensation.\textsuperscript{152}

C. Multi-Jurisdictional Disputes

The decision in Avery v. State Farm Mutual Automobile Insurance Company\textsuperscript{153} marked a major change in the willingness of some courts to certify nationwide classes for consumer fraud and deceptive trade practices act claims. After a nightmare journey through motions and trial in the then-infamous Madison County, Illinois, the case had been affirmed by an intermediate appellate court before arriving on the docket of the Illinois Supreme Court. In a lengthy and painstaking opinion, the Court reversed the certification of a 48-state class and a damage award of more than a billion dollars ($1,056,180,000). Among other conclusions, Avery discouraged the application of a single legal standard to claims that should have been governed by separate and different state laws, and rejected class treatment for causes of action that depended upon proof of individualized issues like causation, reliance and damages.

Other state and federal opinions have been equally vigilant about limiting the reach of claims under state deceptive trade practices act or consumer protection statutes. For example, the Third Circuit recently vacated a nationwide class where the underlying rights arose under the laws of multiple jurisdictions with different requirements for sustaining a claim. In Sullivan v. DB Investments\textsuperscript{154}, the federal appeals court was confronted with a proposed settlement class of plaintiffs from different states. Diamond wholesalers, retailers and consumers had sued the DeBeers family of companies under the antitrust, consumer protection

\textsuperscript{150} No. 08-C-1035, 2009 WL 3380354, at *9 (E.D. Wis. Oct. 20, 2009).

\textsuperscript{151} Wis. Stats. §100.18.

\textsuperscript{152} See discussion supra at II(A)-(D).

\textsuperscript{153} 835 N.E.2d 801 (Ill. 2005).

\textsuperscript{154} 2010 U.S. App. LEXIS 14375 (3d Cir. July 13, 2010).
and unjust enrichment laws of all 50 states, and then reached a proposed settlement. The court held that the district court had abused its discretion by certifying the settlement class, noting that the differences in state consumer protection and unjust enrichment laws, as well as the antitrust laws, precluded finding that common questions of law or fact predominated. Even for a settlement class, the court required a rigorous analysis of Rule 23(b)(3), and vacated the class certification.

Other courts have continued to view class actions as the superior method for resolving consumer fraud or deceptive trade practice claims, by using subclasses, or certifying a class solely for the determination of liability. In a per curiam opinion in Pella Corp. v. Saltzman, for example, the Seventh Circuit upheld the certification of one nationwide and six single-state classes, under Rules 23(b)(2) and (b)(3), for the litigation of consumer claims that Pella violated consumer fraud laws by failing to disclose that more than six (6) million Pella windows contained a design defect, and could leak. The court specifically rejected Pella's contention that consumer fraud cases generally are not appropriate for class treatment due to individual issues of causation, reliance, and damages. The court acknowledged its prior decisions denying class certification in such cases but concluded that "those cases did not opine that class certification was never appropriate in consumer fraud cases, only that it was inappropriate in the circumstances before it." The court rejected one of the stronger arguments against certification of consumer fraud classes (the need to evaluate individualized proof of proximate cause), and held that although proximate cause is "necessarily an individual issue," it does not "necessarily preclude class certification." The court emphasized that a district court "has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments." Class members will have the right to bring individual claims for money damages.

Among other rulings, the decision upheld six statewide Rule 23(b)(3) classes (California, Florida, Illinois, Michigan, New Jersey, and New York), consisting of those consumers whose windows "have had a manifest defect" and have already been replaced, but were not provided with disclosure of the defect. The Seventh Circuit agreed that the district court reasonably identified the "narrow" predominant common issue: whether the windows suffer from a single, inherent design defect leading to wood rot. As the "essence of the dispute," the court

155 605 F.3d 391, 393-94 (7th Cir. 2010).

156 See e.g. Thorogood v. Sears Roebuck & Co., 547 F.3d 742, 745 (7th Cir. 2008), Oshana v. Coca-Cola, Co., 472 F.3d 506, 514 (7th Cir. 2006), In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018-19 (7th 2002).

157 Id. at 393.

158 Id. at 394.

159 Id.

160 Id. at 395.

161 Id.
concluded that it is better resolved by class treatment.\textsuperscript{162} Because the district court had specifically declined to certify issues relating to causation, damages, and statutes of limitations, those issues presumably must be determined on an individual or other basis, under the laws of the applicable jurisdictions.

\textbf{CONCLUSION}

The protections afforded by little FTC Acts and consumer fraud statutes present a volatile mix of risks for defendants, and corresponding opportunities for plaintiffs who fall within their reach. These protective statutes cut a broad swath through the franchise world, and will likely play an increasing role in future litigation and counseling for franchisors as well as franchisees. Little FTC and consumer fraud statutes can impact the rights of consumers who deal with a brand and its franchisees, and can influence the relationship between franchisors and their franchisees as well.

The challenge of understanding and counseling a client about these laws is compounded by their complexity, the differences between the various state requirements, and by the speed with which they evolve. These statutory directives are the subject of a steady flow of legislative amendments, voter initiatives and interpretive decisions. The importance of monitoring these powerful tools is underscored by the potential consequences, however, of failing to do so. Consumer protection laws, and deceptive trade practices acts, can give rise to broad and expensive litigation, particularly if the claims are certified for class treatment. Accordingly, it will be critically important for franchise practitioners to continue to monitor and understand the effect of this growing body of law.

\textsuperscript{162} \textit{Id.} at 393.
SPEAKER BIOGRAPHIES

Altresha Q. Burchett-Williams is an associate with Haynes and Boone, LLP in Dallas, Texas. Ms. Burchett-Williams is in the Business Litigation Practice Group and is a member of the Business Litigation and Franchise and Distribution Sections. She focuses her practice on representing small and large entities in commercial litigation and arbitration disputes based on breach of contract, fraud, and intentional/negligent misrepresentation. Ms. Burchett-Williams’ franchise practice focuses on litigation involving covenants not to compete, trademark infringement, tortious interference, breach of contract, and injunctive relief. Ms. Burchett-Williams is a frequent author on franchise and distribution topics, particularly in the Southern Methodist University Law Review, Franchise Law.

Ms. Burchett-Williams received her undergraduate degree (B.A., magna cum laude, 2001) from Tennessee State University and her law degree (J.D., magna cum laude, 2004) from TSU Thurgood Marshall School of Law.

Robert M. Einhorn is a partner at Zarco Einhorn Salkowski & Brito, P.A., a Miami-based franchise law firm. The firm represents franchisees in litigation and other forms of dispute resolution throughout the United States. The firm has represented franchisees from almost every major franchise system in the hotel, restaurant, and service industries. The firm has also represented franchise clients from Mexico, Europe, Australia, New Zealand and throughout the Caribbean.

Robert holds a Bachelor of Business Administration degree from the University of Wisconsin-Madison, where he dual-majored in Accounting and Risk & Insurance (B.B.A., 1986). He holds a law degree from the University of Miami (J.D., 1990) and is both an attorney and Certified Public Accountant. Robert serves as an editor on the Franchise Law Journal and a frequent author and speaker on franchise-related topics.

Paula J. Morency is a partner with Schiff Hardin LLP in Chicago, in the Firm’s Litigation and Intellectual Property groups. She concentrates her practice in the litigation, mediation and arbitration of commercial disputes, including franchise and distributor issues, protection of trademarks and trade secrets, class actions and antitrust issues. Ms. Morency teaches for the National Institute for Trial Advocacy, and is an Adjunct Professor of Trial Advocacy at the Northwestern University School of Law. She is a former member of the Governing Committee of the ABA Forum on Franchising, co-chaired the 2003 Forum, and has been a frequent speaker and author on franchise and distribution topics.

Ms. Morency received her undergraduate degree (A.B., magna cum laude, 1977) from Princeton University and her law degree (J.D., 1980) from the University of Virginia School of Law.