



**A 50-State Report
on Unfair and Deceptive Acts
and Practices Statutes**

Carolyn L. Carter

NATIONAL
CONSUMER LAW
CENTER INC®
www.consumerlaw.org



February 2009

ABOUT THE AUTHOR

Carolyn L. Carter is the Deputy Director for Advocacy at the National Consumer Law Center. She is one of the principal authors of NCLC's *Unfair and Deceptive Acts and Practices* (7th ed. 2008) and a number of other NCLC treatises dealing with consumer fraud. She is the editor of *Pennsylvania Consumer Law* and was the editor of the first edition of *Ohio Consumer Law*. She is a graduate of Brown University and Yale Law School and has been practicing consumer law since 1974.

ABOUT THE NATIONAL CONSUMER LAW CENTER

The National Consumer Law Center®, a nonprofit corporation founded in 1969, assists consumers, advocates, and public policy makers nationwide on consumer law issues. NCLC works toward the goal of consumer justice and fair treatment, particularly for those whose poverty renders them powerless to demand accountability from the economic marketplace. NCLC has provided model language and testimony on numerous consumer law issues before federal and state policy makers. NCLC publishes an 18-volume series of treatises on consumer law, and a number of publications for consumers.

ACKNOWLEDGMENTS

Thanks to Jon Sheldon, Will Ogburn, and Rick Jurgens for reviewing drafts of this report, and to the many attorneys in legal services offices, private practice, and Attorney General offices, who reviewed the analyses of the states' laws. Particular thanks to Nate Player for research and analysis and to Julie Gallagher for graphic design.

SUMMARY

Unfair and Deceptive Acts and Practices (UDAP) statutes in each of the fifty states and the District of Columbia constitute the main lines of defense protecting consumers from predatory, deceptive, and unscrupulous business practices.

This report documents how widely and frequently those lines have been breached, and finds that in almost all states significant gaps or weaknesses undermine the promise of UDAP protections for consumers.

UDAP laws prohibit deceptive practices in consumer transactions and, in many states, also prohibit unfair or unconscionable practices. Yet despite their critical role in ensuring marketplace justice and fairness, the effectiveness of UDAP laws varies widely from state to state.

The holes are glaring. Legislation or court decisions in dozens of states have narrowed the scope of UDAP laws or granted sweeping exemptions to entire industries. Other states have placed substantial legal obstacles in the path of officials charged with UDAP enforcement, or imposed ceilings as low as \$1,000 on civil penalties. And several states have stacked the financial deck against consumers who go to court to enforce the law themselves.

Specific findings include:

- UDAP protections in Michigan and Rhode Island have been gutted by court decisions that interpret the statute as being applicable to almost no consumer transactions.
- Iowa does not allow consumers who have been cheated to go to court to enforce UDAP provisions.
- In addition to Michigan and Rhode Island, three states—Louisiana, New Hampshire, and Virginia—exempt most lenders and creditors from UDAP statutes, while another 15 leave significant gaps or ambiguities in their coverage of creditors.
- Utility companies in 16 states enjoy immunity from UDAP laws, as do insurance companies in 24 states.
- Five states—Colorado, Indiana, Nevada, North Dakota, and Wyoming—impede the Attorney General’s ability to stop ongoing unfair or deceptive practices by conditioning an injunction or any other relief upon proof that those practices were done knowingly or intentionally.
- While all states except Iowa allow consumers to go to court to enforce UDAP laws, five states—Arizona, Delaware, Mississippi, South Dakota, and Wyoming—impose a financial burden on those consumers by denying them the ability to recover their attorney’s fees.
- Worse, in Florida and Oregon, courts have required unsuccessful consumers to pay tens of thousands of dollars to the *business* for its attorney fees, even though the consumers filed suit in good faith. Alaska’s UDAP statute requires unsuccessful consumers to pay partial attorney fees to the business, and in three other states the UDAP statute has not yet been authoritatively interpreted to rule out this result.
- A number of states impose special procedural obstacles on consumers that can hinder or even prevent them from enforcing the UDAP statute.

CONSUMER PROTECTION IN THE STATES

A 50-State Report on UDAP Statutes

Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well. These statutes, commonly known as Unfair and Deceptive Acts and Practices or UDAP statutes, provide bedrock protections for consumers.

In billions of transactions annually, UDAP statutes provide the main protection to consumers against predators and unscrupulous businesses. Yet, despite their importance, UDAP statutes vary greatly in their strength from state to state.

In many states, the UDAP statute is surprisingly weak. Common weaknesses include:

- Prohibiting only a few narrow types of unfairness and deception;
- Prohibiting only deceptive acts, not unfair acts;
- Failing to give a state agency the authority to adopt substantive regulations prohibiting emerging scams;
- A constricted scope, so that the statute appears to prohibit unfairness and deception but actually applies to few businesses;
- Weaknesses in the remedies that the Attorney General can invoke;
- Weaknesses in the remedies consumers can invoke, such as failing to allow consumers to recover their attorney fees;
- Imposing special preconditions when consumers who have been cheated seek to go to court.

These weaknesses undermine—and in some states almost completely negate—the promise of

UDAP statutes to protect consumers. This report evaluates the strength of these fundamental consumer protection statutes in the fifty states and the District of Columbia.

Why UDAP Statutes Are Important

UDAP statutes provide the basic protections for the thousands of everyday transactions that each consumer in the United States enters into each year. Although UDAP statutes vary widely from state to state, their basic premise is that unfair and deceptive tactics in the marketplace are inappropriate. UDAP statutes are the basic legal underpinning for fair treatment of consumers in the marketplace.

Before the adoption of state UDAP statutes in the 1970's and 1980's, neither consumers nor state agencies had effective tools against fraud and abuse in the consumer marketplace. This was so even though the Federal Trade Commission Act had prohibited unfair or deceptive acts or practices since 1938. In most states, there was no state agency with a mandate to root out consumer fraud and abuse, much less tools to pursue fraud artists.

Consumers had even fewer tools at their disposal. A consumer who was defrauded often found that fine print in the contract immunized the seller or creditor. Consumers could fall back only on claims such as common law fraud, which requires rigorous and often insurmountable proof of numerous elements, including the seller's state of mind. Even if a consumer could mount a claim,

and even if the consumer won, few states had any provisions for reimbursing the consumer for attorney fees. As a result, even a consumer who won a case against a fraudulent seller or creditor was rarely made whole. Without the possibility of reimbursement from the seller, consumers could not even find an attorney in many cases.

UDAP statutes were passed in recognition of these deficiencies. States worked from several different model laws, all of which adopted at least some features of the Federal Trade Commission Act by prohibiting at least some categories of unfair or deceptive practices. But all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all but one also provide remedies that consumers who have been cheated can invoke.

Laws other than UDAP statutes rarely fill this need. For example, much consumer fraud is not a criminal offense. Even where an activity might violate a criminal law, police and prosecuting authorities usually have few resources to devote to non-violent crime. In addition, the burden of proof is extremely high in a criminal case, and the result of the case may only be punishment of the offender—not the refund that the consumer wants. State UDAP statutes provide a way for consumers to get their money back when they have been cheated.

Another example is predatory lending and mortgage fraud. There are a few federal laws that address lending in general and mortgage lending in particular. However, while these laws require disclosures to be given to consumers, and some restrict certain loan terms, none includes a prohibition against deception or unfairness that consumers can enforce. A consumer who has been cheated or deceived by a lender will not have any claim under federal banking laws as long as the lender complied with relatively narrow requirements regarding disclosures and contract terms. The massive level of fraud and unfairness that has led to the subprime mortgage crisis demonstrates this weakness of the federal lending laws.

UDAP statutes bring consumer justice to the state, local, and individual level. They enable state

agencies to protect their citizens by responding quickly to emerging frauds. They give effective remedies that consumers themselves can invoke. UDAP statutes help the marketplace as well. By providing disincentives for unfair and deceptive practices, they help honest merchants compete.

UDAP statutes are primarily civil statutes. Some allow criminal penalties for extreme violations, but almost all enforcement is through the civil courts.

The typical UDAP statute allows a state enforcement agency, usually the Attorney General, to obtain an order prohibiting a seller or creditor from engaging in a particular unfair or deceptive practice. The Attorney General can also ask the court to impose civil penalties of a certain dollar amount for violations, and to order the seller or creditor to return consumers' payments. The typical statute also allows consumers to seek similar remedies—return of payments or compensation for other consumer loss (often with some sort of enhancement to account for intangible or hard-to-document losses), sometimes an injunction against repetition of the fraudulent practices, and, in most states, reimbursement for attorney fees.

About This Report

This report analyzes the strengths and weaknesses of state UDAP statutes in four broad categories: their substantive prohibitions, their scope, the remedies they provide for the state enforcement agency, and the remedies they provide for consumers. **Appendix A** provides a capsule summary of the strength and weaknesses of each law, and **Appendix B**, available at www.nclc.org, provides a detailed analysis of each state's law.

A handful of states have more than one UDAP-type statute. In many of those states, only one of the UDAP statutes is commonly used by consumers and state enforcement agencies, so this report analyzes only that statute.

The factors analyzed in this report are summarized on the charts on the following pages.

State UDAP Statutes at a Glance
Strengths and Weaknesses

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	○	○	○	○	○	●	○	○	○	○	○	○	○	○
Broad unfairness prohibition	○	○	●	○	○	●	○	●	○	○	○	○	○	○
Rulemaking authority	●	○	●	●	●	●	○	●	○	○	○	○	○	○
<i>Scope</i>														
Covers credit	●	◐	○	◐	○	○	○	◐	○	●	◐	○	◐	◐
Covers insurance	●	●	○	●	○	○	◐	●	○	●	●	○	●	○
Covers utilities	●	◐	○	◐	○	○	○	●	○	●	◐	○	◐	○
Covers post-sale acts	◐	○	◐	○	○	○	○	◐	○	◐	○	○	○	○
Covers real estate	○	○	○	○	○	○	○	○	○	◐	○	○	○	○
<i>State enforcement</i>														
Civil penalty amount	●	○	○	○	●	●	◐	○	●	○	◐	○	◐	○
Deception sufficient without proof of intent or knowledge	○	○	○	◐	○	●	○	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	○	●	●	○	○	○	●	○	●	○	○	○	●
Attorney fees for consumers	○	●	●	○	○	○	○	●	○	●	◐	○	○	○
Class actions	●	○	○	○	○	○	○	○	○	○	●	○	○	○
Allows consumer suit without proof of reliance	◐	○	◐	◐	◐	○	○	○	○	◐	●	◐	◐	○
Allows consumer suit without proof of public impact	○	○	○	○	○	●	○	○	○	○	●	○	○	○
Allows consumer suit without pre-suit notice	●	○	○	○	◐	○	○	○	○	○	●	○	○	○

Key: ○ = strong ◐ = mixed or undecided ● = weak

State UDAP Statutes at a Glance (continued)*Strengths and Weaknesses*

	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	●	◐	○	○	○	○	○	○	○	○	◐	○	○	○
Broad unfairness prohibition	○	◐	○	○	○	○	○	○	○	●	◐	○	○	○
Rulemaking authority	●	○	●	●	○	○	○	○	●	●	○	○	○	●
<i>Scope</i>														
Covers credit	○	○	○	○	●	○	○	○	●	○	◐	○	○	●
Covers insurance	●	○	●	◐	●	○	●	○	●	○	●	◐	●	○
Covers utilities	○	○	○	○	●	○	●	○	●	○	○	○	●	●
Covers post-sale acts	○	○	○	○	○	○	○	○	●	◐	○	◐	○	○
Covers real estate	●	○	○	◐	○	○	◐	○	●	○	◐	○	○	◐
<i>State enforcement</i>														
Civil penalty amount	◐	○	○	●	◐	○	●	◐	○	○	○	●	○	●
Deception sufficient without proof of intent or knowledge	●	○	◐	○	○	○	○	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	●	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	●	●	○	○	●	●	○	●	●	●	○	○	●
Attorney fees for consumers	◐	●	○	◐	○	○	○	○	○	○	●	◐	○	○
Class actions	○	●	○	○	●	○	○	○	○	○	●	○	●	○
Allows consumer suit without proof of reliance	●	●	○	◐	◐	◐	◐	○	○	◐	◐	○	◐	◐
Allows consumer suit without proof of public impact	○	●	○	○	○	○	○	○	○	●	○	○	○	●
Allows consumer suit without pre-suit notice	●	●	○	○	○	●	○	●	○	○	●	○	○	○

Key: ○ = strong ◐ = mixed or undecided ● = weak

State UDAP Statutes at a Glance (continued)
Strengths and Weaknesses

	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD
<i>Prohibition of unfairness, deception</i>														
Broad deception prohibition	○	○	○	○	○	○	○	○	○	●	◐	○	○	◐
Broad unfairness prohibition	●	○	○	○	◐	○	●	○	○	○	◐	○	○	●
Rulemaking authority	○	●	○	○	●	●	○	○	●	○	○	○	●	●
<i>Scope</i>														
Covers credit	○	●	○	○	○	○	○	●	◐	◐	○	●	○	○
Covers insurance	○	●	○	○	◐	○	○	●	●	●	○	●	●	○
Covers utilities	○	●	●	○	○	○	○	●	●	○	○	●	○	○
Covers post-sale acts	○	○	○	○	○	○	○	○	◐	○	○	○	○	○
Covers real estate	○	○	○	●	○	○	○	●	○	○	○	●	○	◐
<i>State enforcement</i>														
Civil penalty amount	◐	○	○	◐	◐	◐	◐	○	○	○	●	●	◐	●
Deception sufficient without proof of intent or knowledge	●	○	○	◐	○	○	●	○	○	○	○	○	○	○
<i>Remedies for consumers</i>														
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	●	○	○	○	◐	○	○	○	●	○	○	○	○	●
Attorney fees for consumers	○	○	○	○	○	○	○	○	○	●	○	○	○	●
Class actions	○	○	○	○	○	○	○	○	○	○	○	○	●	○
Allows consumer suit without proof of reliance	◐	◐	○	○	○	◐	◐	○	◐	◐	●	◐	◐	○
Allows consumer suit without proof of public impact	○	○	○	○	●	○	○	○	○	○	○	○	●	○
Allows consumer suit without pre-suit notice	○	○	○	○	○	○	○	○	○	○	○	○	○	○

Key: ○ = strong ◐ = mixed or undecided ● = weak

State UDAP Statutes at a Glance (continued)
Strengths and Weaknesses

	TN	TX	UT	VT	VA	WA	WV	WI	WY
<i>Prohibition of unfairness, deception</i>									
Broad deception prohibition	○	◐	○	○	○	○	○	○	○
Broad unfairness prohibition	○	○	○	○	●	○	○	○	○
Rulemaking authority	●	●	○	○	●	●	○	○	●
<i>Scope</i>									
Covers credit	◐	◐	◐	○	●	◐	◐	◐	○
Covers insurance	○	○	●	●	●	○	○	●	●
Covers utilities	◐	○	●	○	●	●	◐	○	○
Covers post-sale acts	●	○	○	○	◐	○	○	●	○
Covers real estate	○	○	○	○	◐	○	◐	○	○
<i>State enforcement</i>									
Civil penalty amount	●	○	●	○	●	●	◐	○	○
Deception sufficient without proof of intent or knowledge	○	○	○	○	○	○	○	○	●
<i>Remedies for consumers</i>									
Compensatory damages for consumers	○	○	○	○	○	○	○	○	○
Multiple or punitive damages	○	○	●	○	○	○	●	○	●
Attorney fees for consumers	○	○	○	○	○	○	○	○	●
Class actions	●	○	○	○	●	○	○	○	○
Allows consumer suit without proof of reliance	○	●	◐	○	●	○	◐	○	●
Allows consumer suit without proof of public impact	○	○	○	○	○	●	○	○	○
Allows consumer suit without pre-suit notice	○	●	○	○	○	○	●	○	●

Key: ○ = strong ◐ = mixed or undecided ● = weak

I. Practices Prohibited

Broad prohibition of deception and unfairness.

A state UDAP statute’s substantive protections—the extent to which it prohibits unfair and deceptive acts and practices—is one of its most important features. The strongest statutes include broad, general prohibitions against both deceptive conduct and unfair conduct. This is also the approach of the FTC Act, on which many UDAP statutes are based.

By broadly prohibiting deception, rather than confining the prohibition to a closed list of deceptive tactics, states are able to attack new methods of deception as they emerge. A broad prohibition against unfairness (or unconscionability, a similar concept that some state UDAP statutes use) is also important. Practices such as harassment, high-pressure sales tactics, and one-sided contract terms are unfair to consumers and can distort the marketplace even though they may not involve deception.

A number of states, however, provide weaker protections for consumers. The weakest states include no general prohibitions, but prohibit only a closed list of specific practices. While prohibitions of specific practices are sometimes helpful to consumers, they inevitably leave the door open for inventive fraud artists who devise new methods of deception and unfairness.

Rulemaking authority. The strongest UDAP statutes also allow a state agency to issue detailed regulations prohibiting specific unfair and deceptive practices. The authority to issue regulations means that the state can target emerging or persistent unfair and deceptive acts and practices and develop state-based solutions. It means that states can add bright-line rules to their general prohibitions, so that there is no question that a certain practice is unfair or deceptive. Specific rules also act as helpful guidelines for businesses that want to use fair practices.

While rulemaking authority is important, its existence does not mean that the state agency will use it. For example, Mississippi and the Dis-

trict of Columbia have rulemaking authority but have never adopted any rules. Florida repealed most of its UDAP rules in 1996. North Dakota has adopted just one rule, relating to retail price advertising, and Rhode Island has adopted only two very narrow rules.

How Do the States Rate on the Strength of Their Substantive Protections?

Broad prohibition against deception. The UDAP statutes in forty-three states and the District of Columbia include a broad prohibition against deception that is enforceable by both consumers and a state agency. On the other hand, the UDAP statutes in Colorado, Indiana, and Oregon do not include a general prohibition against deception. Instead, those states prohibit only a closed list of specific deceptive acts, leaving the field open for creative fraud artists. South Dakota’s statute includes a prohibition of deception that might appear at first blush to be broad, but consumers who seek to take advantage of this prohibition must bear the heavy burden of showing that the deceptive act was both knowing and intentional. In addition, Iowa, Mississippi, and Texas, while including broad prohibitions of deception in their statutes, do not allow consumers to enforce this prohibition. Colorado and South Dakota are particularly notable because their UDAP statutes also lack broad prohibitions of unfair or unconscionable acts, making their substantive prohibitions the weakest in the country.

**STATES WITHOUT A
BROAD PROHIBITION OF
DECEPTIVE ACTS, ENFORCEABLE
BY CONSUMERS**

Colorado	Mississippi
Indiana	Oregon
Iowa	South Dakota
	Texas

Broad prohibition against unfair or unconscionable acts. In thirty-nine states and the District of Columbia, the UDAP statute includes at least a fairly broad prohibition against unfair or unconscionable acts that is enforceable by consumers and a state agency. Eight state UDAP statutes—those in Arizona, Colorado, Delaware, Minnesota, Nevada, North Dakota, South Dakota, and Virginia—do not include a general prohibition of unfair or unconscionable practices. In addition, Iowa, Mississippi, and New York include general prohibitions of unfair or unconscionable practices, but do not allow consumers to enforce them.

STATES WITHOUT A BROAD PROHIBITION OF UNFAIR OR UNCONSCIONABLE ACTS, ENFORCEABLE BY CONSUMERS

Arizona
Colorado
Delaware
Iowa
Minnesota
Mississippi
Nevada
New York
North Dakota
South Dakota
Virginia

Rulemaking authority. Twenty-seven states and the District of Columbia give rulemaking authority to a state agency, but the remaining jurisdictions do not.

STATES THAT DO NOT GIVE A STATE AGENCY THE AUTHORITY TO ADOPT SUBSTANTIVE RULES

Alabama	Nebraska
Arizona	New Hampshire
Arkansas	New York
California	North Carolina
Colorado	Oklahoma
Delaware	South Carolina
Indiana	South Dakota
Kansas	Tennessee
Kentucky	Texas
Michigan ¹	Virginia
Minnesota	Washington
	Wyoming

What States Can Do To Improve Their UDAP Statutes' Substantive Strength

States that want to improve the substantive strength of their UDAP statutes should consider these steps:

- Add broad prohibitions of deceptive and unfair acts
- Remove any provisions that prevent consumers from enforcing broad prohibitions
- Give a state agency the authority to adopt rules that specify particular practices as unfair or deceptive

II. Scope of the State UDAP Statute

The scope of the state's UDAP statute is just as important as its substantive prohibitions. If a UDAP statute has strong substantive protections, but applies them to few industries, it is of little help to consumers.

For example, an exemption for banks and other creditors leaves consumers unable to use their state UDAP statute to obtain redress for predatory lending practices. A home purchase is the biggest consumer transaction most consumers enter into, yet an exemption for real estate transactions insulates speculators involved in property flipping and other real estate fraud. Unfair or deceptive practices in the insurance industry include false statements about insurance coverage or costs and stalling and evasion in paying claims. Nonetheless, some states exempt insurers from the state UDAP statute.

Abusive debt collection consistently ranks first among complaints to the FTC about specific industries.² Yet some courts have interpreted their state UDAP statutes not to cover post-sale acts. Some states also exempt utility companies, even though consumers depend on utility service for survival and are therefore extremely vulnerable to unfair and deceptive practices.

In a few states, courts have interpreted a statutory exemption for "regulated industries" so broadly that the UDAP statute covers almost nothing. For example, Michigan had a relatively strong UDAP statute until it was gutted by a court decision³ that construed an exception for "a transaction or conduct specifically authorized under" laws administered by a state or regulatory board to exclude entire industries whenever they are subject to any regulation or licensing.⁴ A Rhode Island Supreme Court decision⁵ gives an equally broad interpretation to similar language in its UDAP statute. As a result, while these two states have UDAP statutes that appear strong on paper, they provide almost no actual protection to consumers. In fact, the UDAP statutes in these

states are worse than ineffective, as they give the appearance of providing protection for consumers while actually providing nothing.

Of course, a business should not be penalized for actions that are required or specifically permitted by another law. For example, if a law requires a business to use certain contract terms or make certain disclosures, the business should be insulated from consumer claims that those contract terms are unfair or that those disclosures are deceptive. But the mere fact that a business is regulated does not mean that it will not engage in unfair and deceptive practices. New and used car dealers, mortgage brokers, debt collectors, payday lenders, and other predatory lenders are just a few of the types of businesses that are commonly licensed or regulated in some fashion, yet have often been found to have engaged in unfair, deceptive, and abusive tactics.

How Do the States Rate on the Scope of Their UDAP Statutes?

The Terrible Two: states whose UDAP statutes cover virtually nothing. As noted above, judicial decisions have gutted Michigan's and Rhode Island's UDAP statutes, leaving them empty shells that cover few if any businesses that deal with consumers.

THE TERRIBLE TWO

Courts in these states have interpreted an exception for "authorized" or "permitted" transactions so broadly that the statute now covers few if any consumer transactions.

Michigan
Rhode Island

Coverage of predatory and abusive lending. The importance of prohibiting unfair and deceptive practices in consumer lending could not be clearer. The abusive lending, bait-and-switch

tactics, and outright deception that led to the subprime mortgage crisis has not only harmed millions of consumers, but also led to global economic insecurity. UDAP statutes can act as a bulwark against predatory lending, and give injured consumers their most effective remedies—but only if the statute does not exempt lenders.

Despite the overwhelming problem of predatory and abusive lending, five states—Louisiana, Michigan, New Hampshire, Rhode Island, and Virginia—immunize all or almost all lenders and creditors from the UDAP statute, regardless of the unfair or deceptive nature of their practices.

In addition, a number of states, while not affording lenders and creditors a blanket exemption, have significant gaps in coverage. Alabama, Alaska, Florida, Illinois, Nebraska, Ohio, Texas, and Utah are examples of states where the statute itself or decisions interpreting it have created substantial loopholes or exemptions for predatory and abusive lenders.

For example, Alabama and Florida exempt all banks, regardless of the unfair or deceptive nature of their acts. Ohio's UDAP statute excludes most lenders other than payday lenders, mortgage brokers, and non-bank mortgage lenders. Illinois courts have significantly reduced the otherwise broad applicability of the UDAP statute to credit by adopting an unusually expansive view of the effect of the federal Truth in Lending Act, with some decisions holding that it immunizes lenders from UDAP liability for a wide range of deception and non-disclosure.

Other states, while not affording such clear immunity to lenders, have ambiguities in their UDAP statutes that could lead to questions about coverage of predatory and abusive lending. For example, a number of states, such as Arkansas and Tennessee, have exemptions for practices “permitted” by a regulatory agency.⁶ States that want to ensure that their UDAP statutes apply to unfair and deceptive lending practices should examine this type of statutory language to make sure that it is not susceptible to an overly broad interpreta-

tion like those which have eviscerated the Michigan and Rhode Island statutes. Other statutes are limited to “goods and services,” and courts have not yet ruled whether lending amounts to a “service.”

STATES THAT IMMUNIZE ALL OR MOST LENDERS AND CREDITORS

In these states, the UDAP statute provides no or very little protection against predatory lending, mortgage fraud, and other abuses and deception in the extension of credit.

Louisiana	New Hampshire
Michigan	Rhode Island
	Virginia

STATES WITH SIGNIFICANT GAPS OR AMBIGUITIES IN COVERAGE OF LENDERS AND CREDITORS

In these states, the UDAP statute covers some lenders and creditors, but has significant gaps or ambiguities.

Alabama ⁷	Oklahoma ¹⁴
Alaska ⁸	Oregon ¹⁵
Arkansas ⁹	Tennessee ¹⁶
Florida ¹⁰	Texas ¹⁷
Illinois ¹¹	Utah ¹⁸
Nebraska ¹²	Washington ¹⁹
Ohio ¹³	West Virginia ²⁰
	Wisconsin ²¹

Coverage of insurance and utility transactions. Twenty-four states immunize insurers, and sixteen states specifically immunize utility companies.

STATES THAT IMMUNIZE ALL OR MOST INSURERS	
Alabama	Montana
Alaska	New Hampshire
Delaware	Ohio
Florida	Oklahoma
Georgia	Oregon
Idaho	Rhode Island
Indiana	South Carolina
Kansas	Utah
Louisiana	Vermont
Maryland	Virginia
Michigan	Wisconsin
Mississippi	Wyoming

STATES THAT IMMUNIZE ALL OR MOST UTILITY COMPANIES	
Alabama	New Hampshire
Delaware	New Jersey
Florida	Ohio
Louisiana	Oklahoma
Maryland	Rhode Island
Michigan	Utah
Montana	Virginia
Nebraska	Washington

Coverage of post-sale activities and real estate transactions. Most state UDAP statutes appear to cover post-sale acts, such as abusive debt collection, although in many states the courts have not directly addressed this question. The status of coverage of post-sale acts is summarized in the chart at the beginning of this report, and described in more detail in Appendix B, available at www.nclc.org.

Most states cover real estate transactions, although there are ambiguities in a number of states that make categorization difficult. In addition, Florida, Maryland, and Virginia specifically exempt holders of real estate licenses even when they engage in intentional deception. Nebraska has interpreted a general exemption for entities subject to state regulation to exclude holders of real estate licenses, and the same result would probably apply in Michigan and Rhode Island because of the courts' sweeping interpretations of similar exemptions. In addition, several states restrict their UDAP statutes to "goods" and "services," and courts have differed as to whether real estate sales amount to a "service." The status of coverage of real estate transactions is summarized in the chart at the beginning of this report, and described in more detail in Appendix B.

What States Can Do To Improve the Scope of Their UDAP Statutes

States that want to improve the scope of their UDAP statutes should consider:

- Narrowing any exclusion for regulated industries, so that is clear that the mere fact of regulation is not a license to engage in unfair and deceptive practices. A 2007 amendment to the Maine UDAP statute, narrowing such an exemption,²² can serve as a model.
- Eliminating exemptions for lenders and other creditors. This may require eliminating an explicit exemption that names certain categories of creditors such as banks; expanding the statute's scope to cover more than "goods and services"; clarifying that "services" includes lending; or eliminating an exemption for a transaction's credit terms.
- Eliminating exemptions for insurers and utility companies.
- Clarifying that the statute applies to real estate and post-transaction matters such as abusive debt collection.

III. State Enforcement

Every state designates a state agency—usually the Attorney General’s office—to enforce its UDAP statute. Almost all states give the state enforcement agency the authority to seek three key forms of relief:

- Equitable relief—an injunction or other order requiring a business to stop engaging in an unfair or deceptive practice.
- Restitution for consumers—an order requiring the business to return money that was wrongfully taken from consumers.
- A civil penalty—a monetary penalty imposed for having engaged in the unfair or deceptive practice.

Equitable relief. Equitable relief is of great importance because it makes it possible for state agencies to shut down unfair or deceptive operations quickly, before more consumers are harmed. Every state UDAP statute allows the state agency to seek this type of order to stop unfair or deceptive practices.

A few states, however, undercut the effectiveness of this basic and critical remedy by requiring the state agency, before it can protect the public, to show not only that the business engaged in the unlawful practices, but also that it did so intentionally or knowingly. While few businesses use unfair and deceptive practices by mistake, proving intent or knowledge can be extremely difficult. If the state agency must prove the business’s intent or knowledge before getting an order stopping an unfair or deceptive practice, it is much harder for the state to protect its citizens. Many more consumers are likely to be harmed. Even if a business acted without knowledge or intent, that should not be an excuse to continue an unfair or deceptive practice.

Restitution. The ability to seek restitution is also critical. Stopping a business’s practices does

nothing to help consumers who fell victim to the practice before the state agency acted. In addition, without the prospect of being forced to make restitution, it would be in a business’s interest to make as much money as possible from unfair and deceptive tactics, and then simply stop when caught, keeping the money it took from consumers. Allowing fraud to be profitable in this way gives new companies an incentive to adopt the same tactics, leading to a steady stream of new fraud artists to replace any stopped by the state.

Civil penalties. A substantial civil penalty for initial violations is important because of its deterrent effect. A business that faces no potential penalty beyond returning its ill-gotten gains may be tempted to engage in unfair and deceptive practices. If it is caught, it simply ends up back where it started, but if it is not caught it keeps its gains. The potential of a civil penalty in addition to restitution helps balance this equation.

The existence of strong remedies does not, of course, mean that the state enforcement agency will use them. If the state enforcement agency is complacent about consumer fraud, its efforts will be ineffective regardless of the strength of the statute. By the same token, an aggressive, committed Attorney General can do a great deal for consumers even with a relatively weak UDAP statute. Still, enacting a statute that has strong state enforcement potential makes it much more likely that the state agency will be able to take effective measures against consumer fraud.

How Do the States Rate on the State Enforcement Potential of Their UDAP Statutes?

All states allow the state agency to seek restitution for consumers, and all states except Rhode Island allow the state agency to seek civil penalties for initial violations. The key differences among the states in the strength of state enforcement remedies are whether a showing of knowledge or intent is required and the size of the civil penalty.

Conditioning state remedies upon proof of intent or knowledge. Most states do not require the state agency to prove the business’s intent or knowledge, but there are five states that require this proof in all or most cases. Colorado, Indiana, Nevada, North Dakota, and Wyoming condition state remedies upon proof of the business’s knowledge or intent in all or a significant number of circumstances.

States That Make Relief Unavailable Unless the State Proves the Business’ Knowledge or Intent ²³	
Colorado	Nevada
Indiana	North Dakota
	Wyoming

Size of civil penalties. Rhode Island is the only state that does not authorize the state agency to seek civil penalties when a business violates the UDAP statute. Among the other 49 states and the District of Columbia, there is a wide range in the amount of the civil penalty that a fraudulent or unfair business can be required to pay. Some states have the ability to assess substantial civil penalties, but in other states the amounts are so low that a seller or creditor may simply consider civil penalties part of the cost of doing business. For example, the District of Columbia, Missouri, Pennsylvania, and Tennessee allow civil penalties of just \$1000 per violation. By contrast, for example, Alaska allows a civil penalty of \$25,000 per violation, without requiring proof of any special factors such as willfulness. (A number of states allow larger civil penalties if the unfair or deceptive act was committed against an elderly or disabled person).

Of course, even a civil penalty in a small amount can be an effective deterrent if courts impose the civil penalty per consumer, or per day of an unlawful practice. Likewise, even a large civil penalty will have less impact if it can be imposed just once no matter how many violations the company has

committed. Nonetheless, the size of the civil penalty is an important measure of the strength of the law. A substantial civil penalty sends a strong message to businesses that unfair and deceptive practices will not be tolerated in the state.

States With Weak Civil Penalty Provisions
<i>No civil penalty for initial violations</i>
Rhode Island
\$1000
District of Columbia
Missouri
Pennsylvania
Tennessee
\$2000–\$2500
Alabama
California
Colorado
Kentucky
Maryland ²⁴
Nebraska
South Dakota
Utah
Virginia
Washington

States With Average Civil Penalty Provisions (all are \$5000)	
Connecticut	Nevada
Georgia	New Mexico
Idaho	New York
Indiana	North Carolina
Louisiana	North Dakota
Massachusetts	South Carolina
	West Virginia

States With Strong Civil Penalty Provisions (\$10,000-\$40,000)	
Alaska	Minnesota
Arizona	Mississippi
Arkansas	Montana
Delaware	New Hampshire
Florida	New Jersey
Hawaii	Ohio
Illinois	Oklahoma
Iowa	Oregon
Kansas	Texas
Maine	Vermont
Michigan	Wisconsin
	Wyoming

What Can States Do To Strengthen State Enforcement of Their UDAP Statutes?

States that want to strengthen state enforcement of their UDAP statutes can:

- Delete any requirement that knowledge or intent be proven as an element of a UDAP violation.
- Increase the size of the civil penalty, and make sure that it is applicable per violation.

States whose UDAP statutes are already strong in these respects can still improve their UDAP statutes by making sure that the agency has a full range of pre-suit investigatory power. States with the strongest laws allow the state agency to demand and obtain information both from the target and from others prior to suit.

Another way to strengthen state enforcement is to allow the court to order the business to pay the state's attorney fees and costs when the state prevails in a UDAP case. Finally, to state the obvious, even with a strong statute, adequate funding for the consumer protection activities of the state agency is essential for strong enforcement.

IV. Consumer Access to Justice

Giving consumers the ability to enforce their state UDAP statute is crucial for consumer justice. Limited state consumer protection enforcement budgets are not able to police the marketplace fully. Most state agencies lack the resources to obtain redress for consumers unless there are many victims of the same practice. And even if a fraudulent business has cheated many consumers, the state agency may only be able to target the common elements in the company's practices, not the individual variations. State enforcement agencies rarely bring cases that require detailed proof of specific facts to show how an individual consumer was cheated.

In addition, many state agencies focus more on stopping future deception and unfairness than on compensating consumers who have already fallen victim. Further, the state agency's priorities—even the priority it gives to prosecuting consumer fraud—may change when officeholders change.

Fundamentally, there are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement cannot do the job no matter how well-funded. The market can never be policed adequately from above. Consumers must be able to protect themselves—and that ability is crucial for a well-functioning consumer marketplace.

A strong, effective UDAP statute gives consumers the ability to take a fraudulent business to court to get back not just the money they lost, but also enhanced or punitive damages in appropriate cases plus attorney fees, and to seek relief in a class action if many consumers have been harmed in the same way. In addition, a strong, effective UDAP statute does not impose special barriers that consumers must meet, such as sending a special advance notice, proving that the business cheated many others in the same way, or proving reliance. These features are discussed in more detail below.

Compensatory relief. Allowing consumers to recover their losses from fraudulent businesses is an essential component of preventing and redressing consumer fraud. All state UDAP statutes except Iowa's allow consumers to seek at least the dollar amount of their losses.

Attorney fees. Consumers need to be able to recover their attorney fees when they win a consumer protection case. Otherwise, the consumer is not made whole, because having to pay an attorney eats into the refund the consumer recovers from the business. Attorney fees are likely to be several thousand dollars even for a small case, and can completely consume—or even exceed the refund the consumer is seeking.

Awarding attorney fees to consumers makes consumer justice affordable. It also provides an incentive for private attorneys to bring consumer suits and thus to vindicate the important public policies underlying these laws. In addition, without such a provision, the business can wear down the consumer by prolonging and over-litigating the case, exhausting the consumer's resources. The consumer may not even be able to find an attorney willing to take the case if there is no provision in the statute for the business to pay the consumer's attorney fees.

At the same time, consumers should not be threatened with having to pay the business's attorney fees unless the case is frivolous or brought in bad faith. Allowing consumers to be threatened with having to pay the business's attorney fees acts as a powerful deterrent against ever seeking to enforce the UDAP statute.

Class actions. Class actions are an efficient way for consumers to obtain redress when an unfair or deceptive practice affects many people. They are particularly important when the dollar amount per person is small. As Congress has recognized, class action lawsuits “permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.”²⁵

Aggregation of claims into a single case recognizes the economic reality that each individual loss is likely to be too small to merit the cost of pursuing it. Moreover, it is patently unfair to consign consumers to the sole option of individualized suits, when suppliers have followed standard practices and cheated consumers in the same way.

It is through class action status and class-wide discovery that the defendant's allegedly harmful practice and its application to large numbers of similarly-situated consumers may be determined carefully and accurately. Class action discovery serves two important functions: (1) it identifies the extent of the underlying wrongful activity, and (2) it aligns the scope and size of the potential recovery for affected consumers with the scope of the unlawful practice.

Despite the importance of class actions in achieving consumer justice, some states prohibit UDAP class actions. Singling out consumer fraud for kid-gloves treatment is certainly questionable as a policy matter. Worse, it leaves consumers without a practical remedy in many circumstances, particularly for small-scale fraud practiced on a wide number of people.

Requirement that the consumer show a public impact. Placing preconditions on consumer protection suits that go beyond those for other civil claims significantly weakens consumer access to justice. For example, some UDAP statutes undercut their effectiveness by requiring consumers to prove not just that they were cheated, but also that the business's practice impacts the public at large. Whether a practice affects the public interest often depends on the eye of the beholder, leading to inconsistent, *ad hoc* decisions allowing or refusing to allow UDAP claims to proceed.

Another problem with this precondition is that it requires consumers to prove facts that they may not be in a position to show. Having to gather and present evidence about how the practice affected others greatly increases the complexity and expense of a consumer suit. It does not make sense to impose this burden on a consumer who has

been cheated and simply wants to be made whole. In states that require such a showing, many consumers with meritorious claims have been left without a remedy under the state UDAP statute.

In some states this requirement is interpreted so expansively as to make the consumer protection law virtually a dead letter for consumers. For example, in Minnesota some courts have held that it is not enough if the practice affects many members of the public: the consumer's suit itself must also benefit the public at large.²⁶ This interpretation precludes consumers from obtaining individual redress under the UDAP statute.

Reliance. Some states require the consumer to show not only that the business engaged in unfairness or deception that was material and caused the consumer's loss, but also that the consumer specifically relied on the practice. This requirement frustrates the forward-looking nature of state unfair and deceptive acts and practices laws, as it impairs consumers' ability to stop practices before they cause widespread consumer harm. It also leads businesses to try to evade consequences for their deceptive practices by inserting clauses in the fine print of their contracts stating that the consumer did not rely on what the salesperson said.

A reliance requirement means that consumers must prove their state of mind—always a difficult undertaking. It allows businesses to argue that the consumer acted unreasonably in falling for the deceptive sales pitch or failing to pay sufficient attention to it. This precondition also complicates aggregation of consumers into class actions where their collective voice could equal the bargaining power of a seller because any need to show reliance for each class member may defeat class treatment.

Under the FTC Act, a seller can be required to make redress to consumers if its misrepresentation was material—that is, of a type that usually makes a difference in the purchasing decision. For example, the FTC can obtain redress for consumers if a seller falsely claimed that an appliance carried a warranty, or that a table was solid

oak, without having to prove that each consumer specifically relied on the misrepresentation. By the same token, state UDAP statutes are stronger if they allow consumers to recover when they show that the seller's deception was material.

Special advance notice procedures: Some states single out consumer protection cases for a special requirement that the consumer send the business a notice before filing suit. Placing this special burden on consumer protection cases makes it harder for consumers to get their cases heard in court, especially if they are trying to proceed without an attorney. This is a particular problem if the courts require rigid compliance with requirements for the timing and content of the notice, giving fraudulent businesses the ability to defeat meritorious suits on technical grounds.

A pre-suit notice requirement also allows unfair and deceptive businesses to avoid UDAP suits simply by returning the money just on those occasions when they get caught. They can keep their activities out of the public eye, buy off troublesome consumers, and continue in their course of conduct. Pre-suit notice laws can also make class action cases impossible if courts allow the business to prevent the suit from going forward by offering a refund just to the individual consumer after receiving notice. Even worse, some businesses have, upon receiving advance notice, tried to retaliate against the consumer by filing a “preemptive strike” suit against the consumer.

Enhanced damages. Many state UDAP statutes include an enhanced damages provision that allows consumers to seek two or three times their actual damages. In the alternative, some UDAP statutes explicitly authorize consumers to recover punitive damages. In many states the consumer must prove that the business acted knowingly in order to get enhanced damages.

Enhanced damages provisions give consumers an incentive to enforce the law and businesses an incentive to comply with it, rather than dragging out litigation. In addition, since consumer claims often involve a relatively small amount of money,

a double or treble damages provision helps cover damages that are difficult to prove in court. It also covers the indirect costs, such as lost time, telephone calls, and travel expenses, that consumers incur when they enforce a statute against a business. Especially when the consumer’s claim is small, providing for an enhanced award in this way is important to make litigation practical. An enhanced damages award also acts as a deterrent to businesses that might otherwise be tempted by the profitability of fraudulent behavior.

How Do the States Rate on Consumer Access to Justice under Their UDAP Statutes?

Iowa and Mississippi: the states with the weakest overall remedies for consumers. Iowa’s UDAP statute ranks at the very bottom, as consumers have no ability to enforce it. A consumer who has been cheated by a business in Iowa cannot obtain any remedy under the UDAP statute.

Mississippi, although it does not deny consumers the right to enforce the state UDAP statute, is almost as bad as Iowa because its consumer remedies are so weak. Mississippi’s UDAP statute requires pre-suit notice, prohibits consumers from joining together in a class action, and does not offer multiple damages. It allows the court to order the *consumer* to pay the business’s attorney fees in some circumstances, but does not allow the court to order the business to reimburse the consumer for attorney fees when the consumer wins. The possibility of having to pay the business’s attorney fees, without having any right to recover fees from the business, makes the Mississippi UDAP statute such a poor and risky remedy for consumers that it is not surprising that few have ever used it.

Attorney fees. Forty-five states and the District of Columbia allow the court to order the business to reimburse the consumer for attorney fees if the consumer wins the case. The failure of the remaining five states—Arizona, Delaware, Mississippi, South Dakota, and Wyoming²⁷—to authorize reimbursement of the consumer’s attorney fees greatly undermines the effectiveness of the statute.

STATES THAT DO NOT ALLOW CONSUMERS WHO PREVAIL TO RECOVER THEIR ATTORNEY FEES	
Arizona	Mississippi
Delaware	South Dakota
Iowa ²⁹	Wyoming ³⁰

In two states—Florida and Oregon—consumers who have lost UDAP cases have been forced to pay tens of thousands of dollars to the business for its attorney fees even though the cases were filed in good faith. In addition, Alaska’s UDAP statute requires unsuccessful consumers to pay partial attorney fees to the business. The threat of this enormous financial burden is a highly effective deterrent against consumer enforcement of the UDAP statute.

The UDAP statutes in three other states—Indiana, Kentucky, and Missouri—do not set forth specific standards that would prevent courts from requiring an unsuccessful consumer to pay the business’s attorney fees. However, reported decisions in those states do not show courts requiring consumers to pay the business’s attorney fees. Faced with a similar statute that lacked specific standards, the Illinois Supreme Court held that trial courts should exercise their discretion and limit fee awards against consumers to cases where the consumer has proceeded in bad faith.¹

TWO STATES WITH WEAKEST OVERALL CONSUMER REMEDIES
Iowa Mississippi

**STATES WHERE CONSUMERS
CAN BE FORCED TO PAY THE
DEFENDANT'S ATTORNEY FEES
EVEN IF SUIT WAS FILED
IN GOOD FAITH**

Alaska³¹ Florida
Oregon

Class actions. Nine states—Alabama, Georgia, Iowa, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Virginia—deny consumers the right to join together in a class action under the state UDAP statute. In addition, some of the states that allow class actions have special rules for UDAP cases that are more restrictive than the rules for other cases. States seeking to strengthen their UDAP statutes should examine whether the statute has class action rules embedded in the statute that are more restrictive than the state's general class action rules.

**STATES THAT PROHIBIT
UDAP CLASS ACTIONS**

Alabama Mississippi³³
Georgia Montana
Iowa³² South Carolina
Louisiana Tennessee
Virginia³⁴

Special barriers to suit. Seven states—Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington—require consumers to prove not just that they were cheated, but that the business cheats consumers frequently or as a general rule. These states vary in how they formulate this requirement. Some Minnesota courts impose a barrier so high that no consumer is ever likely to meet it. New York

courts have dismissed hundreds of UDAP cases, simply because the consumer proved only that the business cheated him or her, not that the practice impacted consumers at large.

**STATES THAT REQUIRE
CONSUMERS TO PROVE AN
IMPACT ON THE PUBLIC AS A
PRECONDITION OF SUIT**

Colorado Nebraska
Georgia New York
Minnesota South Carolina
Washington

Most UDAP statutes do not explicitly require consumers to prove that they specifically relied on the deception. Indiana, Texas, and Wyoming are notable exceptions. In addition, in a number of states the courts have grafted this requirement onto the statute. In many states, the issue of whether and when consumers must prove specific reliance is not completely clear, because the courts have made pronouncements only in specific cases, without purporting to set a universal rule. For these reasons, it is difficult to categorize states precisely as to whether they require consumers to prove reliance. Where it is not already clear that proof of reliance is not required, states can strengthen their UDAP statutes by making this explicit.

Nine states—Alabama, California (one of its two UDAP statutes), Georgia, Indiana (with exceptions), Maine, Massachusetts, Texas, West Virginia, and Wyoming—impose a special advance notice procedure on consumers who seek relief under the state UDAP statute. Mississippi creates an equivalent hurdle by imposing a pre-suit dispute resolution procedure. The remaining forty states and the District of Columbia do not impose this special burden on consumers bringing UDAP claims.

STATES THAT REQUIRE CONSUMERS TO SEND A SPECIAL PRE-SUIT NOTICE

Alabama	Massachusetts
California ³⁵	Mississippi ³⁷
Georgia	Texas
Indiana ³⁶	West Virginia
Maine	Wyoming

Enhanced damages: Twenty-five states and the District of Columbia authorize double or treble damages for consumers (although New York’s treble damage provision is relatively toothless since treble damages are capped at \$1000 for most violations and at \$10,000 for false advertising). In addition, the UDAP statutes in California (one of its two UDAP statutes), Connecticut, Idaho, Kentucky, Missouri, Oregon, and Rhode Island do not authorize multiple damages but explicitly authorize punitive damages.

STATES THAT DO NOT AUTHORIZE ENHANCED DAMAGES

Arizona	Michigan
Arkansas	Minnesota
Delaware	Mississippi
Florida	Nebraska
Illinois	Nevada
Iowa	Oklahoma
Kansas	South Dakota
Maine	Utah
Maryland	West Virginia
	Wyoming

What States Can Do to Improve the UDAP Remedies Available to Consumers

States that want to improve the remedies available to consumers under their UDAP statutes can:

- Make it clear that the court should order the business to pay a successful consumer’s attorney fees, and that the consumer cannot be held responsible for the business’s attorney fees if the case was filed in good faith.
- Remove any restrictions on UDAP class actions, so that they are governed by the state’s usual class action rules.
- Amend the statute if necessary to make it clear that a consumer who has been cheated can invoke the statute’s remedies without proving that the business cheats consumers as a general rule.
- Amend the statute to make it clear that courts can presume that consumers relied on material misrepresentations, without requiring individual proof.
- Delete any special advance notice provisions.
- Allow consumers to seek enhanced damages in appropriate cases.

States whose UDAP statutes are already strong in these respects can improve consumer remedies by 1) making it clear that consumers can obtain equitable relief, such as an injunction to stop a practice that harms similarly-situated consumers; 2) making attorney fee awards to consumers mandatory so that if they prevail they are assured of being made whole; 3) adding a provision for a small statutory damages award, such as \$100–\$200, whenever a consumer proves a violation of the UDAP statute; 4) making it clear that consumers do not have to meet a heightened standard of proof, but can prove a UDAP claim by the normal preponderance of the evidence standard; and 5) making it clear that the heightened requirements of common law fraud and rigid contract law rules are not applicable to UDAP claims.

APPENDIX A

CAPSULE SUMMARIES OF STRENGTHS AND WEAKNESSES OF EACH STATE'S UDAP STATUTE

Alabama

Alabama's UDAP statute includes strong prohibitions of unfair or deceptive acts. It is weakened by blanket exemptions for banks and other lending institutions, so it does not help stop predatory lending and mortgage fraud. Other weaknesses are blanket exemptions for insurers and utility companies, a special advance notice requirement that is imposed on consumers, and a prohibition against class actions. The statute would be stronger if the Attorney General had the authority to adopt regulations prohibiting emerging forms of unfairness and deception.

Alaska

Alaska's UDAP statute includes strong prohibitions of unfair or deceptive acts, and gives the Attorney General the authority to adopt regulations prohibiting emerging forms of unfairness and deception. Its remedies for consumers are undermined by a provision that allows courts to require consumers to pay a portion of the business's attorney fees if the consumer loses the case. The statute is also marred by a complicated series of overlapping exemptions for types of industries and practices, and would be improved by clarifying that these exemptions do not immunize unfair or deceptive acts.

Arizona

Arizona has a weak UDAP statute. It only prohibits deceptive practices, not unfair practices. It provides only minimal remedies for consumers. It does not allow the Attorney General to adopt rules addressing emerging forms of deception. On the positive side, it avoids blanket exemptions of entire industries.

Arkansas

The Arkansas UDAP statute includes broad prohibitions of both deceptive and unconscionable acts. The statute would be stronger if its coverage of deceptive consumer lending and insurance practices were clearer, and if it allowed consumers to recover multiple damages in appropriate cases. It would also be enhanced by giving rulemaking authority to a state agency.

California

California's main UDAP statute, its Unfair Competition Law, broadly prohibits unlawful, unfair, or fraudulent business practices and deceptive advertising, and it is not undercut by exemptions for particular businesses. A weakness is that consumers can only seek restitution, not damages, and multiple damages are not allowed. California has a second UDAP statute that also provides useful remedies, but it lacks a broad prohibition of deception and imposes a special advance notice requirement on consumers. The Unfair Competition Law would be enhanced by increasing the civil penalty for violations, currently just \$2500, by giving a state agency authority to adopt rules prohibiting emerging scams, and by clarifying that consumers need not prove specific reliance on the unfair or deceptive act.

Colorado

The Colorado UDAP statute's substantive prohibitions are among the weakest in the country, prohibiting only certain specified acts without broad prohibitions of either deception or unfairness. In addition, court decisions create a significant impediment for consumers by denying them any remedy, even if they were cheated, unless the unfair or deceptive practice in question also has a significant impact on the public. On the other hand, a significant strength of Colorado's law is that it does not create blanket exemptions for specific industries.

Connecticut

Connecticut's UDAP statute broadly prohibits both deceptive and unfair acts and practices. It would be enhanced by adding a minimum damages provision, making attorney fee awards to consumers mandatory so that if they prevail they are assured of being made whole, and providing that violation of another state or federal consumer protection law is a *per se* UDAP violation.

Delaware

Delaware's UDAP statute has relatively weak prohibitions and private remedies. It broadly prohibits deceptive

acts, but does not prohibit unfair acts or give the Attorney General the authority to adopt regulations addressing new forms of deception. It does not allow consumers to recover their attorney fees, so when they win a case against a deceptive business they will still not be made whole. Other weaknesses are the absence of a multiple damages provision, and blanket exemptions for insurance and utility companies. On the positive side, it appears to cover deceptive loan and credit practices.

District of Columbia

The District of Columbia's UDAP statute broadly prohibits both deceptive and unconscionable practices, and does not include blanket exemptions for entire industries. Public enforcement would be stronger if the civil penalties for violations were increased from their current low amounts (\$1000 per violation—among the lowest in the country). Another weakness is that courts have interpreted the statute as requiring consumers to meet a higher standard of proof—clear and convincing evidence—than is normally required in civil cases.

Florida

Florida's UDAP statute broadly prohibits deceptive, unfair, or unconscionable acts, but provides only weak remedies for consumers and suffers from a constricted scope. A consumer who asserts an unsuccessful UDAP claim can be required to pay the business's attorney fees, even if the consumer asserted the claim in good faith. The statute exempts many practices by lenders, even if they act unfairly or deceptively, so is of little use against predatory lending and mortgage fraud. It also provides blanket exemptions for insurers, utility companies, and holders of real estate licenses. It would be enhanced by allowing consumers to recover multiple damages in appropriate cases. A strength of the statute is that it gives a state agency the authority to adopt rules specifying prohibited practices, but the state agency repealed almost all of its rules in 1996.

Georgia

The broad prohibitions of Georgia's UDAP statute are undermined by procedural obstacles and a constricted scope. Georgia courts require consumers to show not just that they were cheated, but that the practice affects other consumers. The statute also imposes a special advance notice requirement on consumers and prohibits consumers from joining together in a class action. Some courts have interpreted the statute not to apply to lending practices at all, which denies consumers a remedy for predatory lending and mortgage fraud, or have denied consumers the right to sue regarding oral misrepresentations. Georgia courts have

also interpreted the statute as providing a blanket exemption for insurers.

Hawaii

Hawaii's UDAP statute broadly prohibits both unfair and deceptive acts and gives the office of consumer protection the authority to adopt rules to address emerging scams. It does not carve out entire industries as exempt.

Idaho

Idaho's UDAP statute is quite strong in some ways. It broadly prohibits both deceptive and unconscionable acts and gives the attorney general relatively strong enforcement powers, including the authority to adopt regulations prohibiting emerging scams. It does not impose procedural hurdles on consumers seeking remedies, and allows consumers to recover their attorney fees. Significant weaknesses are a blanket exemption for insurance companies, and some ambiguities as to coverage of lenders and utility companies. The statute would also be enhanced by adding a multiple damages provision.

Illinois

The main Illinois UDAP statute includes both broad and specific prohibitions. Its main weaknesses are significant gaps created by court decisions in coverage of creditors and credit transactions, making it less useful than it could be to stop predatory lending and mortgage fraud, and its lack of a multiple damages provision.

Indiana

Indiana has a relatively weak UDAP statute. It broadly prohibits unconscionable acts but confines its prohibition of deception to a list of specific practices, most of which are violations only if it is proven that the business acted knowingly. While there are no reported decisions requiring consumers to pay the business's attorney fees after losing a good-faith suit, the statute would be stronger if it were amended to preclude this result. Consumer enforcement is impeded by a pre-suit notice requirement. The statute also specifically denies consumers the right to bring suit for unfair and deceptive acts that occur in real estate transactions.

Iowa

Iowa is the only state in the nation that does not give consumers the right to go to court under the state UDAP statute. The statute's scope and prohibitions are broad, and it provides strong enforcement tools to the state, but the failure to allow consumers to seek remedies for unfair and deceptive practices leaves it as one of the country's weakest UDAP statutes.

Kansas

The Kansas UDAP statute is quite strong in its prohibitions, its application to a broad range of businesses, and its public and private remedies. One weakness is that many of the specific prohibitions require a showing that the business acted knowingly or willfully. The statute would be enhanced if consumers could recover multiple damages in appropriate cases, if insurance transactions were covered, and if a state agency had authority to adopt rules to address emerging scams.

Kentucky

The broad prohibitions of Kentucky's UDAP statute are undermined by weaknesses in its consumer remedies. While there are no reported decisions requiring consumers to pay the business's attorney fees after losing a good-faith suit, the statute would be stronger if it were amended to preclude this result. In addition, there is no provision for multiple damages. The statute would be stronger if coverage of credit transactions and real estate transactions were clarified.

Louisiana

The Louisiana UDAP statute's broad prohibitions would be far more valuable to consumers were its scope not so limited. It is of little use against predatory lending and mortgage fraud, as it exempts most practices, no matter how unfair or deceptive, by a wide range of financial institutions, as well as by insurers and utility companies. It also prohibits consumers from joining together in a class action.

Maine

Maine's UDAP statute has broad prohibitions and reasonably strong consumer remedies. The legislature recently narrowed the statute's exemptions, so it applies broadly to most businesses. Two weaknesses are that consumers are required to send the business a notice before filing suit, and the statute does not provide for multiple damages.

Maryland

Maryland's UDAP statute broadly prohibits both deceptive and unfair acts. Private enforcement would be enhanced by a multiple damages provision. While the statute covers credit transactions, a weakness is that it excludes insurance companies, utility companies, and a long list of specific occupations such as real estate brokers, land surveyors, and certified public accountants.

Massachusetts

Massachusetts' UDAP statute has broad prohibitions and no significant exemptions. It gives the attorney general the authority to adopt regulations defining unfair and deceptive acts, and the attorney general has

adopted a number of strong, specific regulations. Consumers can obtain injunctions, damages, multiple damages, and attorney fees against businesses for unfair or deceptive acts. A weakness is that Massachusetts' UDAP imposes a special advance notice requirement on consumers.

Michigan

Michigan's UDAP statute has been gutted by rulings narrowing its scope. The courts have interpreted an exemption for "a transaction or conduct specifically authorized" under laws administered by a state or federal regulatory board so broadly that the statute now covers almost no businesses. If not for these rulings, it would provide relatively strong consumer protection, as it includes reasonably broad prohibitions, relatively strong public and private enforcement remedies, and few procedural hurdles for consumers to overcome. As it stands, however, the statute is of little or no use to the state enforcement agency or to consumers.

Minnesota

Minnesota's main UDAP statute has relatively weak substantive prohibitions, as it prohibits only deceptive, not unfair acts, and does not give the state agency the authority to adopt regulations to address new scams. An even greater weakness is that courts hold that a consumer who has been defrauded cannot obtain any remedy unless the suit benefits the public at large. These rulings have left many injured consumers without a remedy under the statute. The statute's public remedies are relatively strong. Although they would be enhanced by a multiple damages provision, the statute's private remedies would be adequate if consumers could use them.

Mississippi

Mississippi's UDAP statute has among the weakest consumer enforcement provisions in the nation. Consumers can bring suit only for a narrow subset of violations, and the statute allows consumers to claim only limited relief. In addition, a consumer who sues a business can be required to pay the business's attorney fees, but there is no provision for requiring the business to pay the consumer's attorney fees, even if the consumer wins the case. Mississippi does not allow consumers to join together in a class action to pursue deceptive practices claims. As a result of these weaknesses, Mississippi's UDAP statute is of little use to consumers.

Missouri

Missouri's UDAP statute broadly prohibits unfair and deceptive acts, plus allows the Attorney General to adopt regulations addressing specific practices.

While there are no reported decisions requiring consumers to pay the business's attorney fees after losing a good-faith suit, the statute would be stronger if it were amended to preclude this result. Other weaknesses are the statute's lack of clarity regarding coverage of insurers and some ambiguities regarding coverage of lenders and other creditors. The civil penalty amount is just \$1000, among the lowest in the country.

Montana

Montana's UDAP statute broadly prohibits both deceptive and unfair acts, plus gives the state department of justice the authority to adopt regulations addressing specific practices. The state supreme court has ruled that the statute applies to consumer lending, and the statute does not impose significant procedural obstacles when consumers seek remedies for unfair or deceptive acts. However, the statute is weakened by blanket exemptions for insurance and utility companies, and by a prohibition of class actions.

Nebraska

The broad prohibitions of unfair or deceptive acts in Nebraska's UDAP statute are undermined by the statute's limited scope. Exemptions for lending practices and practices by utility companies and holders of real estate licenses exclude a wide range of acts even if they are unfair and deceptive. Another weakness is that courts hold that a consumer who has been defrauded cannot obtain any remedy unless the consumer also shows that the practice affects the public. The statute would also be enhanced by allowing consumers to recover multiple damages in appropriate cases and by giving a state agency the authority to adopt rules prohibiting emerging scams.

Nevada

Nevada's substantive prohibitions are relatively narrow, as they only address deception, not unfairness, and generally require a showing that the business acted knowingly. The statute would be enhanced if consumers could recover multiple damages in appropriate cases. A strength of the statute is that it does not generally provide blanket exemptions for industries.

New Hampshire

New Hampshire's broad prohibitions of unfair or deceptive acts and reasonably strong public and private remedies are undermined by the statute's limited scope. The statute does not apply to transactions with banks, no matter how unfair or deceptive, so it does little to stop predatory lending and mortgage fraud. It also provides blanket exemptions for insurance and utility companies. The statute would also be enhanced

by giving a state agency the authority to adopt regulations prohibiting specific unfair and deceptive practices.

New Jersey

New Jersey's UDAP statute includes both broad and specific prohibitions of unfair and deceptive acts, plus gives the Attorney General authority to adopt rules prohibiting other specific practices. It exempts few businesses, and does not impose procedural obstacles on consumers seeking redress. The statute would be improved by overruling judicial decisions that have carved out "learned professionals" such as insurance brokers and attorneys from its scope, and by clarifying that it covers unfair and deceptive insurance claims settlement practices.

New Mexico

New Mexico's UDAP statute includes both broad and specific prohibitions, plus gives the Attorney General authority to adopt regulations prohibiting additional unfair or deceptive practices. The remedies afforded to the Attorney General and consumers would be stronger if the statute did not require proof that the business acted knowingly. Courts have given an appropriately narrow reading to the statute's exemptions, declining to read them as blanket exemptions for particular industries, but the statute would be strengthened by clarifying that it applies to real estate transactions.

New York

The scope of New York's UDAP statute is broad, but its prohibitions are relatively weak and courts have imposed procedural hurdles on consumers seeking remedies for deceptive practices. The statute broadly prohibits deceptive practices, but its prohibitions against unconscionable and unlawful practices are found in a separate statute that is enforceable only by public officials, not by consumers. Nor does New York give a state agency the authority to adopt rules addressing emerging scams. A great weakness is that courts hold that a consumer cannot obtain any remedy for a deceptive practice without showing that the practice has a broader impact on consumers at large. These rulings have left many injured consumers without a remedy under the statute. The statute's treble damages remedies are undermined by outdated caps of \$1000 and \$10,000.

North Carolina

North Carolina's UDAP statute includes both broad and specific prohibitions of unfair and deceptive practices, provides reasonably strong remedies for both the Attorney General and consumers, and covers most

businesses. One weakness is a blanket exemption for learned professions such as attorneys. The statute would also be improved by giving a state agency the authority to adopt regulations addressing emerging scams.

North Dakota

North Dakota's UDAP statute prohibits only deception, not unfairness. Unlike most states, in North Dakota both the Attorney General and consumers must not only show that a practice was deceptive, but also that the business acted with the intent that others rely on the deception. A strength of the law is that it allows the Attorney General to adopt regulations specifying practices that are deceptive. Although there are few decisions construing the statute's scope, it does not appear to create blanket exemptions for any types of businesses.

Ohio

The strong prohibitions of Ohio's UDAP statute are undermined by its limited scope. It excludes most lenders, financial institutions, and real estate transactions, so is of little use to stop predatory lending and mortgage fraud. It also provides blanket exemptions for insurance and utility companies. In 2007 the state legislature weakened the statute by capping the damages consumers can recover.

Oklahoma

Oklahoma's main UDAP statute includes both broad and specific prohibitions of unfair and deceptive practices. The scope of the statute has not yet been definitively resolved, and the statute would be improved if it were clearer that it applies to all unfair and deceptive lending practices. The statute would also be improved by allowing consumers to recover multiple damages in appropriate cases, clarifying that it applies to unfair and deceptive acts by insurance and utility companies, overruling a series of poorly-reasoned decisions that refuse to apply it to unfair, deceptive, and abusive debt collection tactics, and giving a state agency the authority to adopt rules to address emerging forms of deception.

Oregon

Oregon's UDAP statute is fairly strong in some respects but also has significant weaknesses. A significant weakness is that a consumer who files an unsuccessful claim can be required to pay the business's attorney fees even if the case was filed in good faith. The statute's substantive prohibitions would be stronger if they were broader, but this weakness is balanced to some extent by the Attorney General's authority to adopt rules prohibiting additional unfair and deceptive practices. The statute would be strengthened by allowing consumers to recover multiple damages in appropri-

ate cases, by deleting an exemption for insurance companies, and by clarifying that it applies to consumer lending, as a 30-year old decision from an intermediate appellate court creates uncertainty in this regard.

Pennsylvania

The strength of Pennsylvania's UDAP statute is its scope, as courts have not created blanket exemptions for specific industries, and its remedies for consumers, which include multiple damages and attorney fees. On the other hand, some courts have weakened the statute by imposing burdensome requirements taken from common law fraud cases (such as proof of intent to defraud) and contract cases (such as a prohibiting evidence of oral misrepresentations). The Attorney General's enforcement remedies would be improved by increasing the low civil penalty (\$1000—among the lowest in the country) for violations.

Rhode Island

The strong substantive prohibitions of the Rhode Island UDAP statute have been rendered virtually meaningless by court decisions creating blanket exemptions for a wide range of businesses. As it stands, the statute is of little or no use to consumers, because it applies to so few businesses. Rhode Island is also the only state that does not authorize the Attorney General to seek a civil penalty when a business violates the UDAP statute.

South Carolina

South Carolina's UDAP statute includes both broad and specific prohibitions of unfair and deceptive practices. One weakness is that courts have required consumers to show not only that they were cheated, but also that the practice impacts the public interest. Another weakness is an exemption for insurers, although courts have not construed the statute to create blanket exemptions for other businesses. The statute would be enhanced by giving a state agency rulemaking authority and by deleting the prohibition of consumer class actions.

South Dakota

South Dakota's UDAP statute has unusually narrow prohibitions, and its consumer remedies are among the weakest in the nation. Only deceptive acts, not unfair acts, are prohibited, and consumers must prove that the deceptive act was both knowing and intentional. Consumers can recover only compensatory damages, not multiple damages or even their attorney fees. On the positive side, the statute does not appear to provide blanket exemptions for entire industries, although it would be improved by clarifying that it applies to real estate transactions.

Tennessee

Tennessee's UDAP statute includes both broad and specific prohibitions. Its main weaknesses are the low civil penalty (\$1000—among the lowest in the country) that the Attorney General can seek for violations, a prohibition on class actions, and significant gaps in coverage of unfair and deceptive lending practices that can leave consumers without a remedy under the statute for predatory lending or mortgage fraud. It would be enhanced by giving a state agency the authority to adopt regulations prohibiting emerging forms of unfairness and deception.

Texas

The Texas UDAP statute has many weaknesses. Only the Attorney General, not consumers, can bring suit under the statute's broad prohibition of deceptive acts. Other weaknesses are gaps in coverage of consumer credit transactions, and the statute's elaborate pre-suit notice requirements. The statute would be enhanced by giving a state agency the authority to adopt regulations prohibiting emerging forms of unfairness and deception.

Utah

Utah's UDAP statute includes broad prohibitions of both deceptive and unconscionable practices. One significant weakness is its scope, as it excludes all insurance and utility companies and has significant gaps in coverage of unfair or deceptive consumer lending practices. The statute's remedies for consumers would be enhanced by authorizing multiple damages in appropriate cases.

Vermont

Vermont's UDAP statute includes broad prohibitions of both unfair and deceptive acts, plus gives the Attorney General the authority to adopt rules prohibiting additional forms of unfairness and deception. It would be strengthened by clarification that it applies to unfair or deceptive practices by insurance companies.

Virginia

Virginia's UDAP statute is relatively weak. It prohibits deceptive practices, but not unfair practices, and it exempts all insurance companies and almost all consumer lenders. It also includes a broad exemption for any aspect of a transaction that is subject to certain federal consumer laws, and exempts holders of real estate licenses from any liability. Its consumer remedies are undermined by Virginia's failure to allow consumers to join together in a class action. The statute would be enhanced by giving a state agency the authority to adopt regulations prohibiting emerging forms of deception.

Washington

Washington's UDAP statute broadly prohibits unfair and deceptive acts, and violations of many other consumer protection laws are considered to be UDAP violations. Major weaknesses of the statute are its gaps in coverage of consumer lending, its blanket exemption for most utility companies, and a complicated public interest test that has resulted in denial of many meritorious consumer claims.

West Virginia

West Virginia's UDAP statute broadly prohibits both unfair and deceptive acts. It also includes a number of specific prohibitions, and gives the Attorney General the authority to adopt regulations defining unfair and deceptive acts more specifically. The statute would be enhanced by clarification that it applies to all forms of consumer lending and to real estate transactions, and by allowing consumers to recover multiple damages.

Wisconsin

Wisconsin's patchy UDAP statutes broadly prohibit unfair trade practices, but prohibit deception only in advertisements and other misrepresentations to the general public. On the other hand, the state has a strong series of UDAP regulations defining specific practices as unfair. The statute gives consumers relatively strong remedies, but only if the business violated one of the regulations. The statutes would be enhanced by clarification that they cover unfair lending practices; by deletion of the false advertising statute's exemption for insurance companies; by adding a broad prohibition of deceptive practices that is not limited to advertisements and is enforceable by both the state agency and consumers; and by allowing consumers to bring suit for unfair practices that are not addressed by a specific regulation.

Wyoming

Wyoming's UDAP statute applies only if the consumer or the Attorney General can prove that a business committed an unfair or deceptive act knowingly. It does not allow consumers to recover their attorney fees in individual suits, so when they win a case against a deceptive business they will still not be made whole. The statute would be enhanced by making it clear that it applies to insurance companies, deleting the special advance notice requirement imposed on consumers, giving rulemaking authority to a state agency, and allowing consumers to recover multiple damages in appropriate cases.

APPENDIX B

STATE-BY-STATE ANALYSES OF STATE UDAP STATUTES

Appendix B provides a detailed analysis of each state's law. Because of its length, it is found as an appendix to this report only at www.nclc.org.

[State-by-State Summaries of State UDAP Statutes](#)

Notes

¹ Mich. Comp. Laws Ann. § 445.903(2) gives the Attorney General the authority to adopt rules, but it forbids rules that create additional unfair trade practices not already enumerated.

² Federal Trade Commission, Annual Report 2007: Fair Debt Collection Practices Act, *available at* www.ftc.gov/reports/fdcpa07/P0748032007FDCPAReport.pdf, at 2/-/3.

³ *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514 (Mich. 2007).

⁴ Mich. Comp. Laws Ann. § 445.904(1)(a).

⁵ *Chavers v. Fleet Bank*, 844 A.2d 666 (R.I. 2004).

⁶ Tennessee's UDAP statute also has an exemption for the "credit terms of a transaction," and, while courts have held that this language does not create a blanket exemption for all lenders, it could be interpreted as a significant restriction on the scope of the statute.

⁷ Ala. Code § 8-19-7(3) exempts any bank or affiliate regulated by a state or federal agency.

⁸ Alaska Stat. § 45.50.481(a)(1) says that the statute does not apply to "an act or transaction regulated under laws administered by the state, by a regulatory board or commission except as provided by Alaska Stat. § 45.50.471(b)(27) and (30), or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in Alaska Stat. § 45.50.571." Alaska courts find that this exemption applies "only where the business is both regulated elsewhere and the unfair acts and practices are therein prohibited." *Smallwood v. Central Peninsula General Hosp.*, 151 P.3d 319, 329 (Alaska 2006). As a result, this section does not create a blanket exemption for creditors or credit. However, it is still relatively broad, as it denies consumers a UDAP remedy whenever another law prohibits a creditor's practice.

⁹ The exemption set forth in Ark. Code § 4-88-101(3) for "actions or transactions permitted under laws administered by the banking commissioner and other regulatory bodies" has not yet been construed by the courts.

¹⁰ Fla. Stat. Ann. § 501.212(4) exempts "[a]ny person or activity regulated under laws administered by ... (b) Banks and savings and loan associations regulated by [the state agency]; (c) Banks or savings and loan associations regulated by federal agencies."

¹¹ Illinois courts have significantly reduced the applicability of the UDAP statute to credit by adopting an unusually broad view of the effect of the Truth in Lending Act, with some decisions holding that it immunizes lenders from UDAP liability for a wide range of deception and non-disclosure. *See, e.g., Najieb v. William Chrysler-Plymouth*, 2002 WL 31906466 (N.D. Ill. 2002). In addition, *Zekman v. Direct*

American Marketers, Inc., 659 N.E.2d 853 (Ill. 1998), holds that knowingly accepting the fruit of a seller's fraud is insufficient to impose UDAP liability upon actors such as creditors.

¹² Neb. Rev. Stat. § 59-1617(1) immunizes conduct if the lender is regulated and the conduct itself is also regulated.

¹³ Ohio excludes financial institutions, dealers in intangibles, and lenders other than payday lenders, mortgage brokers, and nonbank mortgage lenders and their loan officers. Ohio Rev. Code § 1345.01(A), (K).

¹⁴ The exemption set forth in Okla. Stat. Ann. tit. 15, § 754(2) for "actions or transactions regulated under laws administered by" a regulatory authority has not yet been authoritatively interpreted.

¹⁵ Or. Rev. Stat. § 646.605(8) defines "trade" and "commerce" as "advertising, offering or distributing, whether by sale, rental or otherwise, any real estate, goods or services. . . ." *Haeger v. Johnson*, 548 P.2d 532 (Or. App. 1976) interpreted this language not to include consumer lending. While the Oregon Supreme Court has not yet ruled on the question, the intermediate appellate decision stands as an impediment to consumers.

¹⁶ Tenn. Code § 47-18-111(a)(1) and (3) exclude "acts or transactions required or specifically authorized under the laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States" and "Credit terms of a transaction which may be otherwise subject to the provisions of this part, except insofar as the Tennessee Equal Consumer Credit Act of 1974, compiled in part 8 of this chapter may be applicable."

¹⁷ Credit is covered but only if it was used to purchase goods or services. *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980).

¹⁸ Utah Code Ann. § 13-11-22(1)(d) exempts "Credit terms of a transaction otherwise subject to this act."

¹⁹ Wash. Rev. Code § 19.86.170 states that the UDAP statute does not "apply to actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States." The Washington Supreme Court has interpreted this exemption as applying if the particular practice found to be unfair or deceptive is specifically permitted, prohibited or regulated. The exemption is significantly narrowed, however, by provisions in Washington lending laws that explicitly make violations actionable under the state UDAP statute.

²⁰ The West Virginia UDAP statutes applies to transactions involving goods or services, and there has not yet been an

authoritative ruling as to whether it encompasses extensions of credit.

²¹ Wis. Stat. Ann. § 100.20 applies to “business and trade,” but a private cause of action is available only if the defendant violated one of the specific UDAP regulations, and none of the UDAP regulations targets lending practices.

²² Me. Rev. Stat. Ann. tit. 5, § 208.

²³In Arizona, the state agency must show that the defendant acted with intent that others rely; in Colorado, the most significant substantive prohibitions require showing of knowledge; in Indiana, a showing of intent or knowledge is required for most substantive violations; in Nevada, almost all prohibitions require that the act be knowing or intentional; North Dakota requires a showing of intent that others rely on the misrepresentation; in Wyoming, the definition of unlawful practices requires that the defendant act knowingly. In New Mexico, knowledge is required as an element of any deceptive practice, but courts have appropriately interpreted this language as requiring a showing only that the defendant knew or should have known of the receptive nature of the statement, so it is not listed here.

²⁴ \$5000 per violation for repeat offender.

²⁵ CAFA (Class Action Fairness Act of 2005), Sec. 2(a).

²⁶ See, e.g., *Yarian v. Rainbow Foods Group*, 2003 WL 24027721 (D. Minn. Mar. 18, 2003).

²⁷ Wyoming allows the court to order reimbursement of the consumer’s attorney fees in class actions, but not in individual suits.

²⁸ *Krautsack v. Anderson*, 861 N.E.2d 633 (Ill. 2006).

²⁹ Iowa does not allow consumers to bring suit at all.

³⁰ Wyoming authorizes the court to order reimbursement of the consumer’s attorney fees in class actions, but not individual suits.

³¹ A consumer who loses a UDAP case in Alaska can be required to pay a percentage of the defendant’s fees without regard to good faith.

³² Iowa does not allow consumers to bring suit at all.

³³ Mississippi disallows class actions as a general rule for all types of cases.

³⁴ Virginia disallows class actions as a general rule for all types of cases.

³⁵ One of two UDAP statutes requires notice.

³⁶ Advance notice is required except for deceptive acts done as part of a scheme, artifice, or device with intent to defraud.

³⁷ Requires a pre-suit dispute resolution procedure.