

CONSUMER PROTECTION IN THE STATES

A 50-STATE EVALUATION OF UNFAIR AND
DECEPTIVE PRACTICES LAWS



March 2018

NCLC[®]
NATIONAL
CONSUMER
LAW
CENTER[®]

© Copyright 2018, National Consumer Law Center, Inc. All rights reserved.

ABOUT THE AUTHOR

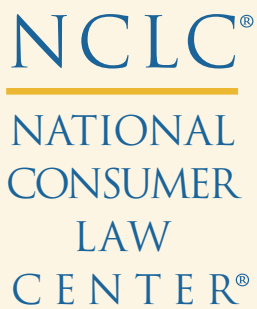
Carolyn Carter is the Deputy Director at the National Consumer Law Center (NCLC). She has specialized in consumer law issues for over 30 years. From 1974 to 1986 she worked for the Legal Aid Society of Cleveland, first as a staff attorney and later as law reform director. From 1986 to 1999 she was co-director of a legal services program in Pennsylvania. She was the 1992 recipient of NCLC's Vern Countryman Award. From 2005 to 2007 she was a member of the Federal Reserve Board's Consumer Advisory Council. She is a graduate of Brown University and Yale Law School and is a member of the Pennsylvania bar.

She is co-author of NCLC's *Unfair and Deceptive Acts and Practices* and is a contributor to a number of other NCLC legal treatises. Subscription information, and free access to Chapter One of all of the treatises in NCLC's Consumer Credit and Sales Legal Practices Series, is available at www.nclc.org/library.

ACKNOWLEDGEMENTS

Thanks to Jon Sheldon and Jan Kruse for reviewing drafts of this report, to Roseanna Sommers and Allen Agnitti for legal research, to Maggie Eggert for review and editing, to Nate Player for extensive research for the 2009 version of this report, to Julie Gallagher for graphic design, and to the many consumer attorneys around the country who reviewed the analyses of the states' laws.

Any errors in this report are the sole responsibility of the National Consumer Law Center (NCLC) and should be brought to NCLC's attention.



ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

CONSUMER PROTECTION IN THE STATES

A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
<i>Key Findings</i>	1
<i>Key Recommendations</i>	3
AT A GLANCE: STATE UDAP STATUTES' STRENGTHS AND WEAKNESSES	5
CONSUMER PROTECTION IN THE STATES	9
ABOUT THIS REPORT	9
<i>Why UDAP Statutes Are Important</i>	10
HOW STATE UDAP STATUTES STACK UP	11
I. HOW DO THE STATES RATE ON THE STRENGTH OF THEIR SUBSTANTIVE PROHIBITIONS?	12
<i>Broad prohibitions of deception and unfairness</i>	12
<i>Rulemaking authority</i>	16
<i>What states can do to improve their UDAP statutes' substantive strength</i>	17
II. HOW DO THE STATES RATE ON THE SCOPE OF THEIR UDAP STATUTES?	17
<i>Coverage of predatory and abusive lending</i>	18
<i>Coverage of insurance</i>	20
<i>Coverage of utility transactions</i>	23
<i>Coverage of post-sale activities</i>	24
<i>Coverage of real estate transactions</i>	26
<i>What states can do to improve the scope of their UDAP statutes</i>	26
III. HOW DO THE STATES RATE ON THE STATE ENFORCEMENT POTENTIAL OF THEIR UDAP STATUTES?	28
<i>Must the state prove that a business acted knowingly or intentionally before it can enforce the statute?</i>	28
<i>Does the state authorize effective civil penalties?</i>	30
<i>What states can do to strengthen state enforcement of their UDAP statutes</i>	32
IV. HOW DO THE STATES RATE ON CONSUMER ACCESS TO JUSTICE? ..	32
<i>Gaps in consumers' ability to enforce the statute</i>	33

<i>Attorney fees</i>	35
<i>Can consumers join together to bring suit?</i>	36
<i>Requirement that the consumer show a public impact</i>	37
<i>Restrictive injury requirements</i>	40
<i>Special advance notice requirement for consumers</i>	40
<i>Reliance</i>	42
<i>Enhanced damages</i>	42
<i>What states can do to improve the UDAP remedies available to consumers</i>	45
HAVE STATES IMPROVED OR WEAKENED THEIR UDAP STATUTES SINCE 2009?	46
<i>Gains and losses for consumers in state legislatures</i>	46
<i>Gains and losses for consumers in state courts</i>	47
RECOMMENDATIONS	48
ENDNOTES	50
APPENDIX A: Capsule Summaries of Strengths and Weaknesses of Each State’s Udap Statute	53
APPENDIX B: Rating Criteria	66
APPENDIX C: State-by-State Summaries of State UDAP Statutes (available online at http://bit.ly/2DJKbGp)	
MAPS	
Map 1 Does State Law Broadly Prohibit Deceptive Acts?	14
Map 2 Does State Law Broadly Prohibit Unfair or Unconscionable Acts?	15
Map 3 Does a State UDAP Law Give a State Agency Rulemaking Authority?	16
Map 4 Does the State UDAP Law Immunize Lenders and Creditors?	21
Map 5 Does the State UDAP Law Immunize Insurers?	22
Map 6 Does the State UDAP Law Apply to Utility Companies?	23
Map 7 Does the State UDAP Statute Apply to Post-Sale Acts?	25
Map 8 Does the State UDAP Statute Apply to Real Estate Transactions?	27
Map 9 States that Deny Consumer Relief Unless the State Proves the Business’s Knowledge or Intent	29
Map 10 Strength of States’ Civil Penalties	31
Map 11 States with Major Gaps in Consumers’ Ability to Enforce UDAP Statutes	34
Map 12 States that Require Consumers to Prove an Impact on the Public as a Precondition of Suit	39
Map 13 States that Require Consumers to Give a Special Pre-Suit Notice	41
Map 14 States That Allow Consumers to Seek Enhanced Damages	43

SECTION BY SECTION STATE REFERENCES

I. Executive Summary: AL, AK, AZ, CA, CO, CT, DE, DC, FL, GA, HI, IN, IL, IA, KY, LA, ME, MD, MA, MI, MN, MS, MO, NE, NV, NH, NY, ND, OH, OR, PA, RI, SC, SD, TN, TX, VA, VT, WA, WV, WI, WY	1
a. Key recommendations	3
II. At a glance: State UDAP statutes’ strengths and weaknesses: All states.	5
III. Consumer Protection in the States: About this report	9
a. Why state UDAP statutes are important	10
IV. How state UDAP statutes stack up	11
V. How do the states rate on the strength of their substantive prohibitions? . . .	12
a. Broad prohibitions of deception and unfairness: CO, DE, DC, MN, MS, NV, NY, OR, SD, TN, TX, VA, WI	12
b. Rulemaking authority: DC, FL, MS, ND, RI	16
c. What states can do to improve their UDAP statutes’ substantive strength . . .	17
VI. How do the states rate on the scope of their UDAP statutes?: FL, LA, MI, NH, OH, RI, VA	17
a. Coverage of predatory and abusive lending: AL, AK, FL, GA, ID, IL, IA, KS, LA, ME, MI, MS, NE, NH, OH, OK, RI, TN, TX, UT, VA, WV, WI	18
b. Coverage of insurance: CT, IA, MS, NY, VT, WV, WY	20
c. Coverage of utility transactions: IA, KY, WV	23
d. Coverage of post-sale activities: KY, NJ, OH.	24
e. Coverage of real estate transactions: AK, FL, IN, IA, KY, MD, MI, NE, NM, OH, RI, VA	26
f. What states can do to improve the scope of their UDAP statutes: ME	26
VII. How do the states rate on the state enforcement potential of their UDAP statutes?: RI.	28
a. Must the state prove that a business acted knowingly or intentionally before it can enforce the statute?: AR, CO, IN, KS, MN, NV, NM, ND, UT, WY	28
b. Does the state authorize effective civil penalties?: AK, DC, IL, IA, MD, MO, PA, RI, TN	30
c. What states can do to strengthen state enforcement of their UDAP penalties . .	32
VIII. How do the states rate on consumer access to justice?	32
a. Gaps in consumers’ ability to enforce the statute: CA, IN, IA, KY, MS, NY, OR, TN, TX, VT, WI	33

b. Attorney fees: AK, AZ, DE, FL, IL, IN, KY, MS, MO, MT, SD, WY.	35
c. Can consumers come together to bring suit?: AL, AR, CO, GA, LA, MS, MT, SC, TN, VA	36
d. Requirement that the consumer show a public impact: CO, GA, MN, NE, NY, SC, WA	37
e. Restrictive injury requirements: AL, AK, AR, CA, CT, ID, IA, KY, LA, ME, MI, MO, MT, NJ, OR, PA, RI, SC, TN, WA, WV, WI	40
f. Special advance notice requirement for consumers: AL, CA, FL, GA, IN, ME, MA, MS, TX, WV, WY	40
g. Reliance: AR, GA, IN, MD, NC, PA, TX, VA, WY	42
h. Enhanced damages: AZ, CA, CT, DE, ID, IL, KS, KY, MO, NY, OR, RI.	42
i. What states can do to improve the UDAP remedies available to consumers . . .	45
IX. Have states improved or weakened their UDAP statutes since 2009?	46
a. Gains and losses for consumers in state legislatures: AK, AZ, AR, IA, ND, OH, OR, TN	46
b. Gains and losses for consumers in state courts: NC, OH, RI, WA.	47
X. Recommendations	48
XI. Appendix A: Capsule summaries of strengths and weaknesses of each state's UDAP statute: All states and District of Columbia	53
XII. Appendix B: Rating criteria	66
XIII. Appendix C: State-by-state summaries of state UDAP statutes: All states and District of Columbia (available online at http://bit.ly/2DJKbGp)	

EXECUTIVE SUMMARY

Unfair and Deceptive Acts and Practices (UDAP) laws should be the backbone of consumer protection in every state. Yet in many states these statutes fall far short of their goal of deterring and remedying a broad range of predatory, deceptive, and unscrupulous business practices.

This report evaluates the strength of each state’s UDAP statute, and documents how significant gaps or weaknesses in almost all states 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. But their effectiveness varies widely from state to state.

In many states, the deficiencies 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.

Key Findings

- UDAP protections in **Michigan** and **Rhode Island**—the “terrible two”—have been gutted by court decisions that interpret the statute as being applicable to almost no consumer transactions. These decisions were issued over ten years ago, yet the state legislatures still have not corrected them.
- In addition to **Michigan** and **Rhode Island**, seven states—**Alabama, Florida, Louisiana, Nebraska, New Hampshire, Ohio,** and **Virginia**—exempt most lenders and creditors from UDAP statutes, while another 14 leave significant gaps or ambiguities in their coverage of creditors.
- Utility companies in 14 states enjoy immunity from UDAP laws, as do insurance companies in 21 states.
- Nine states—**Indiana, Iowa, Kentucky, Mississippi, New York, Oregon, Tennessee, Texas,** and **Wisconsin**—prevent consumers from enforcing certain key prohibitions in the statute, or enforcing it against certain businesses such as lenders, insurance companies, or sellers of real estate.
- Broad, flexible prohibitions of unfair and deceptive practices are the hallmark of UDAP laws. Yet **Colorado** and **Oregon** do not include a broad prohibition of deceptive practices, **South Dakota’s** prohibition is burdened by a requirement to show knowledge and intent, and the broad prohibition of deception in the **Mississippi, Tennessee,** and **Texas** laws cannot be enforced by consumers. In addition, **Oregon, Colorado, Delaware, Minnesota, Nevada, South Dakota,** and **Virginia** do not include a broad

prohibition of unfairness, and **Mississippi, New York, Oregon, Tennessee,** and **Wisconsin** do not include a broad prohibition of unfairness that consumers can enforce.

- Only about half the states give a state agency the authority to adopt rules prohibiting emerging forms of deception or unfairness.
- While all states allow consumers to go to court to enforce UDAP laws, **Iowa** and **Mississippi** provide the weakest overall remedies for consumers of all the states. In addition, five states—**Arizona, Delaware, Mississippi, South Dakota,** and **Wyoming**—impose a financial burden on consumers by denying them the ability to recover their attorney’s fees, so even a consumer who wins a case is not made whole.
- Worse, two states—**Alaska** and **Florida**—deter victims of fraud from going to court by requiring unsuccessful plaintiffs to pay the *business’s* attorney fees even if the case was filed in good faith. As a result, a consumer who brings a UDAP claim in good faith, even for a relatively small amount of money, can be hit with tens of thousands of dollars in the business’s attorney fees.
- Three states—**Colorado, Nevada,** and **Wyoming**—impede the Attorney General’s ability to stop unfair or deceptive practices by conditioning any state enforcement action on proof that those practices were done knowingly or intentionally.
- A number of states impose special procedural obstacles on consumers that can hinder or even prevent them from enforcing the UDAP statute. Ten states—**Alabama, California, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, West Virginia,** and **Wyoming**—require a consumer to give a special advance notice to the business or impose an equivalent pre-suit requirement, and **California** and **Florida** impose this requirement in some circumstances. 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, or that their practices impact consumers at large. This complicated requirement can force a consumer who was cheated to foot the bill for an expensive investigation. Twenty-one states deny a consumer who has suffered an intangible injury such as invasion of privacy the right to bring suit under the UDAP statute.
- Most states allow a civil penalty, ranging from \$1,000 to \$50,000, to be imposed on a business that violates the UDAP statute. **Rhode Island** is the only state in the nation that does not provide a civil penalty for initial violations. Five jurisdictions—the **District of Columbia, Maryland, Missouri, Pennsylvania,** and **Tennessee**—provide for civil penalties of just \$1,000 for initial violations.

On the other hand, some states have avoided most of these weaknesses. For example, **Hawaii’s** UDAP statute has strong prohibitions and strong provisions for enforcement both by the state and by consumers, and no carve-outs for major industries. The **Massachusetts** statute shares these same strengths, although it is marred by imposing the procedural obstacle of advance notice before a consumer can proceed against a business – a technical requirement that can result in dismissal of meritorious claims. **Connecticut’s** and **Vermont’s** statutes also share these strengths for the most part, except for a lack of clarity about their statutes’ application to insurance transactions. The **Illinois**

statute is also strong, except for court decisions that cloud its application to credit transactions and to persons who profit from others' unfair and deceptive tactics. Although even these states' UDAP statutes can be improved, they stand as examples to the rest of the country of how to strengthen state-level consumer protection.

Alaska, Arizona, Delaware, Iowa, North Dakota, and Oregon have made significant improvements to their UDAP statutes since 2009. **Tennessee** and **Ohio** went in the opposite direction, weakening their UDAP statutes in significant ways. **Arkansas** enacted a set of amendments in 2017 that both improve its UDAP statute in some ways and weaken it in others.

Key Recommendations

States that want to strengthen their protections for consumers should:

- Strengthen their UDAP statute's substantive prohibitions by:
 - Making sure that the statute includes **broad prohibitions** of deceptive and unfair acts.
 - Removing any provisions that prevent consumers from **enforcing** these broad prohibitions.
 - Making sure that a state agency has the **authority to adopt rules** that specify particular practices as unfair or deceptive.
- Strengthen their UDAP statute's scope by:
 - **Narrowing or deleting 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.
 - **Eliminating exemptions** for lenders, other creditors, insurers, and utility companies.
 - Making it clear that the statute applies to **real estate transactions** and to **post-transaction matters** such as abusive collection of consumer debts.
- Strengthen the state's ability to enforce the statute by:
 - Deleting any requirement that **knowledge or intent** be proven as an element of a UDAP violation.
 - Increasing the size of the **civil penalty** and making sure that it is applicable per violation.
 - Giving the enforcement agency a full range of pre-suit **investigatory power**.
 - Allowing courts to order a business to **pay the state's attorney fees** and costs when the state prevails in a UDAP case.
 - Providing **adequate funding** for the consumer protection activities of the state agency.
- Strengthen consumers' access to justice by:
 - Removing any gaps in consumers' **ability to enforce** the statute.
 - Making it clear that courts can order a business to pay a 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.
 - Removing any restrictions on UDAP **class actions**, so that they are governed by the state's usual rules (or by the federal rules if the case is filed in federal court).

- Deleting any **special barriers** imposed on consumers before they can invoke a statute's remedies, such as a special advance notice requirement, a requirement that a consumer who has been cheated prove that the business cheats consumers as a general rule, or a rule that denies consumers who have suffered an invasion of privacy or some other non-monetary injury the ability to enforce the statute.
- Amending the statute to make it clear that courts can **presume that consumers relied on material misrepresentations**, without requiring individual proof.
- Allowing consumers to seek **enhanced damages or punitive damages** in appropriate cases.

Even if a UDAP statute is already free from these weaknesses, it can often be improved by:

- Making it clear that consumers can obtain **equitable relief**, such as an injunction to stop a practice.
- Making **attorney fee awards** to consumers mandatory, so that if they prevail they are assured of being made whole.
- Adding a provision for a **small statutory damages award** whenever a consumer proves a violation of the UDAP statute.
- Making it clear that consumers can prove a UDAP claim by the normal **preponderance of the evidence** standard.
- Making it clear that the heightened requirements of common law fraud and rigid contract law rules are not applicable to UDAP claims.

AT A GLANCE: STATE UDAP STATUTES' STRENGTHS AND WEAKNESSES

This chart summarizes the factors analyzed in the National Consumer Law Center's report *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*

Key: ○ = Strong
◐ = Mixed
● = Weak
? = Undecided*

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL
PRACTICES PROHIBITED														
Broad deception prohibition	○	○	○	○	○	●	○	○	○	○	○	○	○	○
Broad unfairness prohibition	○	○	○	○	○	●	○	●	○	○	○	○	○	○
Rulemaking authority	●	○	●	●	●	●	○	○	◐	◐	○	○	○	○
SCOPE														
Covers credit	●	◐	○	○	○	○	○	○	○	●	?	○	?	◐
Covers insurance	●	●	○	○	○	○	◐	?	○	●	●	○	●	○
Covers utilities	●	○	○	?	○	○	○	?	○	●	?	○	?	○
Covers post-sale acts	?	○	?	○	○	○	○	?	?	?	○	○	○	○
Covers real estate	○	●	○	○	○	○	○	○	○	◐	○	○	○	○
STATE ENFORCEMENT														
Civil penalty amount	●	○	○	○	●	●	◐	○	●	○	◐	○	◐	○
Does not require proof of intent or knowledge	○	○	○	◐	○	●	○	○	○	○	○	○	○	○
REMEDIES FOR CONSUMERS														
No major gaps in scope of consumers' ability to enforce	○	○	○	○	○	○	○	○	○	○	○	○	○	○
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	●	○	○	○	◐	○	○	○	○	◐	●	○	○	○
Allows consumer suit for any type of injury	●	●	○	●	●	○	●	○	○	○	○	○	●	○

*The statute is unclear and courts have not resolved the question, or courts have issued conflicting interpretations.

	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE
PRACTICES PROHIBITED														
Broad deception prohibition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Broad unfairness prohibition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Rulemaking authority	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
SCOPE														
Covers credit	<input type="radio"/>	<input checked="" type="radio"/>	?	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Covers insurance	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	?	<input checked="" type="radio"/>	<input type="radio"/>
Covers utilities	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	?	<input checked="" type="radio"/>
Covers post-sale acts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	?	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Covers real estate	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
State enforcement														
Civil penalty amount	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Does not require proof of intent or knowledge	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
REMEDIES FOR CONSUMERS														
No major gaps in scope of consumers' ability to enforce	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Multiple or punitive damages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Attorney fees for consumers	?	<input type="radio"/>	<input type="radio"/>	?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Class actions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Allows consumer suit without proof of reliance	<input checked="" type="radio"/>	<input type="radio"/>	?	<input type="radio"/>	?	?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	?	<input type="radio"/>	?	?
Allows consumer suit without proof of public impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Allows consumer suit without pre-suit notice	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Allows consumer suit for any type of injury	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD
PRACTICES PROHIBITED														
Broad deception prohibition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Broad unfairness prohibition	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Rulemaking authority	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>
SCOPE														
Covers credit	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Covers insurance	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Covers utilities	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Covers post-sale acts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Covers real estate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
STATE ENFORCEMENT														
Civil penalty amount	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Does not require proof of intent or knowledge	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
REMEDIES FOR CONSUMERS														
No major gaps in scope of consumers' ability to enforce	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Multiple or punitive damages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Attorney fees for consumers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Class actions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Allows consumer suit without proof of reliance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Allows consumer suit without proof of public impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Allows consumer suit without pre-suit notice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Allows consumer suit for any type of injury	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

	TN	TX	UT	VT	VA	WA	WV	WI	WY
PRACTICES PROHIBITED									
Broad deception prohibition	◐	◐	○	○	○	○	○	○	○
Broad unfairness prohibition	◐	○	○	○	●	○	○	◐	○
Rulemaking authority	●	●	○	○	●	●	○	○	●
SCOPE									
Covers credit	?	◐	?	○	●	○	?	◐	○
Covers insurance	●	○	●	◐	●	○	◐	●	◐
Covers utilities	?	○	●	○	●	●	◐	○	○
Covers post-sale acts	?	○	○	○	?	○	?	●	○
Covers real estate	○	○	○	○	◐	○	?	○	○
State enforcement									
Civil penalty amount	●	○	●	○	●	●	◐	○	○
Does not require proof of intent or knowledge	○	○	◐	○	○	○	○	○	●
REMEDIES FOR CONSUMERS									
No major gaps in scope of consumers' ability to enforce	●	●	○	?	○	○	○	●	○
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	○	●	○	○	○	○	●	○	●
Allows consumer suit for any type of injury	●	○	○	○	○	●	●	●	○

CONSUMER PROTECTION IN THE STATES

A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS

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 50 states and the District of Columbia.

ABOUT THIS REPORT

This report first reviews the history and importance of state UDAP statutes. It then analyzes the strengths and weaknesses of the UDAP statutes in the fifty states and the District of Columbia 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. It concludes with recommendations for strengthening the statutes.

Appendix A is a set of capsule summaries of the strengths and weaknesses of each state's statute. Appendix B gives detail about the criteria we used in rating the statutes. Appendix C, available online, provides a detailed analysis of each state's law (see <http://www.nclc.org/issues/how-well-do-states-protect-consumers.html>).

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.

This report updates NCLC's 2009 report *Consumer Protection in the States: A 50-State Report on UDAP Statutes*. NCLC's legal treatise *Unfair and Deceptive Acts and Practices*, provides a comprehensive analysis of state UDAP statutes, including extensive discussion of decisions from all states, key regulations, and the role of related statutes.

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 1970s and 1980s, 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 (FTC) 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, often a consumer could not even find an attorney.

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 FTC 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 now also provide remedies that consumers who were 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.

A number of federal laws protect consumers, and many of them were strengthened after the 2008 mortgage meltdown revealed the weaknesses of federal-level regulation of mortgage transactions. However, the federal consumer protection laws tend to focus on a single industry. Many people are surprised to learn that no federal statute includes a broadly-applicable prohibition of unfair or deceptive practices that is enforceable by consumers. And many of the federal consumer protections laws that exist are currently under attack. The role of the states in protecting consumers has never been more important.

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, UDAP statutes 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 losses, often with some sort of enhancement to account for intangible or hard-to-document losses and to act as a deterrent. In some states consumers can seek an injunction against repetition of the fraudulent practices, and, in most states, they can ask that the fraudulent seller or creditor be ordered to reimburse them for their attorney fees.

HOW STATE UDAP STATUTES STACK UP

This report evaluates the strengths and weaknesses of state UDAP statutes in four areas:

- **Substantive prohibitions.**
 - Does the statute include broad prohibitions of deception and unfairness or unconscionability?
 - Does the statute give a state agency the authority to issue substantive rules?

- **Scope.**
 - Does the statute apply to lenders, car finance companies, and other creditors?
 - Does the statute apply to insurers?
 - Does the statute apply to utility companies?
 - Does the statute apply to post-sale acts, such as debt collection, repossession, and mortgage servicing and foreclosure?
 - Does the statute apply to real estate transactions?
- **State enforcement.**
 - Does the statute allow the state to seek equitable relief such as an injunction against a business that engages in unfair or deceptive practices?
 - Can the state obtain restitution for consumers?
 - Must the state prove that the defendant acted with intent or knowledge?
 - Can the state seek a monetary penalty against a business for an initial violation of the statute?
- **Consumer access to justice.**
 - Does the statute bar consumers from enforcing certain of its prohibitions or enforcing the statute against certain types of businesses?
 - Does the statute impose special obstacles, such as a requirement of pre-suit notice, a requirement to prove some public impact, a requirement to prove that the consumer specifically relied on the unfair or deceptive practice, or a rule that the injury the consumer suffered must be a loss of money or property, before consumers can go to court against a fraudulent business?
 - Can consumers recover treble or punitive damages and reimbursement for their attorney fees?

These questions are discussed in detail in the following sections.

I. HOW DO THE STATES RATE ON THE STRENGTH OF THEIR SUBSTANTIVE PROHIBITIONS?

Broad prohibitions 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. States with UDAP statutes that do not include these broad prohibitions that Congress made part of the FTC Act in 1938 are 80 years behind the times.

Another weakness is that some states have broad prohibitions only of deception or only of unfairness or unconscionability. In addition, a few of the states that have broad prohibitions of deception or unfairness provide that only a state agency, not consumers, can enforce the prohibition.

Three states stand out as particularly weak. The **Colorado** UDAP statute includes *neither* a broad prohibition of deception nor one of unfair or unconscionable acts. The **Oregon** statute, while it includes a broad prohibition of “unconscionable tactics,” denies consumers the right to enforce it. In addition, what might appear to be a broad prohibition of deception is limited to specific acts prohibited by attorney general rules. **South Dakota** does not include a broad prohibition of unfair or unconscionable acts, and makes the statutory prohibition of deceptive acts of little use to consumers by imposing on them the burden of showing that the act was both knowing and intentional. These three states’ substantive prohibitions are the weakest in the nation.

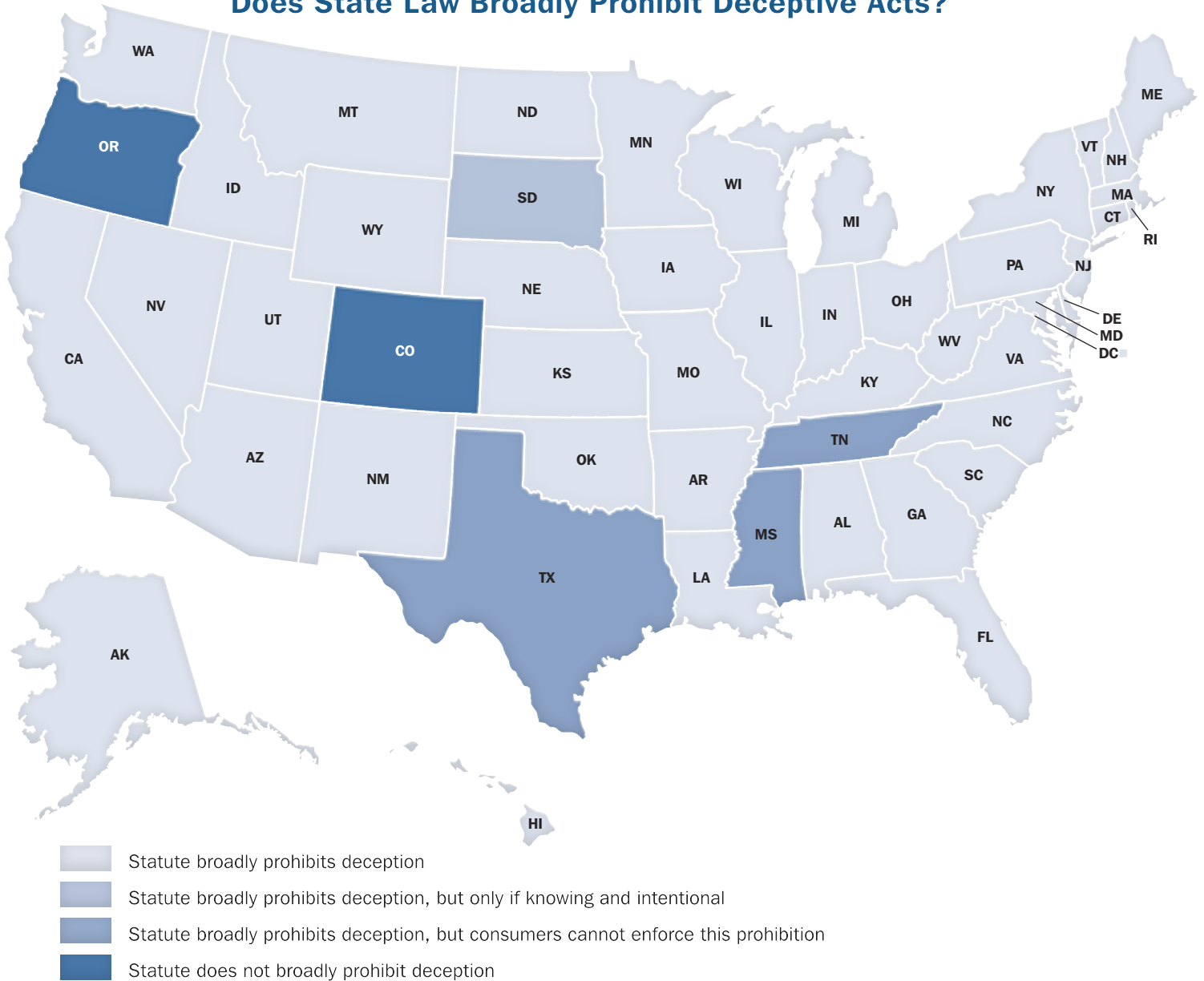
Colorado, Oregon, and South Dakota have the weakest substantive prohibitions in the nation.

Deception. The UDAP statutes in 45 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 statute in **Colorado** does not include a general prohibition against deception. Instead, **Colorado** prohibits only a closed list of specific deceptive acts, leaving the field open for creative fraud artists. **Oregon** is similar, in that what might appear at first glance to be a broad prohibition of deception is limited to specific acts prohibited by attorney general rules.

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, **Mississippi, Tennessee, and Texas**, while including broad prohibitions of deception in their statutes, do not allow consumers to enforce this prohibition.

MAP 1

Does State Law Broadly Prohibit Deceptive Acts?



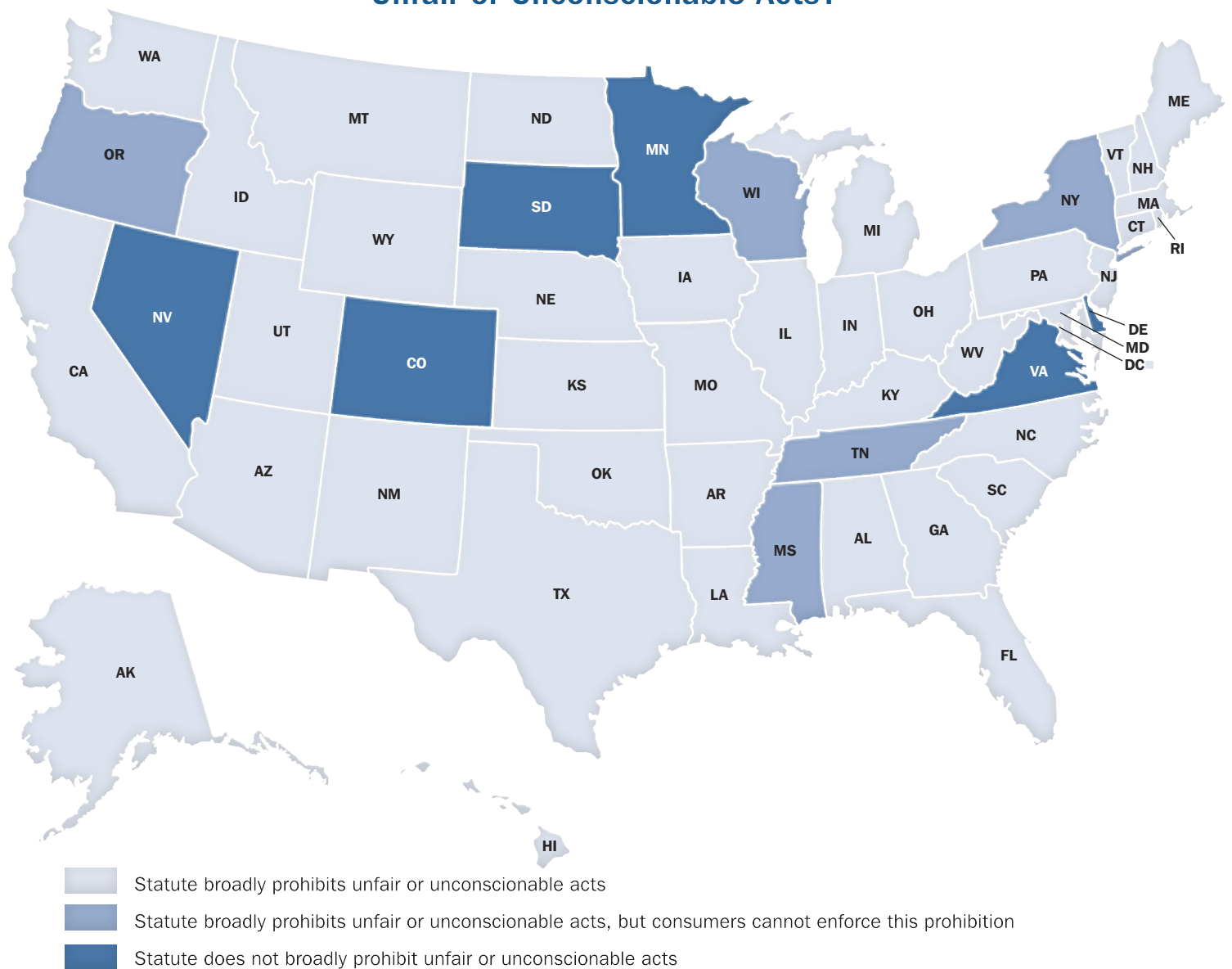
Source: ©National Consumer Law Center, 2018.

Unfairness. In 39 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. But six state UDAP statutes—those in **Colorado, Delaware, Minnesota, Nevada, South Dakota, and Virginia**—do not include a general prohibition of unfair or unconscionable practices. In addition, **Mississippi, Oregon, and**

Tennessee include general prohibitions of unfair or unconscionable practices, but do not allow consumers to enforce them, and New York's prohibition of unconscionable contract terms is enforceable only by public officials, not consumers. One of Wisconsin's UDAP statutes has a broad prohibition of unfairness, but consumers can enforce it only if the defendant violated a specific regulation.

MAP 2

Does State Law Broadly Prohibit Unfair or Unconscionable Acts?



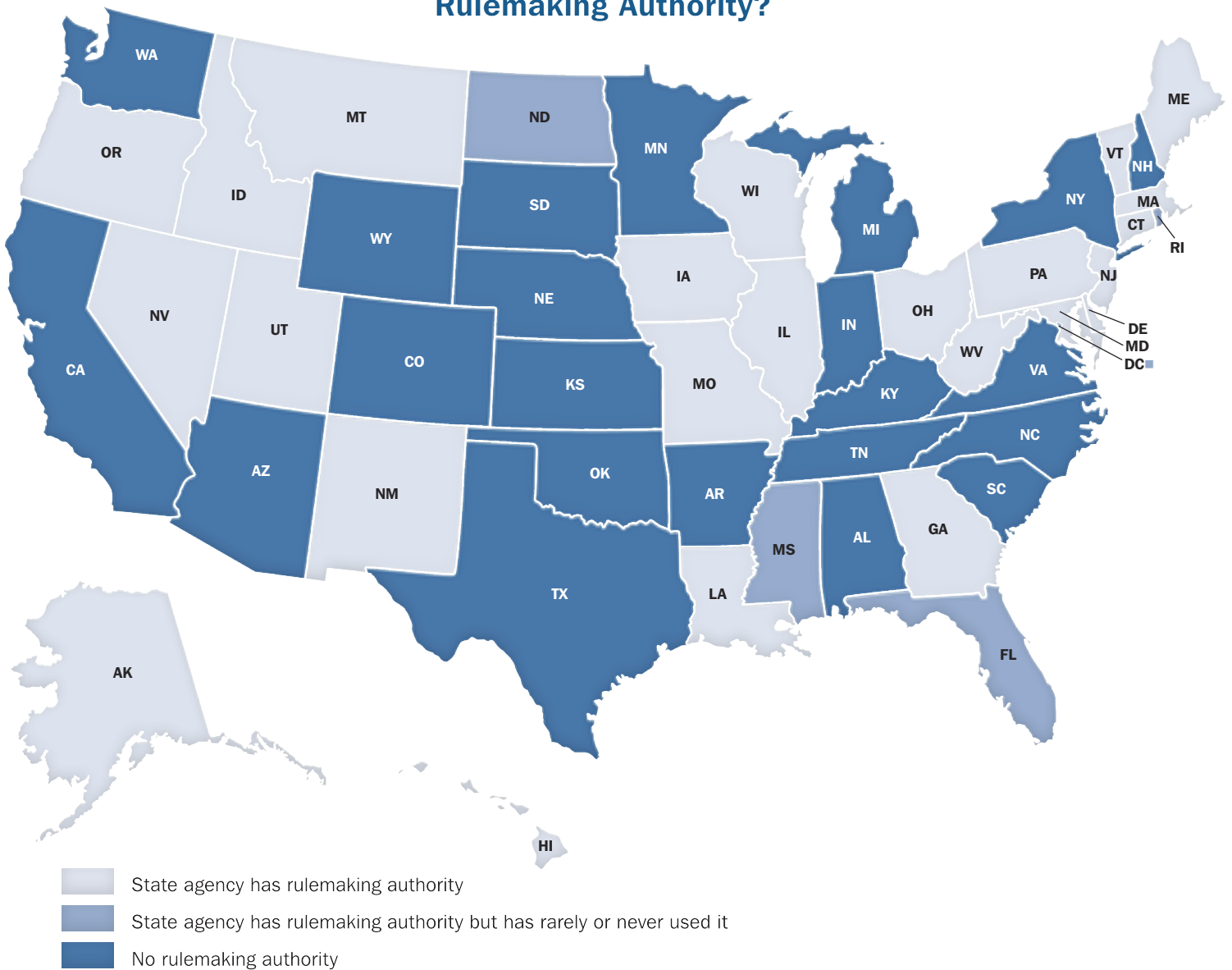
Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, 2016.

Rulemaking authority

The strongest UDAP statutes authorize a state agency to issue detailed regulations prohibiting specific unfair and deceptive practices. The authority to issue regulations enables the state to 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.

MAP 3

Does a State UDAP Law Give a State Agency Rulemaking Authority?



Source: ©National Consumer Law Center, 2018.

Twenty-eight states and the District of Columbia give rulemaking authority to a state agency, but the remaining jurisdictions do not.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. Moreover, while rulemaking authority is important, its existence does not mean that the state agency will use it. For example, **Mississippi** and the **District 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.

What states can do to improve their UDAP statutes' substantive strength

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

- 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. HOW DO THE STATES RATE ON THE SCOPE OF THEIR UDAP STATUTES?

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 parties involved in real estate fraud such as property flipping. Unfair or deceptive practices in the insurance industry include false statements about insurance coverage or costs and stalling or 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 board⁴ to exclude entire industries whenever they are subject to

any regulation or licensing. 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. **Florida, Louisiana, New Hampshire, Ohio, and Virginia** also exempt an extraordinarily large part of the consumer marketplace—most extensions of credit, insurance transactions, and utility service, plus, in Ohio, all real estate transactions.

The Terrible Two:

Michigan and Rhode Island

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.

The problems with the **Michigan** and **Rhode Island** UDAP statutes cannot be laid solely at the feet of the state legislatures there. Even if the statutory language was unclear, it is unlikely that the legislatures could have anticipated how their state supreme courts would misinterpret it to gut their UDAP statutes. However, the state legislatures do bear the blame for having failed to amend the statutes to correct the courts’ misinterpretation. For example, the **Michigan** decision that gutted the statute is now 11 years old, and a series of 2009 articles in the *Detroit Free Press* culminated in an editorial stating “It’s time for Michigan legislators to reject the Engler court’s absurd claim that those who drafted

the state’s consumer protection law deliberately placed most businesses beyond its reach.”⁶ Yet the state legislature still has not corrected the problem.

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 engage in unfair, deceptive, and abusive tactics.

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 and the 2008 Great Recession not only harmed millions of consumers but also led to global economic insecurity. UDAP statutes can act as a bulwark against predatory lending, deter abuses, and give injured consumers their most effective remedies—but only if the statute does not exempt lenders.

The abusive lending, bait-and-switch tactics, and outright deception that led to the subprime mortgage crisis and the 2008 Great Recession not only harmed millions of consumers but also led to global economic insecurity.

CASE STUDY: Rhode Island Court’s Broad Interpretation of “Regulated Industries” Exemption Allows Credit Card Lender to Lie to Consumers with Impunity

Fleet Bank engaged in a nationwide advertising campaign for its credit card. As part of the campaign, it sent solicitation letters to thousands of consumers asking them to transfer balances from other credit cards and offering a non-introductory, fixed APR of 8.5%, saying that it “starts low and stays low.” The letters also promised that there would be no annual fee.

After consumers opened credit card accounts and transferred their balances, Fleet informed them that the “fixed” APR would increase to as much as 11.5%. It also started imposing annual fees on some of the consumers who had opened accounts.

Three **Rhode Island** consumers—Tyler Chavers, Alexandra Lossini, and Daniece Burns—who fell victim to this deception sued Fleet under their state UDAP statute, which prohibits unfair or deceptive practices.

The state supreme court threw the UDAP claim out—not because of any evidence that Fleet had not acted deceptively and unfairly, but because Fleet was a national bank regulated by the federal Office of the Comptroller of the Currency (OCC). Since Fleet was regulated, the court concluded that it fell within the UDAP statute’s exemption for regulated industries. The court was not troubled by the fact that OCC had not taken any action to rein in this deception, and in fact had responded to a consumer’s complaint by telling her that it would not take any action and that she should file suit if she wanted to pursue the matter. Fleet was exempt just because it was a bank, regardless of how deceptively it had behaved.

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

Despite the overwhelming problem of predatory and abusive lending, nine states—**Alabama**,⁷ **Florida**,⁸ **Louisiana**,⁹ **Michigan**,¹⁰ **Nebraska**,¹¹ **New Hampshire**,¹² **Ohio**,¹³ **Rhode Island**,¹⁴ and **Virginia**¹⁵—immunize all or a very wide range of lenders and creditors from the UDAP statute, regardless of the unfair or deceptive nature of their practices. For example, Alabama and Florida exempt all banks. Ohio’s UDAP statute excludes most lenders other than payday lenders, mortgage brokers, and non-bank mortgage lenders. 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.

In addition, in **Alaska**,¹⁶ **Illinois**,¹⁷ **Iowa**,¹⁸ **Maine**,¹⁹ **Texas**,²⁰ and **Wisconsin**,²¹ while there is not a blanket exemption for lenders and creditors, the statute or decisions interpreting it have created substantial loopholes or exemptions for predatory and abusive lenders. For example, **Illinois** courts have significantly reduced the otherwise broad applicability of the UDAP statute to credit transactions 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.²² **Illinois** decisions also refuse to hold creditors liable under the UDAP statute for knowingly accepting the fruit of a seller's fraud.²³ **Texas** courts interpret the state UDAP statute to apply only to extensions of credit used to purchase goods or services. As a result, it does not apply to non-purchase money loans such as home equity loans and cash advances. **Maine** exempts state-chartered banks and credit unions. **Iowa's** UDAP statute applies broadly to credit transactions but denies consumers the ability to enforce the statute against most lenders and creditors.

Other states—**Georgia**, **Idaho**, **Kansas**, **Mississippi**, **Oklahoma**, **Tennessee**, **Utah**, and **West Virginia**—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, **Tennessee's** UDAP state excludes “acts or transactions required or specifically authorized” by an agency's laws or regulations, and it also does not apply to “the credit terms of a transaction.” Courts have differed about whether these provisions amount to a blanket exemption for lenders, and the matter remains unresolved. 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 interpretation like those that have eviscerated the **Michigan** and **Rhode Island** statutes. In other states, such as **Mississippi** and **West Virginia**, the UDAP statute or the consumer's right to enforce it is limited to transactions involving “goods or services,” and courts have not yet ruled whether lending amounts to a “service.”

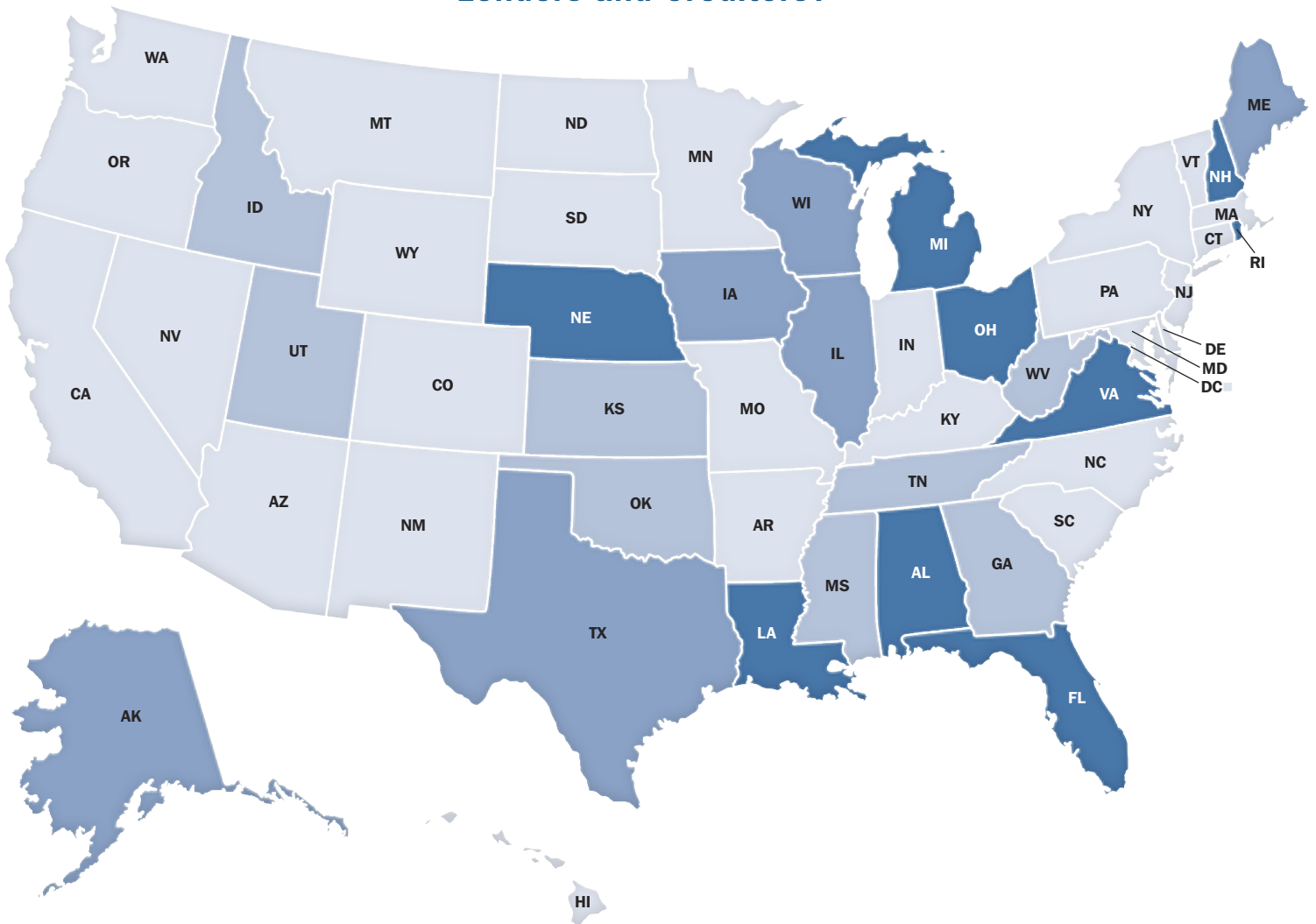
Coverage of insurance

Insurance policies are complicated financial instruments, making it difficult for consumers to detect deceptive sales pitches. For example, a common insurance sales pitch several years ago was that the interest earned on the premiums the consumer paid in the early years of a life insurance policy would build up so much that the consumer would be able to stop paying premiums after a certain number of years. The claim was based on the unfounded assumption that interest rates would stay high, but this assumption was never disclosed to consumers. Only when interest rates rose and the “vanishing premiums” failed to vanish did consumers realize they were defrauded. Consumers can also find themselves having to deal with stalling, unjustified denial, and other unfair practices when they suffer losses and try to make claims on their insurance policies.

Despite these concerns, 21 states immunize insurers completely or almost completely. Seven additional states—**Connecticut**, **Iowa**, **Mississippi**, **New York**, **Vermont**, **West Virginia**, and **Wyoming**—give insurers significant partial immunity. For example, in **Iowa**, consumers cannot enforce the UDAP statute against insurers. Their only recourse

MAP 4

Does the State UDAP Law Immunize Lenders and Creditors?



- Statute applies broadly to lenders and creditors
- Courts have not resolved whether statute applies to lenders and creditors
- Statute applies to some lenders and creditors, but there are major gaps in scope or in consumers' ability to enforce it
- Statute excludes most lenders and creditors

Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 2.2.1.7.

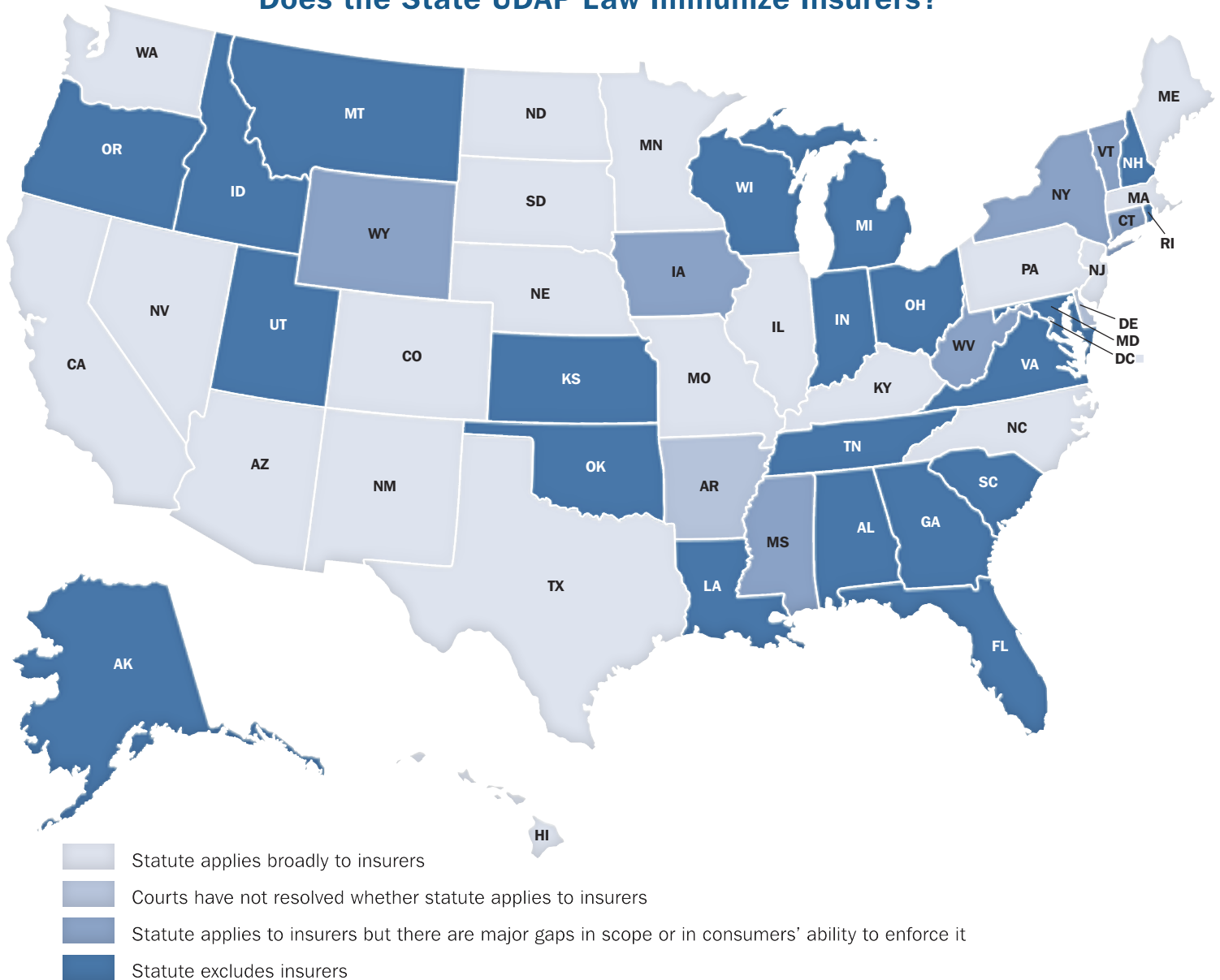
is to hope that the attorney general will proceed against the insurer, but attorney general offices generally lack the resources to pursue individual cases. In **Vermont**, an older decision holds that consumers cannot enforce the statute against insurers, and the state

supreme court has not yet resolved the question whether it is still binding. **West Virginia's** statute carves out "the sale of insurance by an insurer" but leaves the door open to applying the statute to unfair or deceptive acts by insurers outside the initial sale of the policy, such as unfairly denying insurance coverage after a loss. In **Connecticut, New York, and Wyoming**, the statute appears to apply to insurers but courts have carved out large exceptions.

Insurers may justify their exclusion from UDAP statutes on the ground that they are regulated by state Unfair Insurance Practices statutes. But in most states consumers have

MAP 5

Does the State UDAP Law Immunize Insurers?



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 2.3.1.5.

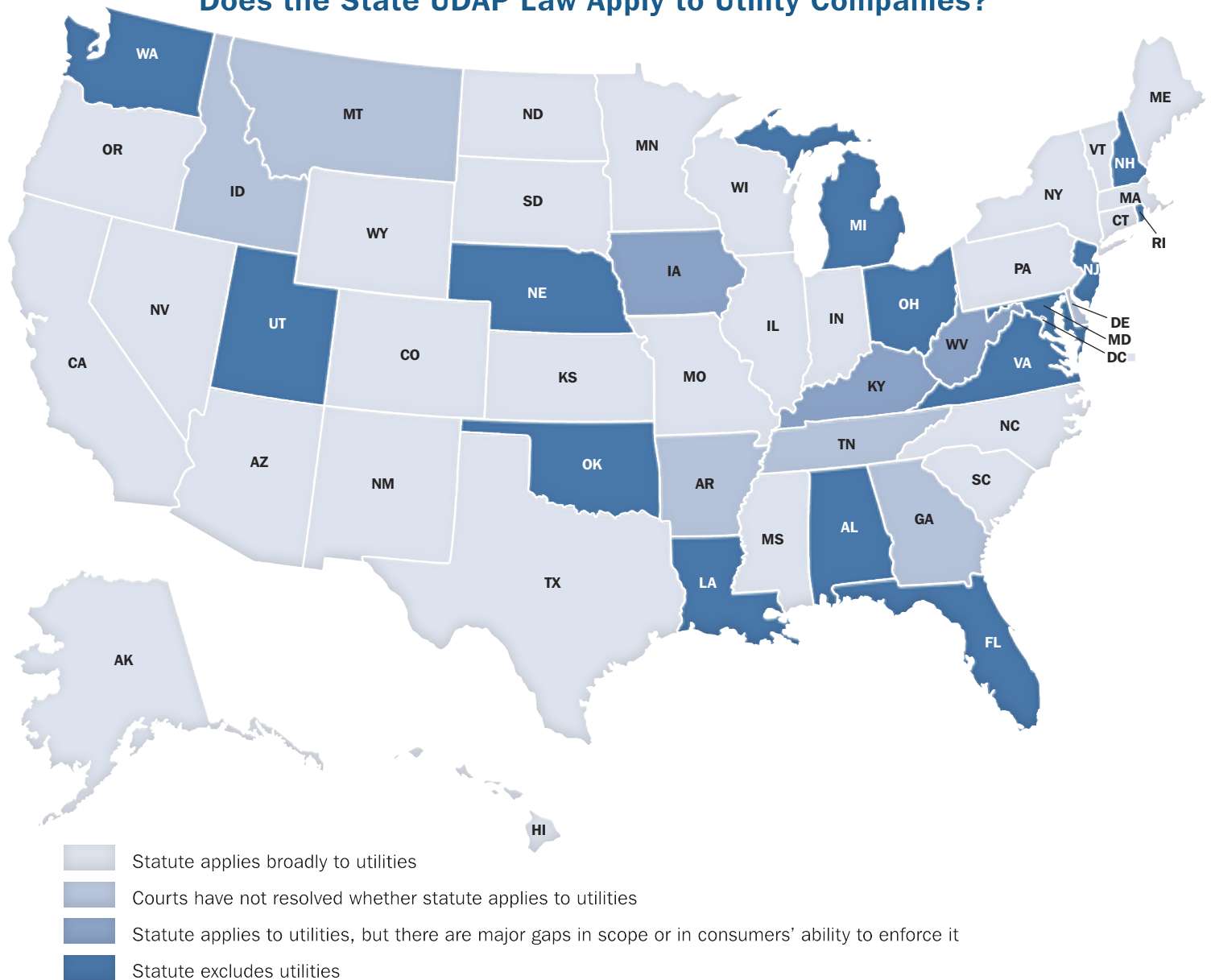
no right to enforce these statutes; their only recourse is to complain to the state insurance department. State insurance departments generally do not have the resources to provide much help to individual consumers.

Coverage of utility transactions

Utility service is a necessity of life. Without heat in the winter, cooling in the summer, and electricity to run medical equipment, consumers are at great risk.

MAP 6

Does the State UDAP Law Apply to Utility Companies?



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 2.3.2.2.

Nonetheless, 14 state UDAP statutes specifically immunize all or most utility companies. In addition, three states—**Iowa**, **Kentucky**, and **West Virginia**—have major gaps in the application of the UDAP statute to utility companies. In **Iowa**, only the attorney general can enforce the UDAP statute against utility companies. In **Kentucky** and **West Virginia**, courts have interpreted the filed rate doctrine or its statutory equivalent—a judicial doctrine that courts should not order deviations from rates set by a public utility commission—extraordinarily broadly. The result? Utility companies are immunized from liability for unfair and deceptive practices that have little or nothing to do with rates.

Coverage of post-sale activities

Some of the most serious marketplace abuses may occur after a sale is completed, such as those involving debt collection, repossessions, mortgage servicing, foreclosures, or renegeing on warranties. Surprisingly, while most state UDAP statutes cover such post-sale practices, this is not always the case.

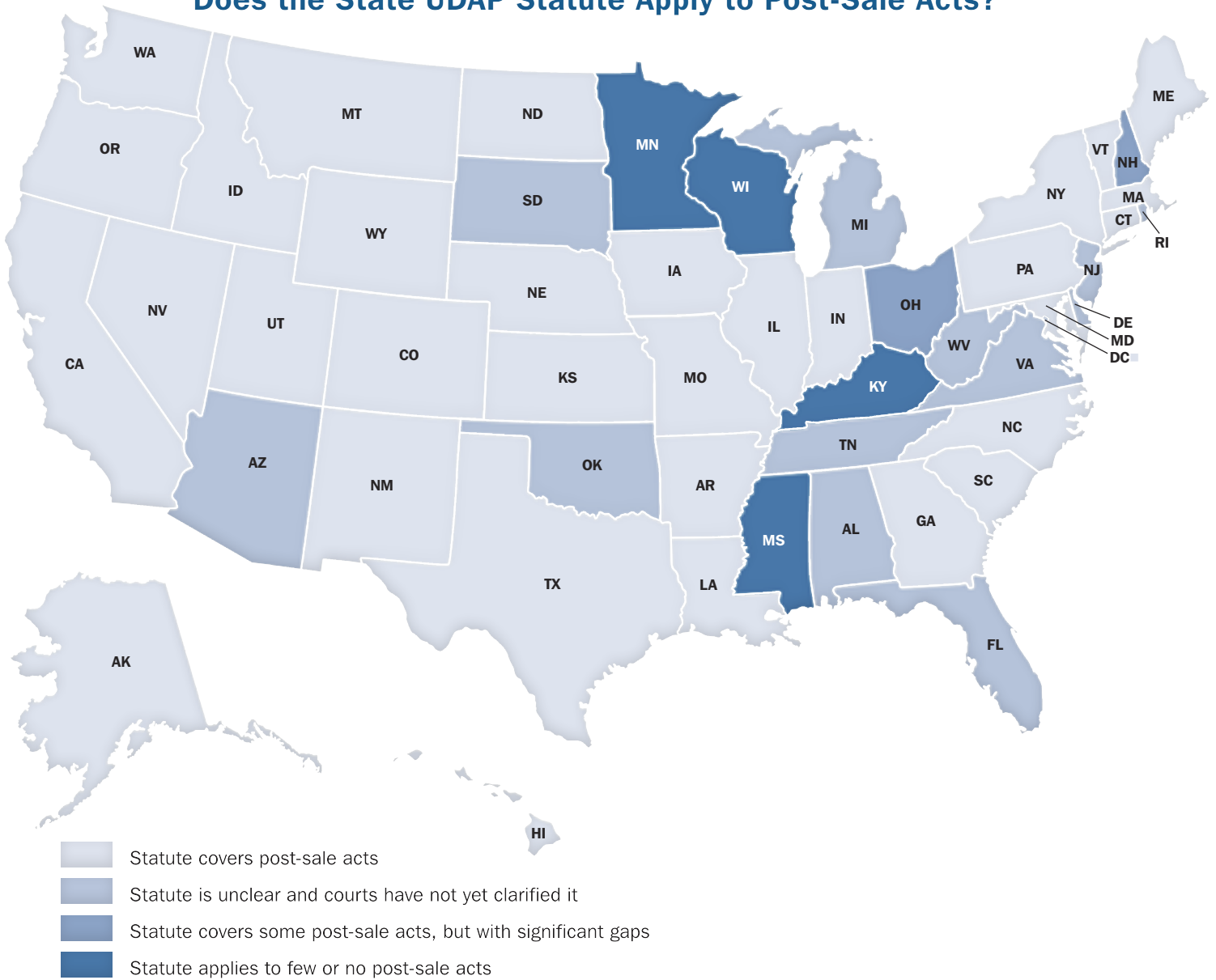
In many states the courts have not directly addressed this question or have issued conflicting decisions. For example, **New Jersey** courts interpret its UDAP statute as applying to mortgage servicing but not to debt collection, and **Ohio** courts say the opposite.

In a number of states, the UDAP statute applies to acts and practices “in connection with” the sale of goods or services. Most courts interpret this language as encompassing post-sale matters, but a few courts give it an inappropriately narrow reading and reach the opposite conclusion. Some **Kentucky** decisions, grafting an outmoded contract law requirement onto the UDAP statute, hold that the statute cannot be applied to any entity other than the original party with which the consumer contracted, so does not apply to third-party debt collectors.

Even if the UDAP statute reaches post-sale practices as a general rule, some of the entities involved in post-sale practices may be exempt for other reasons. For example, a few states create a blanket exemption for banks and other financial institutions, and they are thus outside the UDAP statute even when servicing mortgages or collecting debts originated by a party covered by the UDAP statute.

MAP 7

Does the State UDAP Statute Apply to Post-Sale Acts?



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, §§ 2.2.2.2, 2.2.3.

Coverage of real estate transactions

The purchase of a home is the largest investment many consumers ever make. As a result, real estate transactions attract scam artists, from property flippers to foreclosure rescue scammers to revolving “land contract” sellers who cycle homes through one defrauded buyer after another.

Most state UDAP statutes cover real estate transactions, although there are ambiguities in a number of states that make categorization difficult. For example, several states restrict their UDAP statutes to “goods” and “services,” and courts have differed as to whether real estate sales amount to a “service.”

However, in three states—**Alaska**, **New Mexico**, and **Ohio**—courts have interpreted the statute to exclude real estate transactions. **Indiana’s** UDAP statute applies to real estate transactions, but it denies consumers the right to enforce the statute in these transactions, and some **Kentucky** decisions take the same view.

In addition, **Florida**, **Maryland**, and **Virginia** specifically exempt holders of real estate licenses even when they engage in intentional deception. **Iowa** denies consumers the right to enforce the UDAP statute against holders of real estate licenses (real estate brokers, broker associates, and salespersons). **Nebraska** has interpreted a general exemption for entities subject to state regulation to exclude holders of real estate licensees, and the same result would probably apply in **Michigan** and **Rhode Island** because of the courts’ sweeping interpretations of similar exemptions.

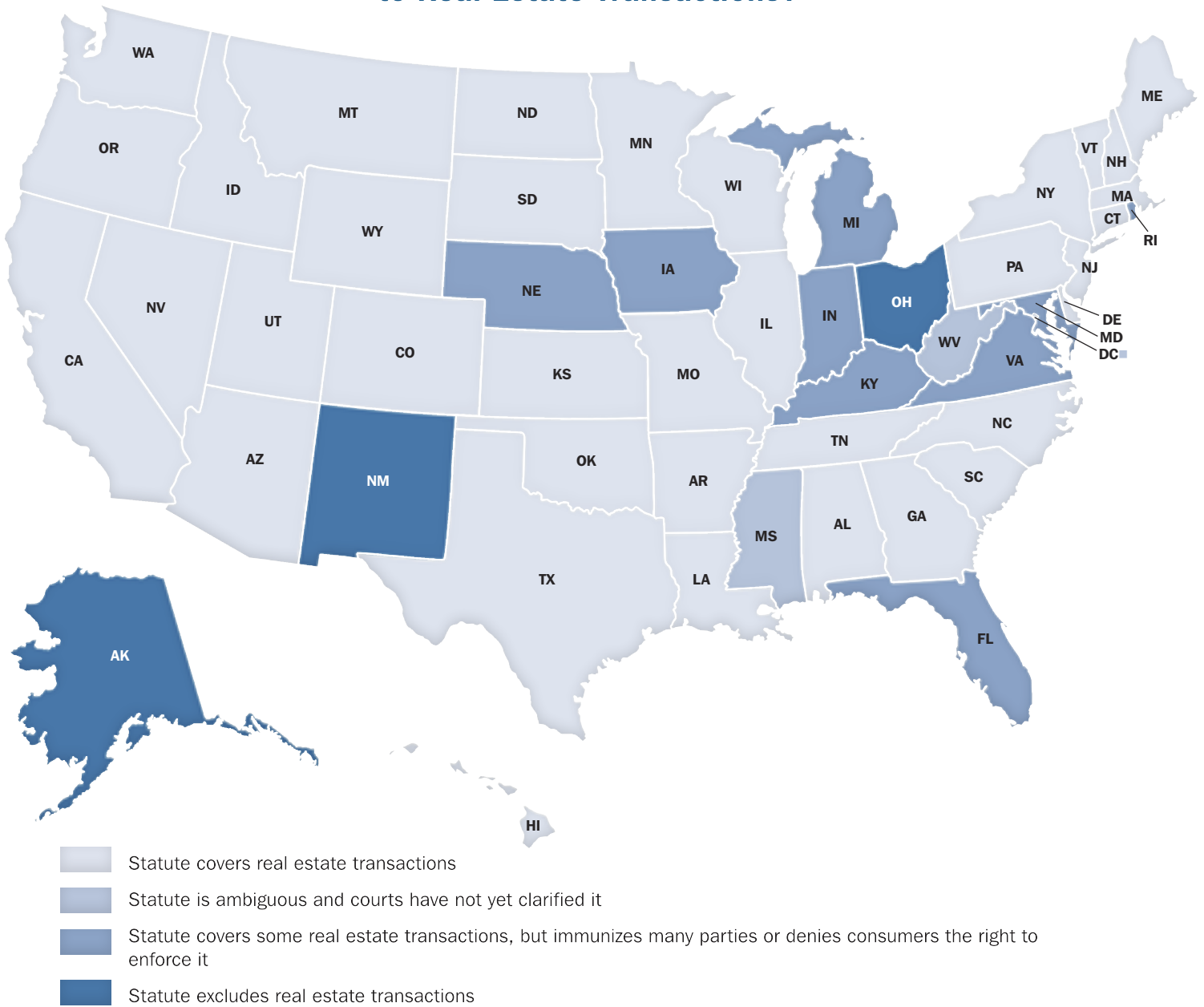
What states can do to improve the scope of their UDAP statutes

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

- **Narrow or delete 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,²⁴ can serve as a model.
- **Eliminate exemptions for lenders and other creditors.** This may require steps such as:
 - eliminating an explicit exemption for certain categories of creditors such as banks;
 - expanding the general scope of the statute to cover more than “goods and services”;
 - clarifying that “services” includes lending;
 - eliminating an exemption for the credit terms of a transaction; or
 - making sure that the section of the statute allowing consumers to bring suit is not limited in a way to exclude transactions that involve extensions of credit.
- **Eliminate exemptions for insurers and utility companies.**
- **Make it clear that the statute applies to real estate transactions and to post-transaction matters such as abusive collection of consumer debts.** States should also make sure that the section of the statute allowing consumers to bring suit is not limited in a way that could be interpreted to exclude real estate transactions.

MAP 8

Does the State UDAP Statute Apply to Real Estate Transactions?



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 2.2.5.

III. HOW DO THE STATES RATE ON THE STATE ENFORCEMENT POTENTIAL OF THEIR UDAP STATUTES?

Every state designates a state agency—usually the attorney general’s office—to enforce its UDAP statute. All states give the state enforcement agency the authority to seek two key forms of relief:

- **Equitable relief**—an injunction or other order requiring a business to stop engaging in an unfair or deceptive practice. Equitable relief is of great importance because it allows state agencies to shut down unfair or deceptive operations quickly, before more consumers are harmed.
- **Restitution for consumers**—an order requiring the business to return money that was wrongfully taken from consumers. The ability to seek restitution is critical because stopping a business’s practices does nothing to help consumers who fell victim to the practice before the state agency could act. 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 those stopped by the state.

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. All states except **Rhode Island** allow the state agency to seek civil penalties for initial violations.

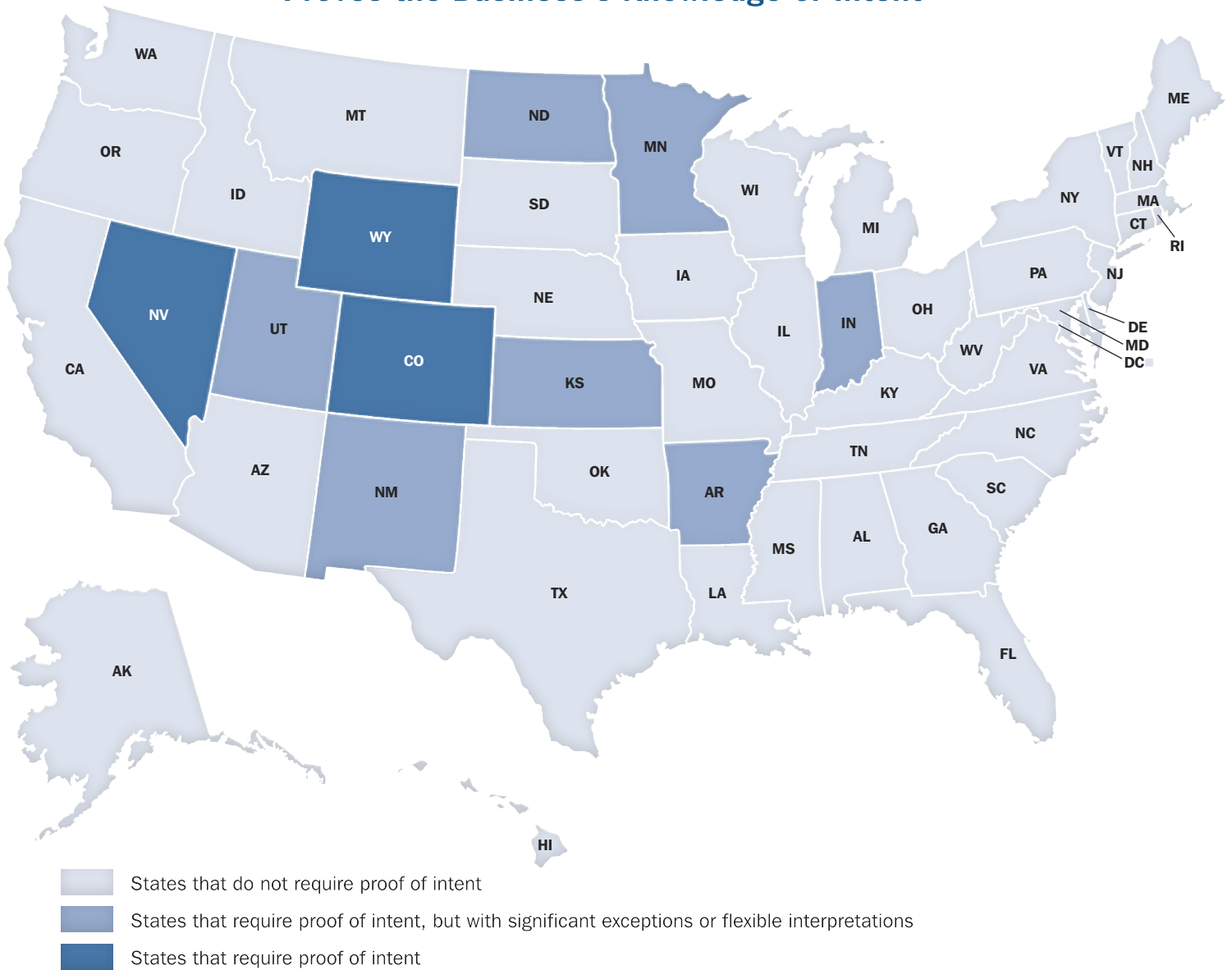
Must the state prove that a business acted knowingly or intentionally before it can enforce the statute?

A few states undercut the effectiveness of state enforcement 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 from the courts to stop an unfair or deceptive practice, it is much harder for the state to protect its citizens. Many more consumers are likely to be harmed. It should not be an excuse to continue an unfair or deceptive practice because a business acted without knowledge or intent.

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

MAP 9

States that Deny Consumer Relief Unless the State Proves the Business's Knowledge or Intent



Source: ©National Consumer Law Center, 2018.

Several other states require a showing of intent or knowledge, but there are exceptions or the requirement has been interpreted to be less onerous. **Arkansas, Indiana, Kansas,** and **Utah** require a showing of intent or knowledge for most of their statutory prohibitions, but in each state there is a broad prohibition of deception or unfairness that does not include a requirement to show intent or knowledge. **Minnesota** and **North Dakota** require a showing that the defendant acted with intent that others rely on the deception, a somewhat less demanding requirement than proof of knowledge of a falsehood or intent to deceive. (A few other states require this showing when the deception involves concealment of a material fact.²⁵) The **New Mexico** UDAP statute requires knowledge as an element of a deceptive practice, but the state supreme court has held that the requirement is satisfied if the party knows *or should know* of the deceptive nature of a statement,²⁶ so it does not create as great an obstacle as would a requirement that actual knowledge be established.

Does the state authorize effective civil penalties?

In almost all states, the UDAP statute allows the state to ask a court to impose a monetary penalty on a business that has engaged in an unfair or deceptive practice. 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 not caught it keeps its gains. The potential of a civil penalty in addition to restitution helps balance this equation.

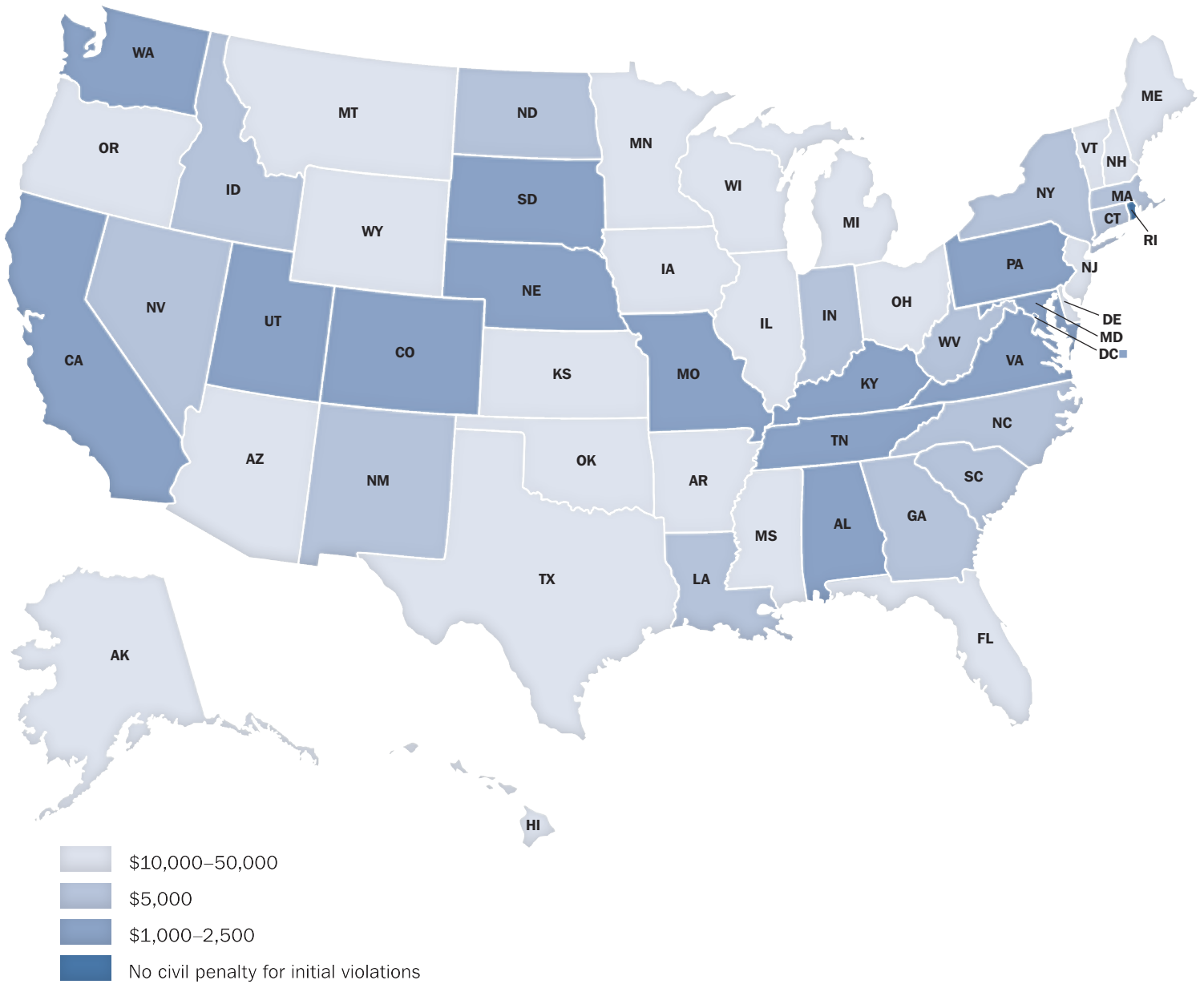
Rhode Island is the only state that does not authorize the state agency to seek civil penalties when a business violates the UDAP statute. Among the other 49 states and the District of Columbia, there is a wide range in the amount of the civil penalty that a fraudulent or unfair business can be required to pay.

Some states have the ability to assess substantial civil penalties for initial violations, 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, Maryland, Missouri, Pennsylvania,** and **Tennessee** allow civil penalties of just \$1,000 per initial violation. By contrast, **Alaska** allows a civil penalty of \$25,000 per violation, without requiring proof of any special factors such as willfulness. **Iowa** allows a civil penalty of \$40,000 per violation, and **Illinois** allows up to \$50,000 per violation if intent to defraud is shown. (Several 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.

MAP 10

Strength of States' Civil Penalties



Source: ©National Consumer Law Center, 2018.

What states can do to strengthen state enforcement of their UDAP statutes

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

- 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 them by:

- Giving the enforcement agency a full range of pre-suit investigatory power, including the right to demand and obtain information both from the target and from others prior to suit.
- Allowing courts to order a 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.

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.

IV. HOW DO THE STATES RATE ON 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, if ever, bring cases that require detailed proof of specific facts that 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 alone. Consumers must be able to protect themselves—and that ability is crucial for a well-functioning consumer marketplace. It would require an enormous amount of public funding to enable a state agency to enforce the UDAP statute in every individual case.

Without strong state remedies for consumers, fraudulent businesses can price consumers out of the courthouse. Strong consumer remedies mean that state enforcement is supplemented by private enforcement. Private enforcement increases the likelihood that a violator will be found out, makes consumers whole, and helps discourage illegal conduct.

Private enforcement increases the likelihood that a violator will be found out, makes consumers whole, and helps discourage illegal conduct.

A strong, effective UDAP statute gives consumers the ability to enforce it, without gaps or carve-outs for certain businesses or certain prohibitions. It allows consumers 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 were 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, proving reliance, or meeting some special injury requirement. These features are discussed in the next sections.

Gaps in consumers' ability to enforce the statute

All state UDAP statutes now allow consumers to take a fraudulent business to court for at least some violations of the state UDAP statute, and all allow the consumer to recover at least compensatory damages, such as a refund. One of **California's** two UDAP statutes, the Unfair Competition Law, allows consumers only to receive restitution, which is defined by the law as different from compensatory damages and can sometimes be less than full dollar-for-dollar redress for the wrong, but the other California UDAP statute allows compensatory damages.

However, a few states prevent the consumer from enforcing certain prohibitions in the statute or enforcing it against certain businesses. In these states, consumers may have a general right to enforce the statute, but the legislature has carved out some businesses and immunized them from consumer suit, or carved out some provisions of the statute and denied consumers the ability to enforce them.

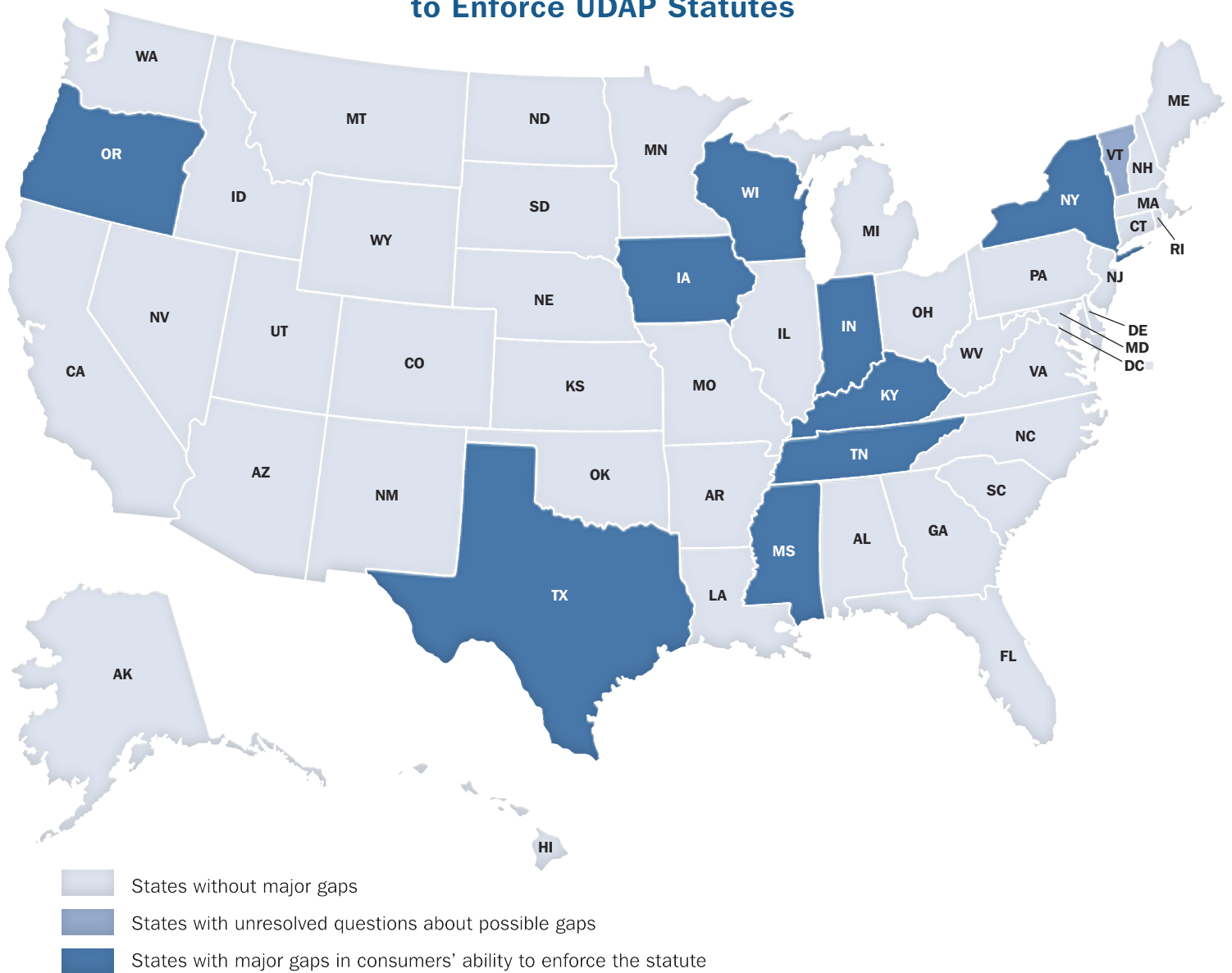
For example, when **Iowa** gave consumers the ability to enforce the statute in 2009, it denied them the right to enforce it against insurance companies, a wide variety of lenders, most utility service providers, and people holding real estate licenses, among others. In **Indiana**, the statute applies to real estate transactions, but only the attorney general, not individual consumers who were cheated, can enforce the statute in those transactions. A number of **Kentucky** decisions interpret their UDAP statute similarly.

The **Mississippi** and **Tennessee** UDAP statutes include broad prohibitions of unfair and deceptive practices, but deny consumers the right to enforce these prohibitions. In **Oregon**, consumers have no right to enforce the statute's broad prohibition of

“unconscionable tactics.” **New York’s** statute governing the general duties of the Attorney General includes a prohibition against repeated illegal acts, defined narrowly to include “unconscionable contract provisions,” but consumers cannot enforce this prohibition. Similarly, one of **Wisconsin’s** UDAP statutes includes a broad prohibition of unfair trade practices, but consumers can enforce this requirement only if the defendant violated a specific rule. **Texas** denies consumers the right to enforce its general prohibitions against deception. In **Vermont** there are unresolved questions about consumers’ ability to enforce the statute against insurers.

MAP 11

States with Major Gaps in Consumers’ Ability to Enforce UDAP Statutes



Source: ©National Consumer Law Center, 2018.

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. A UDAP statute's failure to allow the court to order the business to reimburse the consumer's attorney fees can price consumers out of the courthouse.

Providing for reimbursement of the consumer's attorney fees makes consumer justice affordable. It is one of the most important factors in making UDAP statutes effective in rooting out fraudulent practices, which benefits all consumers as well as legitimate businesses. Without such a provision, a business can wear down a consumer by prolonging and over-litigating the case, exhausting the consumer's resources. The consumer may not even be able to find an attorney able to take the case if there is no provision in the statute for the business to pay the consumer's attorney fees.

Most states allow the court to order the business to reimburse the consumer for attorney fees if the consumer wins the case. But five states—**Arizona, Delaware, Mississippi, South Dakota, and Wyoming**²⁷—have no provision allowing the court to order reimbursement of the consumer's attorney fees. This failure greatly undermines the effectiveness of the statute. **Mississippi** is the worst of these states because it not only has no provision for reimbursement of the consumer's attorney fees, but it authorizes a fee award to a prevailing defendant if the consumer brought a claim that was frivolous or filed for purposes of delay.

In one state—**Florida**—a consumer who loses a UDAP case can be forced to pay the business's attorney fees even if the case was filed in good faith. As a result, a consumer who brings a UDAP claim in good faith, even for a relatively small amount of money, can be hit with tens of thousands of dollars in the business's attorney fees. In addition, **Alaska's** UDAP statute requires unsuccessful consumers to pay partial attorney fees to the business. Allowing consumers to be threatened with having to pay the business's attorney fees acts as a powerful deterrent against ever seeking to enforce a state's UDAP statute.

Allowing consumers to be threatened with having to pay the business's attorney fees acts as a powerful deterrent against ever seeking to enforce a state's UDAP statute.

The UDAP statutes in two other states—**Indiana** and **Kentucky**—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 similar statutes that lacked specific standards, the **Illinois** and **Montana** Supreme Courts held that trial courts should exercise their discretion and limit fee awards against consumers to cases where the consumer has proceeded in bad faith or the case was frivolous.²⁸ A **Missouri** decision takes this same approach.²⁹

Can consumers join together to bring suit?

When a business descends to unfair and deceptive tactics, it usually does not single out just one consumer for this treatment. When a business follows a practice of deceiving its customers or treating them unfairly, it is important for consumers to be able to join together to bring suit. 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.”³⁰

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 the supplier followed a standard practice and cheated many consumers in the same way.

Arizona, Delaware, Mississippi, South Dakota, and Wyoming do not allow a court to order reimbursement of the consumer’s attorney fees when the consumer wins a UDAP case. In **Alaska** and **Florida**, a consumer who loses a UDAP case can be forced to pay the defendant’s attorney fees even if the case was filed in good faith.

It is through class action status and class-wide discovery (the procedures by which both sides obtain information from each other before trial) that the defendant’s allegedly harmful practice and its application to large numbers of similarly-situated consumers can be determined carefully and accurately. Ferreting out proof of the defendant’s practices can be time-consuming and extraordinarily expensive. To relegate consumers to individual suits, where each would have to bear this expense over and over again, would be to deny them any realistic ability to obtain redress.

Despite the importance of class actions in achieving consumer justice, some states prohibit UDAP class actions. Singling out consumer fraud for kid-glove 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 large number of people.

In eight states—**Alabama, Arkansas, Colorado, Georgia, Louisiana, Montana, South Carolina, and Tennessee**—the UDAP statute denies consumers the right to join together in a class action. This type of restriction clearly applies in state court, and some courts hold these restrictions apply in federal court as well.³¹ Since consumer fraud is often committed on a broad scale, with a fraudulent product or scheme foisted on thousands of consumers, requiring each of these consumers to hire an attorney individually and bring an individual suit makes no sense. In addition, two states—**Mississippi** and **Virginia**—do not allow class actions of any sort in state courts. (This restriction is somewhat less severe in the UDAP context, because it is unlikely to apply in federal courts.)

Another impediment, again less severe than a ban, is that a few states 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.

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.³² This interpretation precludes consumers from obtaining individual redress under the UDAP statute.

Alabama, Arkansas, Colorado, Georgia, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Virginia prohibit UDAP class actions.

CASE STUDY: New York UDAP Statute Does Not Help Homeowners Who Relied on Lender's False Statements

In December 2008, as the mortgage crisis was marching the nation into an economic meltdown, New York homeowners Maurice and Mary Jayne Fitzgerald called their mortgage lender to ask it for assistance in reducing their mortgage payments. The lender's representative told them that they would qualify under its "CARE Program," which would reduce their monthly payment.

After the Fitzgeralds applied for the CARE Program, their lender told them they would have to make elevated mortgage payments for three months. They did so, but then in June 2009 the lender stopped sending them mortgage statements. The Fitzgeralds made repeated calls to the lender, and were told over and over again that their application for the CARE Program was under consideration and that they were to make no further payments.

In September 2009, the Fitzgeralds learned that the lender had reported to Experian, a national credit reporting agency, that they were late on their mortgage payments. They called the lender, but it told them that the report to Experian was a mistake, that it would correct the error, and that the Fitzgeralds should continue not to make mortgage payments. Despite its promise, the lender never corrected the credit report, damaging Mr. Fitzgerald's credit score.

On November 2, 2009, the lender sent the Fitzgeralds a notice charging them late fees and interest for having failed to make the mortgage payments it told them not to make. When the Fitzgeralds called the lender, it told them for the first time that they would not qualify for a lower mortgage payment under the CARE Program, but would have to increase their mortgage payment by \$500 a month. It told them that if they did not pay the interest, unamortized principal, penalties, and fees that accrued during the period of non-payment, they would face foreclosure and collection fees.

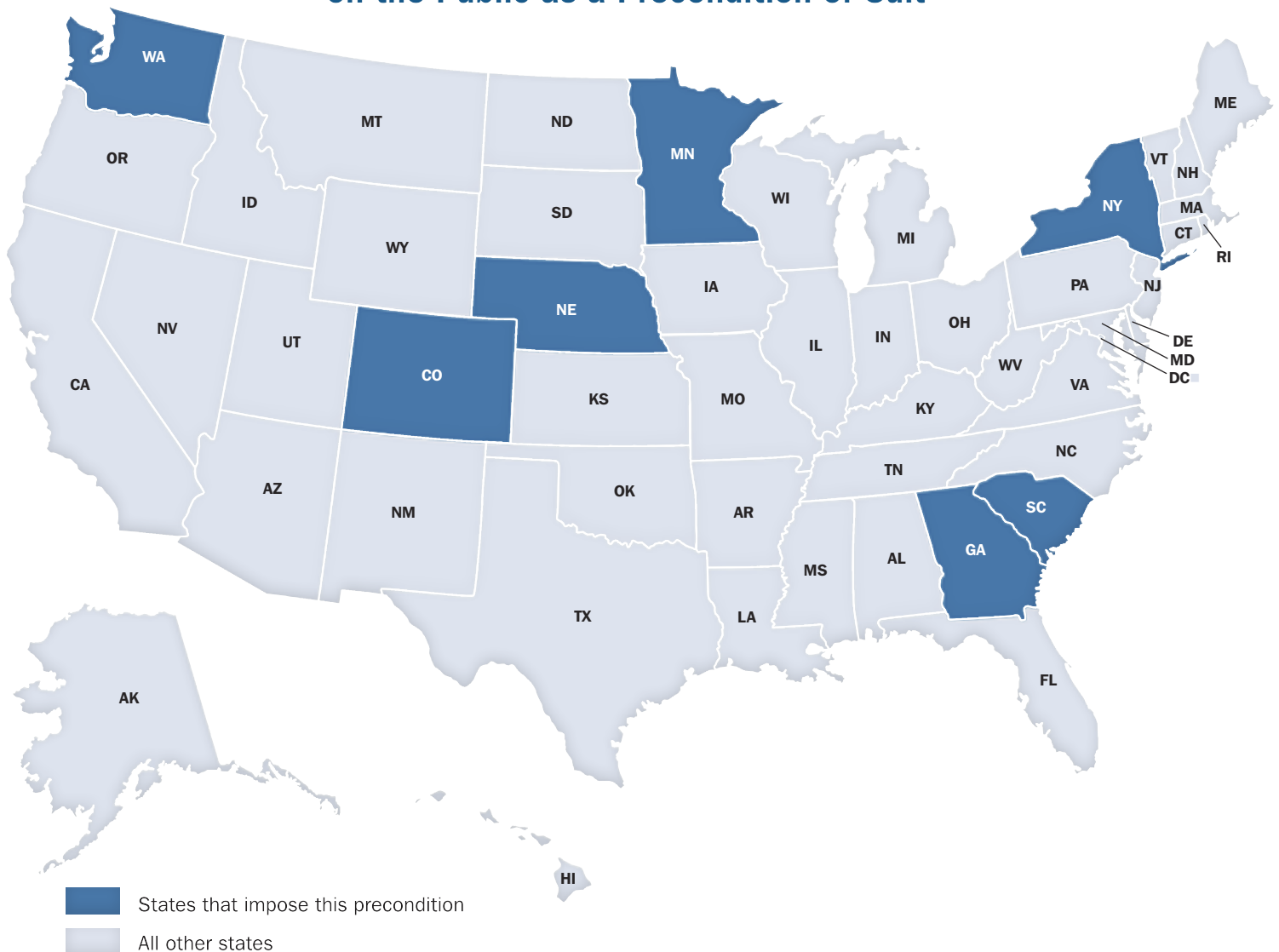
The Fitzgeralds sued the lender, alleging that it had committed deceptive practices in violation of the state UDAP statute. The court dismissed the claim on the ground that repeated false statements to the Fitzgeralds were not enough—the Fitzgeralds had to show that the lender had followed a general practice of false statements or was likely to treat other consumers in the same way. New York is one of the few states that requires consumers not only to prove that a business cheated them, but also to investigate and prove the business's general business practice—a burden that can be so time-consuming and expensive as to make individual consumer redress impossible.

Source: Fitzgerald v. Chase Home Fin., LLC, 2011 WL 9195046 (S.D.N.Y. Feb. 28, 2011).

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, or that their practices impact consumers at large. 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 alleged only that the business cheated him or her.

MAP 12

States that Require Consumers to Prove an Impact on the Public as a Precondition of Suit



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 11.4.3.

Restrictive injury requirements

Another way that some UDAP statutes restrict consumers' access to the courts is through restrictive injury requirements. Most UDAP statutes require that the unfair or deceptive practice have harmed the consumer in some way. But some states go beyond this, and deny the consumer access to the courts unless the harm was a loss of money or property.

In these states, consumers cannot enforce the UDAP statute against a business that is invading their privacy, verbally abusing them, or denying them information that the statute requires them to be given. They may not even be able to enforce the statute against a business whose practices threaten them with a loss of money or property, if the loss has not already occurred.

Twenty-two states—**Alabama, Alaska, Arkansas, California, Connecticut, Idaho, Iowa, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee** (slightly broader language), **Washington, West Virginia, and Wisconsin**—restrict consumers' access to justice in this or an equivalent way.³³

Special advance notice requirement for consumers

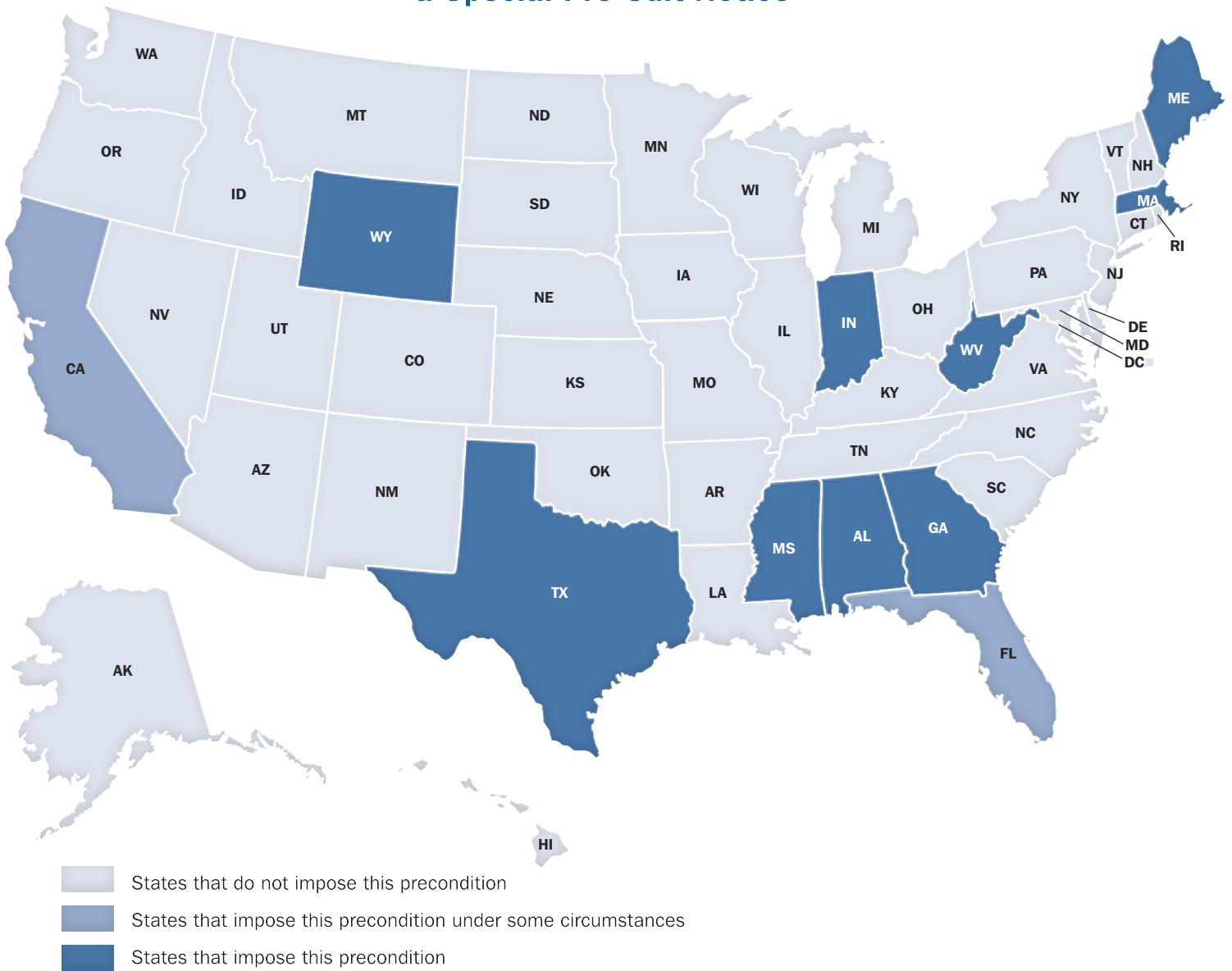
Some states single out consumer protection cases for a special requirement that the consumer send the business a notice before filing suit. Placing this special burden on consumer protection cases makes it harder for consumers to get their cases heard in court, especially if they are trying to proceed 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 sabotage consumer claims by filing a lawsuit against the consumer in a faraway state.

Nine states—**Alabama, California** (one of its two UDAP statutes), **Georgia, Indiana** (with exceptions),³⁴ **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. **Florida** requires a special pre-suit notice for UDAP cases against motor vehicle dealers. The remaining 40 states and the District of Columbia do not impose this special burden on consumers bringing UDAP claims.

MAP 13

States that Require Consumers to Give a Special Pre-Suit Notice



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 11.4.4.

Reliance

Some states require the consumer to show not only that the business engaged in unfairness or deception that caused the consumer's loss, but also that the consumer specifically relied on the unfair or deceptive practice. This requirement frustrates the forward-looking nature of state UDAP laws, as it impairs consumers' ability to stop practices before they cause widespread consumer harm.

A reliance requirement 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. 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 seller's bargaining power, 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.

Most UDAP statutes do not explicitly require consumers to prove that they specifically relied on the deception. **Arkansas, Indiana, Texas, and Wyoming** are notable exceptions. In addition, in a number of states—**Georgia, North Carolina, Pennsylvania, and Virginia** are prime examples—the courts have grafted this requirement onto the statute. Many **Maryland** decisions, while less sweeping, take the same position.

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, state legislatures can strengthen their UDAP statutes by making this explicit.

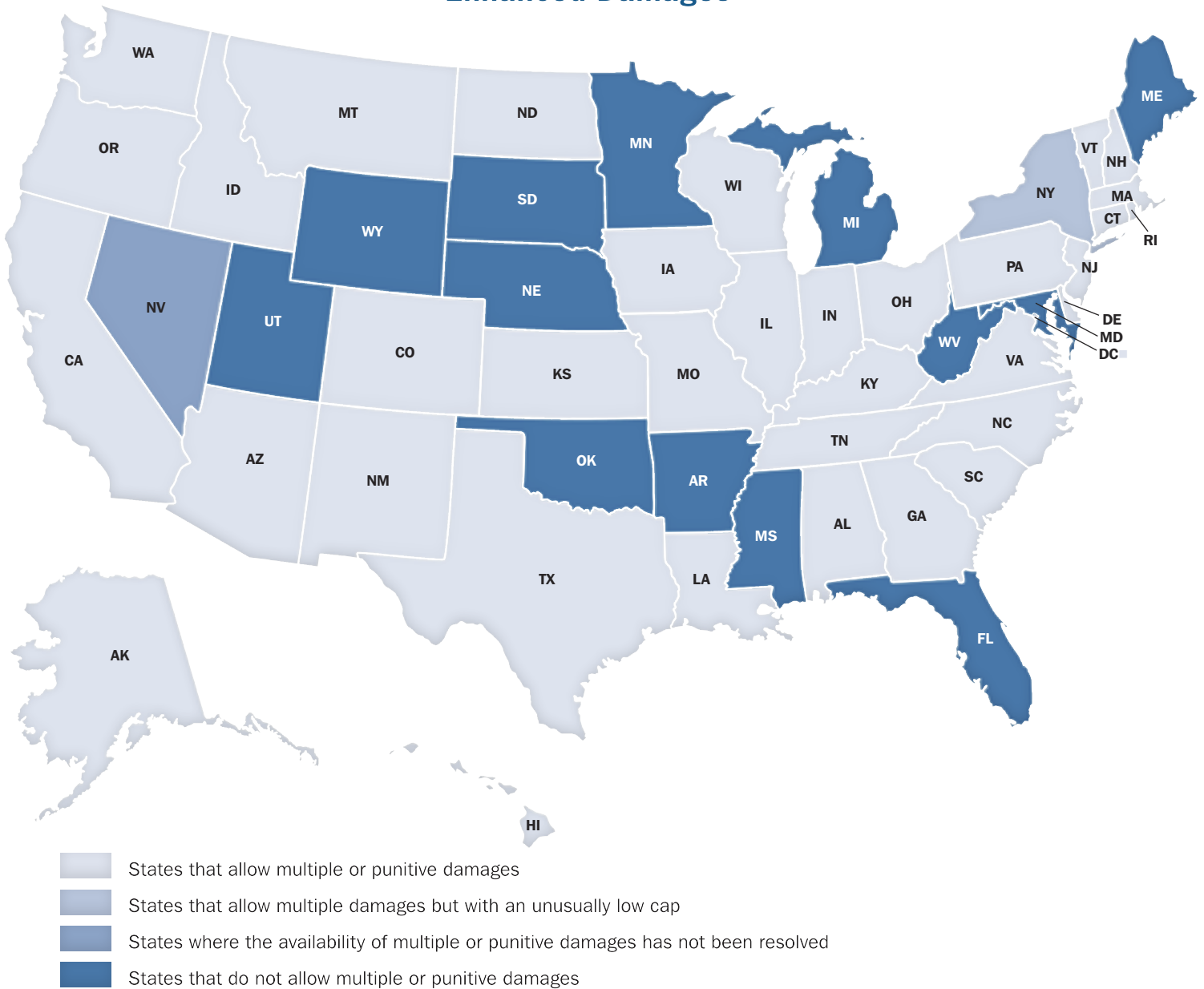
Enhanced damages

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 recover 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,

MAP 14

States That Allow Consumers to Seek Enhanced Damages



Source: ©National Consumer Law Center, 2018.

since consumer claims often involve a relatively small amount of money, a double or treble damages provision helps cover 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.

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 \$1,000 for most violations and at \$10,000 for false advertising). In addition, although the UDAP statutes in **Connecticut, Idaho, Illinois, Kentucky, Missouri, Oregon, and Rhode Island** do not authorize multiple damages, they explicitly authorize punitive damages. One of **California's** two UDAP statutes also authorizes punitive damages. **Kansas's** UDAP statute does not authorize multiple or punitive damages, but allows consumers to seek a civil penalty of up to \$10,000 per violation,³⁵ so serves many of the same purposes as a multiple or punitive damages provision. In **Arizona** and **Delaware**, the UDAP statute is silent about multiple or punitive damages, but the state supreme court has applied general rules of law to hold that consumers can recover punitive damages.³⁶

Iowa and Mississippi: the States with the Weakest Overall Remedies for Consumers

Two states—**Iowa** and **Mississippi**—stand out as providing the weakest remedies for consumers.

Two states—**Iowa** and **Mississippi**—stand out as providing the weakest remedies for consumers. Iowa's UDAP statute formerly ranked at the very bottom, as consumers had no ability to enforce it. Until 2009, a consumer who was cheated by a business in Iowa could not obtain any remedy under the UDAP statute, but had to hope that the Attorney General would pursue the case. In May 2009, Iowa finally gave consumers the right to enforce the statute but it created an extraordinary number of gaps: consumers cannot enforce the statute against insurance companies, a wide variety of lenders, most utility service providers, and people holding real estate licenses, among others. While consumers in Iowa are now much better off than they were when they were completely denied the right to enforce the statute, these enormous gaps still leave them with very weak remedies.

Mississippi also stands out for providing exceptionally weak consumer remedies. Mississippi's UDAP statute requires pre-suit notice, prohibits consumers from joining together in a class action, and does not offer multiple damages. It broadly prohibits unfair and deceptive practices but denies consumers the right to enforce this prohibition, so they have no remedy under the statute unless the defendant's wrongdoing fits within a narrow set of specific prohibitions. 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.

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 should:

- Remove any gaps in consumers' ability to enforce the statute
- Make it clear that the courts can order the business to pay the 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 rules (or by the federal rules if the case is filed in federal court).
- 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.
- Delete any special advance notice provisions and any special requirements about the type of damage a consumer must have suffered.
- Amend the statute to make it clear that courts can presume that consumers relied on material misrepresentations, without requiring individual proof.
- Allow consumers to seek enhanced damages or punitive damages in appropriate cases.

States whose UDAP statutes are already strong in these respects can further improve consumer remedies by:

- Making it clear that consumers can obtain equitable relief, such as an injunction to stop a practice.
- Making attorney fee awards to consumers mandatory, so that if they prevail they are assured of being made whole.
- Adding a provision for a small statutory damages award, such as \$100-\$200, whenever a consumer proves a violation of the UDAP statute.
- 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.
- Making it clear that the heightened requirements of common law fraud and rigid contract law rules are not applicable to UDAP claims.

HAVE STATES IMPROVED OR WEAKENED THEIR UDAP STATUTES SINCE 2009?

How have states changed since NCLC's original report was published in February 2009? Have states retreated from protecting consumers and weakened their UDAP statutes, or have they strengthened them?

Gains and losses for consumers in state legislatures

Six states—**Alaska, Arizona, Delaware, Iowa, North Dakota,** and **Oregon**—significantly improved their UDAP statutes since 2009. On the other hand, **Tennessee's** legislature weakened its statute significantly, and one state, **Arkansas**, adopted both positive and negative amendments.

Iowa's amendment to its UDAP statute in May 2009 made the most significant improvement: the legislature finally amended the statute to allow consumers to enforce it. Before 2009, consumers in Iowa who were cheated by a business could not enforce the statute themselves, but had to hope that the Attorney General would have enough resources to bring suit against the business. Even as amended, Iowa's UDAP statute has major gaps in consumers' ability to enforce it, but it is far better than it was in 2009.

In 2012, **Alaska** narrowed an exemption for regulated industries to provide that the exemption does not apply to any of the over 50 specific unfair and deceptive acts the statute prohibits. Before this amendment, there was a danger that the statute could be interpreted to give a blanket exemption to lenders.

The state legislatures in **Alaska, Arizona, Delaware, Iowa, North Dakota,** and **Oregon** made the greatest improvements to their UDAP statutes.

Arizona significantly strengthened its UDAP statute in 2013 by adding a prohibition of unfair practices. Formerly, the statute had only prohibited deception. The same amendment also gave the attorney general authority to seek a court order that a business disgorge the profits it gained by using an unfair or deceptive practice.

In 2010, **Delaware** amended its laws to give the state Attorney General the authority to adopt rules addressing emerging forms of deception.

North Dakota's legislature made a significant improvement to its UDAP statute by adding a prohibition of unconscionable practices in 2015. Formerly the statute prohibited only deceptive practices, so it gave neither the state attorney general nor individual consumers the right to proceed against a business that used abusive practices but avoided deception.

Oregon amended its statute in 2010 to make it clear that it applies to creditors and to extensions of credit. Prior to that amendment, the statute could not be applied to unfair or deceptive practices by predatory lenders. Oregon also amended the statute to correct

a major weakness, a provision that allowed the court to require a consumer who lost a UDAP case to pay the business's attorney fees even if the case was filed in good faith.

Many states also made more minor improvements to their statutes, for example by adding prohibitions of newly emerging fraudulent tactics.

On the other hand, in 2011, the state legislature in **Tennessee** amended the UDAP statute to make it completely inapplicable to insurance transactions, thereby significantly weakening it. A second set of 2011 amendments further weakened the statute by denying consumers the ability to enforce its broad prohibitions of unfairness and deception.

The state legislatures in **Ohio** and **Tennessee** weakened their UDAP statutes the most.

In 2012, **Ohio** added a burdensome "cure offer" requirement to its UDAP statute. This procedure places consumers at significant risk of being denied treble damages and full attorney fees if they turn down an early low-ball offer to settle the case.

Arkansas amended its statute in 2017 to prohibit defrauded consumers from joining together in a class action and to require a consumer to prove that he or she specifically relied on the unfair or deceptive practice. However, the same set of amendments also repudiated court decisions that had interpreted the statute to create blanket exemptions for creditors and insurers.

Gains and losses for consumers in state courts

Of course, during the past nine years courts have also actively interpreted their state UDAP statutes. Some of these decisions just continued a split within the state about how to interpret the statute, or raised new questions without definitively resolving them. However, some resolved significant issues.

For example, a groundbreaking 2013 **Washington** Supreme Court decision made it clear that the UDAP statute applies to mortgage lending and to collection of mortgage loans by foreclosure.³⁷

The **Rhode Island** Supreme Court issued a major decision in 2014 adopting the FTC's definition of deception, which does not require reliance, and holding that a consumer need only show that the defendant's practice "affected plaintiff's conduct regarding the product."³⁸ On the other hand, the **North Carolina** Supreme Court reached exactly the opposite conclusion in 2013, injecting a requirement to show reliance into a statute that was silent on the subject.³⁹

Ohio's Supreme Court issued two major decisions that went in opposite directions, one holding that the UDAP statute did not apply to mortgage servicers,⁴⁰ and the other holding that it did apply to debt collectors.⁴¹

RECOMMENDATIONS

The UDAP statutes in the states are consumers' bedrock protection against unfair and deceptive practices. However, many of these statutes have significant weaknesses. States, consumers, and the public have a strong interest in preserving and improving these vitally important statutes. States that want to strengthen their protections for consumers should take the following actions.

- **Strengthen their UDAP statute's substantive prohibitions by:**
 - Making sure that the statute includes **broad prohibitions** of deceptive and unfair acts.
 - Removing any provisions that prevent consumers from **enforcing** these broad prohibitions.
 - Making sure that a state agency has the **authority to adopt rules** that specify particular practices as unfair or deceptive.
- **Strengthen their UDAP statute's scope by:**
 - **Narrowing or deleting 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.
 - **Eliminating exemptions** for lenders, other creditors, insurers, and utility companies.
 - Making it clear that the statute applies to **real estate transactions** and to **post-transaction matters** such as abusive collection of consumer debts.
- **Strengthen the state's ability to enforce the statute by:**
 - Deleting any requirement that **knowledge or intent** be proven as an element of a UDAP violation.
 - Increasing the size of the **civil penalty** and making sure that it is applicable per violation.
 - Giving the enforcement agency a full range of pre-suit **investigatory power**.
 - Allowing courts to order a business to **pay the state's attorney fees** and costs when the state prevails in a UDAP case.
 - Providing **adequate funding** for the consumer protection activities of the state agency.
- **Strengthen consumers' access to justice by:**
 - Removing any gaps in consumers' **ability to enforce** the statute.
 - Making it clear that courts can order a business to pay the 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.
 - Removing any restrictions on UDAP **class actions**, so that they are governed by the state's usual rules (or by the federal rules if the case is filed in federal court).
 - Deleting any **special barriers** imposed on consumers before they can invoke a statute's remedies, such as a special advance notice requirement, a requirement that a consumer who has been cheated prove that the business cheats consumers as a general rule, or a rule that denies consumers who have suffered an invasion of privacy or some other non-monetary injury the ability to enforce the statute.

-
- Amending the statute to make it clear that courts can **presume that consumers relied on material misrepresentations**, without requiring individual proof.
 - Allowing consumers to seek **enhanced damages or punitive damages** in appropriate cases.

Even if a UDAP statute is already free from these weaknesses, it can often be improved by:

- Making it clear that consumers can obtain **equitable relief**, such as an injunction to stop a practice.
- Making **attorney fee awards** to consumers mandatory so that if they prevail they are assured of being made whole.
- Adding a provision for a **small statutory damages award** whenever a consumer proves a violation of the UDAP statute.
- Making it clear that consumers can prove a UDAP claim by the normal **preponderance of the evidence** standard.
- Making it clear that the heightened requirements of common law fraud and rigid contract law rules are not applicable to UDAP claims.

ENDNOTES

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, Press Release, “FTC Releases Annual Survey of Consumer Complaints”, Mar. 3, 2017, available at <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints> (documenting that debt collection was top consumer complaint category in 2016, with more than twice the number of complaints as the second-highest category, imposter scams).
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. *Detroit Free Press* “Editorial: Put Teeth Back in Consumer Protection,” May 9, 2009. Copy on file with the author.
7. Ala. Code § 8-19-7(3) exempts any bank or affiliate regulated by a state or federal agency.
8. Fla. Stat. Ann. § 501.212(4) exempts federal and state banks and savings and loan associations.
9. La. Rev. Stat. Ann. § 51:1406 exempts, inter alia, all federally insured or state-licensed financial institutions.
10. The Michigan UDAP statute’s exemption for transactions or conduct specifically authorized under laws administered by a regulatory body, Mich. Comp. Laws Ann. § 445.904(1)(a), has been interpreted by a number of courts to exempt lending. *See, e.g., Molosky v. Washington Mut., Inc.*, 664 F.3d 109, 117-118 (6th Cir. 2011).
11. Neb. Rev. Stat. § 59-1617(1) immunizes conduct if the lender is regulated and the conduct itself is also regulated.
12. N.H. Rev. Stat. § 358-A:3(I) exempts regulated lenders.
13. Ohio’s UDAP statute excludes financial institutions and dealers in intangibles, terms that are defined to include lenders other than payday lenders, mortgage brokers, and nonbank mortgage lenders and their loan officers. Ohio Rev. Code § 1345.01(A), (K).
14. *Chavers v. Fleet Bank*, 844 A.2d 666 (R.I. 2004) (interpreting statute to provide a blanket exclusion of creditors).
15. Va. Code Ann. § 59.1-199 (excluding banks, savings institutions, credit unions, small loan companies, and mortgage lenders, and any aspects of consumer transactions that are regulated by the Federal Consumer Credit Protection Act).
16. Alaska’s UDAP statute contains a chain of exemptions for credit transactions and exceptions to those exemptions. The end result is that the statute is applicable to many unfair and deceptive acts by non-mortgage lenders.
17. 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 liability under the state UDAP upon actors such as creditors.
18. Iowa Code § 714H.4(1)(a)(3), (4), and (k) deny consumers the ability to enforce the UDAP statute against a wide range of lenders and creditors.
19. Me. Rev. Stat. Ann. tit. 9-B, § 244 exempts all state chartered banks and credit unions from the UDAP statute.

20. 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).
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. Wisconsin’s other UDAP statute, Wis. Stat. Ann. § 100.18, has no language that would exclude credit transactions, but applies only to false advertising.
22. *See Jarvis v. South Oak Dodge, Inc.*, 773 N.E.2d 641 (Ill. 2002) (Truth in Lending Act’s assignee liability provision shields assignee from liability for dealer’s affirmative misrepresentations regarding matters on which the Act requires disclosures).
23. *Zekman v. Direct American Marketers, Inc.*, 659 N.E.2d 853 (Ill. 1998).
24. Me. Rev. Stat. Ann. tit. 5, § 208.
25. Arizona, Delaware, Illinois, and West Virginia are examples.
26. *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308 (N.M. 1991).
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); *Tripp v. Jeld-Wen, Inc.*, 112 P.3d 1018, 1026-27 (Mont. 2005).
29. *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 789-790 (Mo. Ct. App. 2016).
30. CAFA (Class Action Fairness Act of 2005), Sec. 2(a).
31. *Compare Stalvey v. Am. Bank Holdings, Inc.*, 2013 WL 6019320 (D.S.C. Nov. 13, 2013) (applicable in federal court) *with Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1336 (11th Cir. 2015) (not applicable in federal court).
32. *See, e.g., Olivares v. PNC Bank*, 2011 WL 4860167 (D. Minn. Oct. 13, 2011) (dismissing claim based on deceptive form letter because bank sent it only to its customers, not to the public at large); *Roers v. Pierce*, 2009 WL 67061 (Minn. Ct. App. Jan. 13, 2009) (unpublished) (dismissing UDAP claim for misrepresenting that real estate sale would include a particular parcel because only one person bought the property and is seeking reimbursement, even though the misrepresentation was disseminated to the general public in marketing materials).
33. Alabama: Ala. Code § 8-19-10(a) (“monetary damage”).
 Alaska: Alaska Stat. § 45.50.531(a) (“suffers an ascertainable loss of money or property”).
 Arkansas: Ark. Code § 4-88-113(f) (“actual financial loss”).
 California: Cal. Bus. & Prof. Code § 17204 (West) (“has suffered injury in fact and has lost money or property”).
 Connecticut: Conn. Gen. Stat. § 42-110g(a) (“suffers an ascertainable loss of money or property”).
 Idaho: Idaho Code Ann. § 48-608(1) (“any ascertainable loss of money or property”).
 Iowa: Iowa Code § 714H.5 (“ascertainable loss of money or property”).
 Kentucky: Ky. Rev. Stat. Ann. § 367.220(1) (West) (“suffers any ascertainable loss of money or property”).
 Louisiana: La. Rev. Stat. Ann. § 51:1409(A) (“suffers any ascertainable loss of money or movable property”).
 Maine: Me. Rev. Stat. tit. 5, § 213(1) (“suffers any loss of money or property”).
 Mississippi: Miss. Code Ann. § 75-24-15(1) (“suffers any ascertainable loss of money or property”).
 Missouri: Mo. Rev. Stat. § 407.025(1) (“suffers an ascertainable loss of money or property”).
 Montana: Mont. Code Ann. § 30-14-133(1) (“suffers any ascertainable loss of money or property”).

New Jersey: N.J. Stat. Ann. 56:8-19 (West) (“suffers any ascertainable loss of moneys or property”).

Oregon: Or. Rev. Stat. § 646.638(1) (“suffers an ascertainable loss of money or property”).

Pennsylvania: 73 Pa. Stat. Ann. § 201-9.2(a) (West) (“suffers any ascertainable loss of money or property”).

Rhode Island: R.I. Gen. Laws § 6-13.1-5.2(a) (“suffers any ascertainable loss of money or property”).

South Carolina: S.C. Code Ann. § 39-5-140(a) (“suffers any ascertainable loss of money or property”).

Tennessee: Tenn. Code Ann. § 47-18-109(a)(1) (“suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value”).

Washington: Wash. Rev. Code § 19.86.090 (“injured in his or her business or property”).

West Virginia: W. Va. Code § 46A-6-106(a) (“suffers ascertainable loss of money or property”).

See also W. Va. Code § 46A-6-106(b) (no award of damages can be made without proof of “an actual out-of-pocket loss that was proximately caused by a violation”; note that this is a restriction only on damages awards, not on the right to bring a UDAP suit).

Wisconsin: Wis. Stat. § 100.18(11)(b)(2) (“pecuniary loss”).

See National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 11.4.2.2 (9th ed. 2016).

34. In Indiana, a special pre-suit notice is required except for deceptive acts done as part of a scheme, artifice, or device with intent to defraud.
35. Kan. Stat. Ann. § 50-636.
36. *Sellinger v. Freeway Motor Home Sales, Inc.*, 521 P.2d 1119 (Ariz. 1974); *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1076-1077 (Del. 1983).
37. *Klem v. Washington Mut. Bank*, 295 P.3d 1179 (Wash. 2013).
38. *Long v. Dell, Inc.*, 93 A.3d 988 (R.I. 2014).
39. *Bumpers v. Cmty. Bank*, 747 S.E.2d 220 (N.C. 2013) (when a UDAP claim stems from an alleged misrepresentation, the plaintiff must show reasonable reliance).
40. *Anderson v. Barclay’s Capital Real Estate, Inc.*, 989 N.E.2d 997 (Ohio 2013).
41. *Taylor v. First Resolution Investment Corp.*, 72 N.E.3d 573 (Ohio 2016).

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 serious 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, and if the civil penalty for initial violations (now just \$2,000) were increased.

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. It is significantly weakened by a blanket exemption for insurers, and by provisions that the state supreme court has interpreted as making the statute inapplicable to real estate transactions. 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, although it has been improved by an amendment clarifying that these exemptions do not immunize a business that commits one of a list of unfair or deceptive acts.

Arizona

Arizona's UDAP statute has significant weaknesses. It does not allow a court to order a seller to reimburse the consumer's attorney fees or award multiple damages. Nor does it allow the attorney general to adopt rules addressing emerging forms of deception. On the positive side, it includes broad prohibitions of both unfair and deceptive practices, and 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 it allowed consumers to recover multiple damages in appropriate cases and to bring class actions. It also has unusually restrictive provisions about the types of losses for which a business can be required to reimburse the consumer. It would 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. Another weakness is that only a consumer who has "lost money or property" can enforce the statute, so consumers who have suffered an intangible injury such as invasion of privacy or who seek injunctive relief to prevent threatened harm are left out. The statute would also be enhanced by increasing the civil penalty for violations, currently just \$2,500, and by giving a state agency authority to adopt rules prohibiting emerging scams. California has a second UDAP statute that also provides useful remedies, but has a more restricted scope and requires a pre-suit notice.

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. Nor does it give a state agency the authority to adopt rules prohibiting emerging forms of unfairness or deception. 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. Yet another weakness is language that courts have interpreted as preventing consumers from joining together in a class action. The civil penalty that the attorney general can seek for initial violations is relatively low (just \$2,000 per violation), and many of the statute's specific prohibitions require proof that the defendant acted knowingly. 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 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, broadening the statute's applicability to insurance transactions, providing that violation of another state or federal consumer protection law is a per se UDAP violation, and allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

Delaware

Delaware's UDAP statute has relatively weak prohibitions and private remedies. It broadly prohibits deceptive acts, but does not prohibit unfair acts. 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. Another weakness is language that could be interpreted as a blanket exemption for utility companies and insurers. On the positive side, it appears to cover deceptive loan and credit practices, and Delaware law

was amended in 2010 to give the attorney general the authority to adopt regulations addressing new forms of deception. While the statute does not provide for multiple damages, the state supreme court has ruled that punitive damages are available.

District of Columbia

The District of Columbia's UDAP statute broadly prohibits 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 (\$1,000 per violation—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. The statute would be strengthened by making it clear that it applies to post-sale acts such as debt collection.

Florida

Florida's UDAP statute broadly prohibits deceptive, unfair, and 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 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, and courts have differed about whether it can be applied to abusive debt collection and other post-sale practices. 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 has an impact on the public. 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, and at least one court has also interpreted the statute as providing a blanket exemption for insurers. Georgia courts have also weakened the statute by denying consumers the right to sue regarding oral misrepresentations.

Hawaii

Hawaii's UDAP statute broadly prohibits 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 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. Another weakness is that, while the statute provides for statutory damages, it limits the total award of statutory damages in a class action to just \$1,000. The statute would also be improved by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

Illinois

The main Illinois UDAP statute includes both broad and specific prohibitions, and allows the attorney general to adopt rules prohibiting emerging forms of deception and unfairness. Its main weakness is that court decisions have created significant gaps in coverage of creditors and credit transactions, making it less useful than it could be to stop predatory lending and mortgage fraud.

Indiana

Indiana's UDAP statute has broad prohibitions of deceptive and unconscionable acts but does not give a state agency the authority to define these practices more specifically. Consumer enforcement is impeded by a pre-suit notice requirement. The statute also provides a blanket exemption for insurance transactions, and denies consumers the right to bring suit for unfair and deceptive acts that occur in real estate transactions. The statute would also be enhanced by specifically providing that a consumer who asserts a good faith but unsuccessful UDAP claim against a business cannot be required to pay the business's attorney fees.

Iowa

The scope and prohibitions of Iowa's UDAP statute are broad, and it provides strong enforcement tools to the state. Iowa was formerly the only state in the nation that did not give consumers the right to go to court under the state UDAP statute. In 2009 it amended the statute to give consumers the right to enforce it, but not against insurance companies, a wide variety of lenders, most utility service providers, real estate licensees, and many others. While Iowa consumers have much better protection now than they did before the amendment, these large gaps make Iowa's remedies for consumers one of the weakest in the nation.

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. While the statute allows consumers to recover a \$10,000 civil penalty for violations, it would be enhanced if consumers could recover multiple damages in appropriate cases. It would also be improved 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 a lack of clarity about its scope. Courts have held the statute applicable only to parties with which the consumer has contracted, a limitation that can make the statute inapplicable to parties such as abusive debt collectors or to wholesalers who launder the titles of rebuilt wrecks so that fraudulent car dealers can sell them without disclosure. Some courts have held that consumers cannot enforce the statute in real estate transactions. There is no provision for multiple damages. The statute would also be enhanced by specifically providing that a consumer who asserts a good faith but unsuccessful UDAP claim against a business cannot be required to pay the business's attorney fees. The statute would also be stronger if it granted rulemaking authority to a state agency and increased the civil penalty for initial violations, currently just \$2,000.

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, and allows a consumer to bring suit only if the consumer has suffered a loss of "money or movable property."

Maine

Maine's UDAP statute has broad prohibitions and reasonably strong consumer remedies. The legislature narrowed the statute's exemptions in 2007, so it now applies broadly to most businesses. State-chartered banks and credit unions are exempt, however. Three other weaknesses are that consumers are required to send the business a notice before filing suit, the statute does not provide for multiple damages, and the statute does not allow a consumer who has been damaged in a way other than a loss of "money or property" to seek relief in the courts.

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 significant 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. The statute would also be improved by

increasing the civil penalty for initial violations, currently just \$1,000, and by clarifying that consumers need not prove reliance as a condition of recovery.

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 statute imposes a special advance notice requirement on consumers. It would also improve the statute if the legislature codified the attorney general's strong rule that violations of other consumer protection statutes are UDAP violations.

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 consumers. Two other weaknesses are that it does not have a multiple damages provision and does not give a state agency the authority to adopt substantive regulations to address emerging forms of unfairness and deception.

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 and its private remedies, although they would be enhanced by a multiple damages provision, would be adequate if consumers could use them. The statute would also be improved by clarifying that it applies to post-sale acts such as unfair debt collection.

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 and a number of other weaknesses, Mississippi's UDAP statute is of little use to consumers.

Missouri

Missouri's UDAP statute broadly prohibits unfair and deceptive acts, and it allows the attorney general to adopt regulations addressing specific practices. The statute is weakened by gaps in the coverage of insurance companies, lenders, and other creditors. The statute would be improved by codifying a court ruling that a consumer who files an unsuccessful case under the statute can be required to pay the business's attorney fees only if the claim was frivolous and vexatious. It would also be improved by increasing the civil penalty amount, which is currently just \$1,000, the lowest in the country, and by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

Montana

Montana's UDAP statute broadly prohibits both deceptive and unfair acts, and it 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 a blanket exemption for insurance companies, ambiguity about its application to utility companies, and a prohibition of class actions. The statute would also be improved by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

Nebraska

The broad prohibitions of unfair and 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, by giving a state agency the authority to adopt rules prohibiting emerging scams, and by increasing the civil penalty for initial violations, currently just \$2,000.

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. Adding a prohibition of unfair acts, and deleting the requirement of a showing of knowledge, or at least defining it in a way consistent with the UDAP statute's consumer protection purposes, would significantly improve the statute. The statute would also be enhanced if consumers could recover multiple damages, such as treble damages, or at

least a modest award of statutory 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 and 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 and other lenders, 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 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, and it 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 professions from its scope, and by clarifying that it covers utility companies and unfair and deceptive insurance claims settlement practices. It would also be improved by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

New Mexico

New Mexico's UDAP statute includes both broad and specific prohibitions, and it 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 not unfair practices, and its prohibition against unconscionable contract terms is 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 \$1,000 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. 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 formerly prohibited only deception, not unfairness. It has been significantly improved by an amendment that expands its prohibitions to include unconscionable practices. 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, but the attorney general has adopted only one rule. 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, and in 2012 it further weakened it by singling out consumer protection claims for a burdensome "cure offer" procedure.

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

A major weakness of Oregon's UDAP statute is that it denies consumers the right to enforce its broad prohibitions of deception and unconscionable tactics. Another weakness is that only a consumer who has suffered a loss of "money or property" has the right to bring suit for a violation of the statute, so a consumer who has suffered an

intangible injury such as an invasion of privacy, or who is seeking a court order to prevent a threatened injury, has no ability to seek relief under the statute. Although the statute currently applies to most businesses, it would be strengthened by deleting an exemption for insurance companies.

Pennsylvania

A strength of Pennsylvania's UDAP statute is its scope, as courts have not created blanket exemptions for specific industries. Another strength is its remedies for consumers, which include multiple damages and attorney fees. On the other hand, some Pennsylvania courts have weakened the statute by imposing burdensome requirements taken from common law fraud cases (such as proof of reliance and intent to defraud) and contract cases (such as prohibiting evidence of oral misrepresentations). Another weakness is that the statute's broad prohibition of unfairness can, if read narrowly, be tied to a specific definition that forbids only a few relatively narrow examples of unfair acts. The attorney general's enforcement remedies would be improved by increasing the low civil penalty (\$1,000—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. It would also be improved by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property."

South Dakota

South Dakota's UDAP statute has unusually narrow prohibitions. Only deceptive acts, not unfair acts, are prohibited, and consumers must prove that the deceptive act was both knowing and intentional. While the statute has strong criminal penalties, the remedies that consumers can invoke are weak: consumers can recover only compensatory damages, not multiple damages or even their attorney fees. Another weakness is the relatively low civil penalty (\$2,000) that the attorney general can seek for violations. 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 and post-sale acts such as debt collection and repossession.

Tennessee

Tennessee's UDAP statute includes both broad and specific prohibitions, but it denies consumers the ability to enforce the broad prohibitions; consumer enforcement is limited solely to specific listed prohibitions. Other weaknesses are the low civil penalty (\$1,000—the lowest in the country) that the attorney general can seek for violations, a prohibition on class actions for damages, a blanket exemption for insurers, 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. The statute would be enhanced by giving a state agency the authority to adopt regulations prohibiting emerging forms of unfairness and deception, and by clarifying that it applies to post-sale acts such as debt collection and repossession.

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. On the other hand, the statute is strong in its broad prohibition of unconscionable acts, its coverage of insurance, utility service, real estate, and post-sale acts such as debt collection. Another strength is that it extends its protections to small businesses. 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. Another weakness is a requirement, found in many of the statute's prohibitions, to show that the defendant's violation was knowing or intentional. The statute's remedies for consumers would be enhanced by authorizing multiple or punitive damages in appropriate cases.

Vermont

Vermont's UDAP statute includes broad prohibitions of both unfair and deceptive acts, and it gives the attorney general the authority to adopt rules prohibiting additional forms of unfairness and deception. It also gives strong remedies to both the attorney general and consumers. 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 insurance companies, utility providers, and almost all consumer lenders. It also creates 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 a complicated public interest test, the failure to give a state agency the authority to adopt regulations prohibiting emerging forms of deception, and the limitation of \$25,000 in additional damages that a court may award to deter future misconduct. Another weakness is the relatively low civil penalty (\$2,000) that the attorney general can seek for violations.

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. It is weakened by a requirement that the consumer send a special pre-suit notice that is not required in other types of cases. The statute would be enhanced by clarification that it applies to debt collection, unfair and deceptive practices by utility companies, real estate transactions, and all forms of consumer lending; by repealing an exemption for sales of insurance; by allowing any consumer who has been damaged to bring suit, whether or not the damage is a loss of "money or property"; and by allowing consumers to recover multiple damages.

Wisconsin

One of Wisconsin's patchy UDAP statutes broadly prohibits unfair trade practices, but consumers can enforce this requirement only if the defendant violated one of the specific rules that the state has adopted. This is a significant limitation even though the state has adopted a strong series of UDAP regulations, as those regulations only address specific industries or practices. In addition, Wisconsin's UDAP statutes prohibit deception only in advertisements and other misrepresentations to the general public. On the positive side, the statutes give consumers relatively strong remedies if the claim falls within one of these unnecessarily narrow substantive prohibitions. The statutes would be enhanced by clarification that they cover unfair lending practices and by deletion of the false advertising statute's exemption for insurance companies.

Wyoming

The prohibitions of unfair and deceptive practices in Wyoming’s UDAP statute may appear broad, but they apply only if the business acted knowingly. The statute does not allow consumers to recover their attorney fees in individual suits, so a consumer who wins a case against a deceptive business 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, allowing any consumer who has been damaged to bring suit, whether or not the damage is a “pecuniary loss,” giving rulemaking authority to a state agency, and allowing consumers to recover multiple damages in appropriate cases.

Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, 2016.

APPENDIX B

RATING CRITERIA

Appendix C (available at <http://www.nclc.org/issues/how-well-do-states-protect-consumers.html>) is a set of state-by-state analyses of the features of state UDAP statutes that this report addresses. For each state, it rates the features that this report addresses as Strong, Mixed, Undecided, or Weak, and it cites the basis for each rating. The rating criteria are set forth below.

The summaries were developed after detailed research into each state's UDAP statute and the decisions interpreting it, and many were reviewed by practitioners in the states. Any errors are the responsibility of the National Consumer Law Center (NCLC) and should be brought to NCLC's attention.

Not all features of the states' statutes fit neatly into our rating system. In borderline cases, we have used our best judgment to rate a particular feature.

General. When a state has conflicting or limited case authority on a question, we rate it as Undecided unless there is some specific indication in the statute that it should be interpreted one way or another. When the state supreme court has ruled, but some federal courts or lower courts are deviating from that ruling, we still consider the supreme court's ruling controlling.

When a statute has a certain feature, but only in a limited or partial way, we rate it as Mixed. For example, some UDAP statutes apply to insurance sales but not insurers' handling of claims, or vice versa.

Section 1, Breadth of substantive prohibitions. Sections 1(a) and 1(b) of the state-by-state rating sheet deal with the breadth of the statute's substantive prohibitions. If the state has a broad general prohibition of unfair or unconscionable practices or of deceptive practices, but does not allow consumers to bring suit under the broad general prohibition, it is rated Mixed in that category, and that limitation is also reflected in Section 3(a), which addresses whether there are major gaps in consumers' ability to enforce the statute. A broad prohibition of deception is also rated Mixed if the deception must be knowing and intentional.

Section 1(c) rates state UDAP statutes on the question whether they give a state agency—usually the attorney general's office—the authority to adopt substantive rules. The state is rated Mixed if the statute provides rulemaking authority but the state agency has rarely or never used it.

Section 2, Scope of the statute. Section 2 of the ratings addresses the scope of the UDAP statute—whether it excludes certain industries. If the statute applies to an industry, but denies consumers the right to bring suit against those entities, it is rated Mixed, and that limitation is also reflected in Section 3(a), which addresses whether there are major gaps in consumers' ability to enforce the statute.

Section 2(a) addresses whether the statute applies to credit transactions and creditors. If it excludes most creditors, it is rated Weak. If it has a less sweeping exclusion it is rated Mixed. It is also rated Mixed if it applies broadly to creditors, but denies consumers the right to enforce the statute against them.

Section 2(b) addresses the applicability of the statute to insurance. If the state allows the statute to be applied to unfair and deceptive practices in sales of insurance, but not to unfair or deceptive claims settlement practices, or vice-versa, it is rated as Mixed. It is also rated Mixed if it applies broadly to insurers, but denies consumers the right to enforce the statute against them.

Section 2(c) addresses the applicability of the statute to utilities. UDAP statutes that explicitly exclude all or most regulated utilities are rated as Weak. In states where regulated utilities are not excluded from the UDAP statute, a public utility commission may still have exclusive jurisdiction to address utility rates. Unless there are decisions taking an unusually broad view of the public utility commission's exclusive jurisdiction, for example by applying it to immunize utilities from liability for unfair or deceptive practices that do not relate to rates, the public utility commission's exclusive jurisdiction over rates will not interfere with a Strong rating. The statute is rated Mixed if it applies broadly to utility companies, but denies consumers the right to enforce the statute against them.

Section 2(d) addresses whether the statute applies to debt collection and other post-sale acts. The rating is based primarily on three types of post-sale activity: debt collection, repossession, and mortgage servicing. If the statute applies to some but not all of these areas, it is rated Mixed. The ratings on this question are complicated by the fact that in some states a number of mortgage servicers may fall into a separate exemption for banks, which is evaluated in Section 2(a).

Section 2(e) addresses whether the UDAP statute applies to real estate transactions. If it applies to real estate transactions, but immunizes licensed real estate agents and brokers from liability even for knowingly false representations, it is rated as Mixed. On the other hand, although a proviso excluding licensed real estate agents and brokers only for unknowing misrepresentations they pass on from others weakens the statute, it will not interfere with a Strong rating. However, such a state should be considered at the bottom of the "Strong" rating. The statute is also rated Mixed if it applies broadly to real estate transactions, but denies consumers the right to enforce the statute in those transactions.

Section 3, Consumer access to justice. Section 3(a) addresses whether there are major gaps in the scope of consumers' ability to enforce the statute. If the statute includes a broad prohibition of unfair or deceptive practices but allows only the state attorney general, not individual consumers, to invoke this prohibition, it is rated Weak. A statute is also rated Weak if it applies to one of the industries listed in Section 2 (credit, insurance, utilities, debt collection, and real estate), but denies consumers the right to bring suit under the statute against members of one of those industries. Gaps such as these are serious weaknesses in UDAP statutes.

Section 3(b) addresses whether the statute or the courts require the consumer to show reliance. There are many variations in how states treat this question. We rate a state Strong if it makes it clear that a showing that a misrepresentation was material—*i.e.* the type of statement that is important to consumers and likely to affect their decisions—is sufficient proof of causation. Issues about the extent to which a showing of reliance is required remain unresolved in many states.

Section 3(c) rates the state on whether it requires consumers to show that a practice impacts the public interest before they can bring suit against a company for unfair or deceptive practices.

Section 3(d) rates the state on whether it requires a consumer to send a pre-suit notice before bringing a claim in court. If a state has two UDAP statutes that are widely used by consumers, and one of them requires pre-suit notice, it is rated Mixed.

Section 3(e) addresses whether the statute allows consumers to recover multiple or punitive damages. If either is allowed, whether due to explicit statutory language or to a state supreme court decision, the state is rated Strong. One state, Kansas, does not allow multiple or punitive damages, but allows consumers to seek a \$10,000 civil penalty, and is also rated Strong.

Section 3(f) addresses whether the statute allows the court to award attorney fees to a consumer who prevails in a UDAP case. The statute is rated Weak if it does not allow for attorney fees to prevailing consumers. It is also rated Weak if it allows the court to order a consumer who loses a UDAP case that was filed in good faith to pay the defendant's attorney fees.

Section 3(g) addresses whether the UDAP statute prohibits class actions. The state is rated Weak if a prohibition of class actions is embedded in the UDAP statute itself. If the UDAP statute does not prohibit class actions, but state courts do not entertain class actions because of restrictions in other law or gaps in court rules, the state is rated Mixed. In those states, while UDAP class actions will not be available in state court, it is likely that federal courts will be able to entertain them. Some UDAP statutes have special rules for class actions that are more restrictive than the rules for other cases. Since these states do not bar class actions, they are still rated Strong, but this is a very marginal rating.

The report also includes an analysis of whether the UDAP statute allows consumers to enforce it only if they have suffered a “loss of money or property” or an equivalent restriction. This issue is not addressed in Appendix C's state-by-state analysis, but the citations can be found in a footnote to the report.

Section 4, Strength of public enforcement authority. Section 4 addresses the remedies available to the state enforcement authority.

Section 4(a) evaluates whether the state enforcement authority must prove that the defendant acted intentionally or knowingly. This rating focuses primarily on whether proof of intent or knowledge is required for deceptive representations or unfair acts. If the statute prohibits concealment of material facts only if the business acts knowingly

or intends that others rely on the concealment, or requires knowledge of certain facts as part of a showing that a business acted unconscionably, but does not otherwise impose an intent or knowledge requirement, it will be rated Strong.

Section 4(b) evaluates whether the state can obtain equitable relief such as an injunction. At present, all state UDAP statutes allow equitable relief.

Section 4(c) rates state UDAP statutes on whether the state enforcement agency can seek restitution for consumers. At present, all states authorize the enforcement agency to seek restitution.

Section 4(d) addresses the civil penalty that can be imposed in a suit brought by the state enforcement authority. The rating is Weak if the penalty is \$2,500 or less, Mixed if it is over \$2,500 but not more than \$5,000, and Strong if it is over \$5,000. (Map 10 breaks the states down in greater detail). Some states provide higher civil penalties if the victim is elderly or disabled, but the rating is based on the generally-applicable civil penalty amount.

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

NCLC®
NATIONAL
CONSUMER
LAW
CENTER®

Advancing Fairness
in the Marketplace for All

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462