

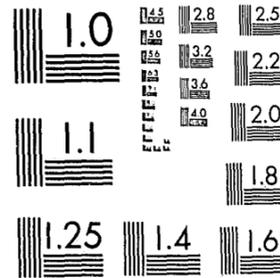


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POLICY BRIEFS

Action Guides for Legislators and Government Executives

Based on research and program development projects of the National Institute of Justice

Consumer Fraud

THE PROBLEM

Consumer fraud is a serious and pervasive phenomenon which continues to plague the American marketplace. Each year millions of consumers are defrauded by unscrupulous vendors, producing an aggregate loss of billions of dollars.¹ The scope and complexity of fraudulent schemes vary widely, ranging from millions of dollars in corporate real estate swindles to the bait-and-switch fraud of a local appliance store.

The harm created by deceptive business practices goes further than the monetary loss of consumers. Consumer fraud affects everyone:

- legitimate businesses suffer losses when sales are diverted to fraudulent firms and they can no longer compete effectively;
- the sale of adulterated products, or shoddy repair or construction jobs exposes consumers to physical harm; and
- unchecked fraudulent activity corrodes the moral values of society, shakes consumer confidence in the marketplace, and undermines uncompensated victims' faith in the judicial system.

Over the past 30 years states have assumed a central role in controlling consumer fraud through the adoption of legislation prohibiting unfair and deceptive trade practices. Although these laws, known as UDAP statutes, proscribe abusive business practices in general, they often fail to provide sufficient guidelines and do not always address the current problems of the marketplace. Comprehensive legislation which builds in disincentives and reduces fraudulent opportunities thus forms the keystone of an effective response to fraud.

CONTENTS OF THIS BRIEF

This Brief discusses statutory provisions for a comprehensive statewide consumer fraud program that can provide a framework for states to increase their efforts in combatting consumer fraud.

- Sections I-III describe the need for enhanced legislation and outline the characteristics of a comprehensive state consumer fraud program.
- Section IV contains a brief discussion of the actions required by legislators and government executives to revise and expand the current body of consumer fraud legislation.
- Section V includes excerpts from state statutes as well as sources of further information and assistance.

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NATIONAL INSTITUTE OF JUSTICE

James L. Underwood, *Acting Director*

Lindsey D. Stellwagen, *Author*

Carol Dorsey, *Government Project Monitor*

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I. INTRODUCTION: The Growth of Consumer Fraud Legislation

Early 20th century consumer fraud legislation was primarily criminal in nature. However, criminal statutes alone failed to curb consumer fraud for several reasons:

- The statutes were narrowly drafted and therefore easily circumvented;
- Criminal prosecutions for white collar offenses were difficult to bring, prove, or win, and in fact were rarely prosecuted at all; and
- The typical criminal sanctions for violations consisted of minor misdemeanor convictions or fines.

Early civil legislative initiatives in the form of regulatory boards and warranty law also failed to help consumers because they did not focus specifically on the consumers' needs.

Federal Initiatives

The passage of the Federal Trade Commission Act (FTCA) in 1914 was one of the first major efforts at the national level to prevent deceptive trade practices. The Federal Trade Commission (FTC) is responsible for enforcement of the Federal Trade Commission Act, which declares the following to be unlawful: (1) unfair or deceptive acts or practices, or (2) unfair methods of competition in or affecting commerce (15 U.S.C. §45). The FTC defines unfair or deceptive acts and practices through a variety of methods including the issuance of orders to cease and desist, the publication of industry guides, and the promulgation of trade regulation rules. Trade regulation rules have the force of law and the FTC may seek civil penalties and an injunction in federal court for rule violations. However, recognizing that it did not have the resources to police all state trade activities, the FTC recommended in 1966 that states enact their own legislation prohibiting deceptive trade practices.² The suggested state legislation was to give investigative and enforcement powers to the state Attorney General or other designated state official and was to embody or combine language from the Federal Trade Commission Act (15 U.S.C. §45) and existing state law.³

In addition, recognizing the need for enhanced consumer fraud responses by legislators and law enforcement, the National Institute of Justice sponsored a comprehensive study of the topic in 1976. It examined existing consumer fraud laws and explored the effectiveness of control mechanisms.⁴ Empirical research was conducted to identify opportunities for intervention.⁵ As a result, the study recommended implementation of various fraud prevention mechanisms and developed action agendas for the private, state, and federal sectors.⁶

State Initiatives

From the 1950s through 1981, all states enacted Unfair and Deceptive Acts and Practices (UDAP) statutes. Two legislative policies are reflected in these statutes:

- **deterrence:** to prevent unfair, deceptive, and unconscionable practices by eliminating monetary incentive for merchants to engage in such activity, and in some states to apply criminal sanctions; and
- **compensation:** to provide strong and effective remedies, both public and private, to assure that consumers will recover any damages caused by abusive acts.

State UDAP legislation meets both of these policy objectives. Because the laws are basically civil rather than criminal, merchants can be held to a higher standard of conduct, and the statutes are more easily enforced than would be possible under the much stricter rules of criminal procedure. Moreover, in a civil action consumers can recover their losses. Finally, in recent years state response has expanded as many states have gone beyond the standard UDAP provisions. These states have enhanced their overall consumer fraud response by adding statutes which define and prohibit certain types of fraud and provide for specific fraud prevention mechanisms.

II. KEY FEATURES

Two basic elements constitute a comprehensive state program to combat consumer fraud: (1) a strong UDAP statute; and (2) specific legislation to curb abuse in targeted industries by developing mechanisms which deter fraud and compensate victimized consumers. The UDAP legislation provides a broad protective framework, while the other approach targets rampant abuse, strengthens UDAP provisions, closes loopholes, and improves the effectiveness of the overall system.

UDAP Statutes

UDAP statutes offer broad and flexible powers to the state and individual consumers by prohibiting numerous deceptive and fraudulent commercial activities and providing the means to address fraud through civil and criminal actions. UDAP statutes currently in effect are presented in a chart in Appendix A. The chart indicates by state the most typical prohibitions, exceptions to the law, remedies (both private and public), and the administrative powers of the enforcement agency. Although the coverage of statutes varies from state to state, some generalizations and comparisons can be made.

Prohibitions: The prohibitions in UDAP statutes cover broad categories of commercial practices. For this reason, the prohibitive language in the statutes is general in nature. While states can establish their own definition, they typically adopt one or more of the following legislative terms—each of which reflects different standards for merchant conduct.

- “False and fraudulent,” as the narrowest term, means the seller knew a claim was false and intended to deceive the buyer.
- “Misleading and deceptive” is a broader concept meaning the practice has the capacity to deceive, so true statements can be deceptive if used to mislead the public.
- The language in section five of the Federal Trade Commission Act prohibiting “unfair or deceptive” acts or practices includes practices which are contrary to public policy although not necessarily deceptive or misleading.
- The definition of “unconscionable” practices, while quite broad, includes an implicit consideration of the particular vulnerabilities of individual consumers. In essence, a practice is unconscionable if the seller is taking an unfair advantage of the consumer’s inability to protect his or her own interest—for example, a seller who induces an illiterate buyer into signing a contract without fully explaining its terms and conditions.

Because these prohibitions lack a precise or even standard definition, many UDAP statutes also itemize specific practices forbidden under law, although most stop short of targeting specific industries, types of transactions, or classes of buyers. In addition, where states prohibit “unfair or deceptive” activity, their UDAP statute will sometimes authorize the use of FTC decisions to define “unfair or deceptive.” Most statutes specify those industries and professions which are exempted from the law.

Agency and Administrative Powers. Typically, UDAP statutes are administered by the State Attorney General, although special agencies or local enforcement mechanisms are sometimes used. To assist enforcement and investigation efforts, specific administrative powers such as rule-making, subpoena powers, and authority for civil investigations may be granted to the enforcing agency.

Private Remedies. Private remedies in a UDAP statute authorize defrauded consumers to sue the seller. As a complementary function to state enforcement efforts, private litigation offers a powerful means for deterring consumer fraud and redressing the wrong done to individual consumers.

- Because consumers are more likely to bring a suit if financial compensation is available, most states have adopted one or more of the following provisions allowing consumers to seek damages from the dishonest merchant:
 - (1) States usually permit consumers to recover their actual losses.
 - (2) As a penalty to dishonest sellers, a number of UDAP statutes authorize damages two or three times the actual loss, or provide a statutorily set minimum amount. These provisions encourage consumers to bring suit even if their actual loss is small.
 - (3) A few states permit punitive damages to be assessed as a deterrent where the seller's conduct is particularly offensive or vicious.
 - (4) To further encourage private suits, many states permit consumers to recover attorney fees and costs.
- To permit recovery by a large number of victims while minimizing individual efforts, several states authorize class action.
- In some states, consumers may also seek an injunction to prohibit the merchant from continuing the deceptive practice.
- Rescission (nullification of a contract) is sometimes authorized as a means to free consumers from deceptive arrangements.
- Finally, in a number of states, the flexibility of enforcement is increased by authorizing the court to make any other orders it finds necessary and proper as a private remedy.

Public Remedies. UDAP statutes offer the state enforcement agency a variety of legal actions which can be brought against dishonest sellers. Public remedies constitute the primary means of UDAP enforcement in almost every state. States typically authorize several different remedies, thus providing enforcement authorities with an arsenal of responses to meet the diversity of consumer fraud.

- All UDAP statutes authorize the enforcing agency to seek an injunction against the offending seller. In addition, most statutes impose fines for the violation of an injunction. The injunction may prohibit the defendant from repeating past conduct, or it may require certain procedures or acts.

- Almost all states authorize restitution because it is the only public remedy which compensates victims. By allowing agencies to seek restitution for consumers, a single court action can be brought to reimburse all of the merchant's victims. In this way, judicial resources are conserved and the case impact is usually greater. The agency can, of course, seek restitution on behalf of a single consumer. Restitution is frequently imposed as a condition of a voluntary compliance agreement in which the offending merchant agrees to stop the activity to avoid a court action.
- Civil penalties are fines which are payable to the state and which can be imposed for each violation of the UDAP statute. The purpose of civil penalties is to provide a financial deterrent. Although penalties successfully generate revenue for the government, they often fail to deter fraud because they are too low and firms view them as nothing more than a cost of doing business.
- Many industries, firms, and professions must obtain state authorization to conduct business. Therefore, a serious deterrent to established businesses is the revocation of licenses, certification, franchises, charters, and other forms of permission to do business within the state. Legitimate firms do not want to risk being put out of business.
- Enforcement agencies are sometimes authorized to seek a court appointed receiver to handle the defendant's assets and to run the defendant's business. Receivership is a useful provision for dealing with marginal operators. If it appears that the defendant is about to conceal assets or leave the state, statutes may authorize a court appointed receiver to control the seller's assets. This procedure ensures that assets remain available to satisfy any future restitution or penalty orders.
- Some states provide criminal fines and/or imprisonment for violation of the UDAP itself and for violation of a court injunction issued under the statute.
- Finally, agencies are often authorized to assess dishonest merchants with court costs or the cost of the fraud investigation. By offsetting the expense of state enforcement, these provisions can encourage effective and aggressive fraud prevention activities.

States may permit the court to enhance public remedies by making any orders necessary to prevent the deceptive practice or grant any appropriate relief.

Amendments to the UDAP

Recently, a few states have begun to review their UDAP statutes and have made revisions to tighten the parameters and close loopholes. While only a minority of jurisdictions have undertaken amendments to strengthen their UDAP statute, the revisions appear to focus on (1) increasing consumer protection by enhancing contract protection and procedure; and (2) addressing commercial concerns by providing sellers' protection. Examples of UDAP amendments appear in Appendix B.

Contract Protection. Because the merchant is usually in a more powerful position than the consumer in a contracting situation, some states have added sections to their UDAP statutes on consumer contracts. These consumer-oriented provisions include the following:

- **Prohibition of confession of judgment:** a seller cannot require a consumer to give up the right to defend against collection suits.

- **Prohibition of waivers:** consumer contracts cannot waive implied warranties, consumers UDAP rights, statutory rights exempting certain property from repossession, and so forth.
- **Limitations on the holder-in-due-course doctrine:** a seller cannot cut off consumer defenses to collection actions by selling consumer indebtedness to a third party.

Procedural Advantages. A few states strengthened their provisions for private actions under the UDAP statute by removing legal obstacles or adding rights. For example, in some states:

- A consumer need not prove he was actually deceived to recover damages under the UDAP statute.
- If the seller is in a regulated industry, state law may require the consumer to exhaust all administrative remedies before bringing suit against the merchant. However, the UDAP statute may authorize the consumer to bring suit directly without first going to the regulatory board.
- When a seller will not pay the judgment, a consumer may have the court appoint a receiver (a disinterested third party) to control the defendant's finances. The receiver will be able to best protect the consumer's right to be paid.

Seller's Protection. One drawback of a strong UDAP law is that it may also penalize legitimate merchants making honest mistakes. To prevent this, some states have revised their UDAP statutes to limit the liability of legitimate businesses. If the merchant can prove that the following exculpatory conditions existed, he may avoid multiple damages and penalties:

- Although the merchant made a good faith effort to prevent the error in question by establishing formal business procedures, a bona fide error was made; or
- Where a state requires the consumer to notify the seller before bringing suit, the seller may show that (1) he received no notice, (2) the seller paid the consumer's loss and expenses, or (3) the consumer unreasonably rejected a settlement offer.

In addition, states sometimes provide further merchant protection by:

- charging the consumer with costs for filing frivolous suits;
- allowing the merchant to recover from a third party who may be liable, such as a dealer against the manufacturer; or
- allowing a seller who is found liable based on promotional materials to sue the third party who provided the materials.

Supplementing the States' UDAP Protection

While theoretically UDAP statutes cover all deceptive activity by general prohibition, states have consistently found a need to enact separate legislation to focus on specific areas of widespread consumer abuse. Although not part of the UDAP statute, these specific statutes are often enforceable under the UDAP statute. There are three major categories of specific legislation:

- **Industry specific statutes** target one commercial sector with a history of fraud, such as automotive repair, or forecast future problem areas, such as energy saving devices.

- **Practice specific statutes** prohibit sales tactics with a high potential for abuse and which are used in a number of industries, such as fire sales.
- **Opportunity scheme statutes** limit situations in which the consumer buys the right to become involved in "get-rich-quick" scams, such as pyramid sales.

The strength of specific statutes results from the combination of two distinct approaches into a single law. Each specific consumer fraud statute should: (1) increase definition to more closely regulate the transaction; and (2) establish a mechanism, or barrier, to prevent the deception or to limit losses if the fraud occurs. These two components of specific legislation are discussed separately in the following two sections. Examples of each approach are provided in Appendix C.

Increased Definition Through Specific Legislation. The first objective of specific legislation is to create a firm, specific standard for assessing the fairness of particular consumer transactions by defining the relationships, rights, and responsibilities of all relevant parties. Specific laws typically increase definition by including the following features:

- Prohibition of specific deceptive acts;
- Definition of the seller's affirmative duties;
- Imposition of additional penalties not specified in the UDAP statute; and
- Definition of excludable transactions.

Because they are highly focused and specific, these laws complement the breadth of the UDAP statute by providing:

- **Specificity concerning industries covered.** Because UDAP statutes often define trade as the sale of goods and services without further specification, questions arise as to UDAP coverage of such areas as credit, insurance, real estate, mobile homes, and leases. In Pennsylvania, for example, extensive litigation was required to determine that a tenant's lease was a sale within the meaning of the statute.⁴ Specific legislation can narrowly address a particular industry, such as landlord-tenant, and provide for enforcement under the UDAP statute.
- **Guidance on prohibited acts.** Because a single piece of legislation cannot define all aspects of commercial dealings, merchants and courts are often uncertain as to whether a particular practice or act is prohibited under the UDAP statute. For instance, a Hawaiian court recently ruled that the mere complexity of an insurance policy does not make it deceptive. In 1979, a Massachusetts court denied an injunction because it decided it was not deceptive for a business to hold a "going-out-of-business sale" at the same location where it had held a "must vacate sale" two years earlier. Specific legislation provides details on particular practices, such as how and when a seller may conduct a "going-out-of-business sale."
- **Ability to target on specific fraud concerns.** Results of an undercover survey conducted by the U.S. Department of Transportation stated that 53% of every dollar spent on auto repairs was wasted.⁷ Because of its generality, UDAP legislation cannot provide the detailed prohibitions, mandated acts, and increased penalties needed to curb the rampant abuse in many specific industries. Specific legislation focuses on one industry or one practice and can precisely regulate the transaction. For example, legislation on auto repairs usually covers disclosures, signs, estimates, parts, invoices, contracts, records, and so forth.

By detailed regulation of the transaction, the statute can enhance consumer protection and ensure that firms compete on an equal basis. In addition, by providing merchants, consumers, prosecutors, and judges with more guidance on which industries are covered and which acts are illegal, this type of legislation provides these additional benefits:

- **Standards of conduct help sellers avoid inadvertent violations.** For example, Ohio's Business Opportunity Law prohibits, with specific exceptions, sellers' activities such as: any representation concerning potential profit or income; use of the phrase "secured investment"; and any representation inconsistent with statute's disclosure requirements. In addition, the law requires sellers to maintain a complete set of books, records, and accounts on every individual transaction for five years.
- **By requiring affirmative duties, the state can prove violations by simply showing that the seller failed to do acts required by the statute.** For example, under Nevada's Auto Repair law it is a misdemeanor for an auto repair shop to present a bill which does not include: owner's authorizing signature; statement of total charges; itemized description of all repair part charges; statement of labor charges; and description of all other charges.
- **The specific penalties prescribed in the statute may deter potential offenders and increase incentives for prosecution.** For example, violation of Connecticut's Home Solicitation Sales law is both a criminal offense and an unfair or deceptive trade practice.
- **The selectivity of the statute allows states to offset the stringency of the legislation through specific, controlled exclusions to the statute.** For example, Florida's Fire and Going-Out-of-Business Sales law exempts persons acting pursuant to court orders, in accordance with duties as public officers, holding a permit issued by a municipality with an ordinance similar to the statute, and licensed auctioneers selling at auction.

However, there are also disadvantages associated with this approach:

- Contract changes must be made by all sellers in the industry;
- Dishonest sellers may find new ways to circumvent the statute; and
- Fly-by-night operators may simply switch scams to an industry not covered in the legislation.

Fraud Prevention Mechanisms in Specific Legislation. The second objective of specific statutes is to establish anti-fraud mechanisms which (1) make it difficult for dishonest merchants to defraud consumers, and (2) limit consumer losses should a fraud occur. Once specific legislation has increased definition to set the state policy by defining deceptive conduct, standards, penalties, and exemptions, the same piece of legislation can also establish fraud prevention mechanisms. These mechanisms increase the effectiveness of specific consumer laws by bolstering protection and offering compensation.

Auto repair fraud offers a case in point. Supplemental statutes targeting auto repair fraud typically address the practice of false charges for replaced parts. The statute may prohibit this practice, require accurate invoices to be prepared, and make other provisions to increase definition of the prohibited conduct. However, this is a rampant form of fraud, and increased definition alone is unlikely to halt it. In response, some statutes added a fraud prevention mechanism requiring the shop to return the replaced parts to the customer.

Another example of the successful development and use of prevention mechanisms is the Civil Aeronautics Board's (CAB) handling of extensive fraud in the air charter flight industry. To prevent companies from cancelling flights without returning large deposits to consumers, the CAB now requires deposits to be placed in an escrow account with a bank. When the flight is completed the carrier is paid; if the flight is cancelled the bank returns the deposits directly to the passengers. Both the CAB and the FTC have concluded that the regulations are effective.⁵ In both of these instances, the problem in essence defined the solution. False charges for replaced parts were remedied by allowing consumers to "inspect the merchandise." Air charter carriers were prevented from abusing consumer prepayments by restricting the carriers' access to such payments.

The mechanisms used to effect additional protection reflect legislative efforts to meet public demands for increased compensation for victims, more stringent protection from fraudulent activity, and more encouragement of healthy competition. Three general classes of fraud prevention mechanisms are presented below.

(1) Some mechanisms provide available funds should the consumer be victimized.

- **Escrow Accounts** restrict the seller's receipt of payment until he has performed non-fraudulently. If the seller fails to perform, or does so unsatisfactorily, the escrow agent pays all or part of the money back to the consumer. This approach is useful for long-term contracts or other advance payments.
- **Bonding** provides a compensation fund for consumers. It also shifts the burden of evaluating the seller from the consumer to the bonding company. Bonding requirements do, however, raise the cost of doing business for all merchants in the industry.
- **Industry Pools**, recently adopted in Hawaii for travel agencies and agents, require members of an industry to make contributions to a special monetary fund. This pool serves as "insurance" to consumers defrauded by industry members, thereby encouraging self-policing within the industry.

(2) Other mechanisms prevent fraud by educating the consumer,* or serve to limit losses.

- **Mandatory disclosures** require merchants to provide written information or disclosures before a sale is finalized. This can raise consumer awareness and alert the consumer to fraudulent claims by the seller. Post-sale disclosures give consumers documentation of their rights and remedies should a dispute arise after the transaction.
- **Plain English** requires consumer contract provisions to be written in a simple and readily understood manner. This prevents sellers from using highly technical language to disguise unfair provisions. A New York statute mandates plain English for residential leases and for all consumer agreements.⁸
- **Cooling-off periods** allow a consumer a few days to cancel a door-to-door sales contract. A few states extend this to telephone solicitations.

*Note: some state UDAP legislation mandates a consumer education program operated by the enforcing agency or by a separate agency established to represent the interests of the consumer.

- **Affirmation** requires a consumer to affirm a contract in writing within a given period in order for it to be legally binding. This gives the consumer time to "cool-off" and examine disclosures. Moreover, the seller must produce the affirmation in order to enforce the contract, eliminating the problem of sellers who claim not to have received a cancellation notice.
 - **Pro-rata return** reduces fraudulent profits and minimizes consumer losses by requiring the seller to make refunds under certain circumstances. This approach is effective where prepayments and long-term contracts are involved.
 - **Limited duration** establishes a maximum contract period, and thereby limits a consumer's financial obligation for future service contracts. It is effective in industries where most firms require "life-time," or other long-term membership. Moreover, limiting such contracts to a shorter term imposes no burden on the merchant.
 - **Limited prepayments** limits the amount a consumer must pay in advance, thereby reducing losses if the seller fails to deliver the goods or services. However, this provision can be burdensome to sellers since they may lose the assurance that the consumer will complete the transaction and may need to obtain financing if their own suppliers require prepayment.
- (3) Finally, there are mechanisms designed to prevent fraudulent merchants from competing with legitimate businesses.
- **Unsubstantiated Ads** prohibitions require companies to possess substantiating materials at the time an advertising claim is made. This approach can be effective and relatively easy to enforce.
 - **Registration** permits easy location of firms by enforcement authorities, but does not restrict entry into the industry or impose an undue burden on legitimate business. Some states have successfully coupled registration with criminal sanctions for failure to obtain a registration certificate.
 - **Licensing** of industries offers many of the same benefits as registration, the major difference being that exams, education, or training may be required to obtain a license. While these requirements serve to ensure competence, they raise the cost of doing business and can also be used to limit numbers in the industry.
 - **Bans** are employed only where consumer abuse is rampant and legitimate activity is infrequent. The activity having a high potential for consumer abuse is totally forbidden, or prohibited with one or two narrow exceptions.

Table I presents examples of how some states have used mechanisms to enhance legislation targeting particular types of fraud. Each example includes a statutory citation and a brief description of the mechanism.

Table I
EXAMPLES OF FRAUD TYPES AS RELATED TO SPECIFIC MECHANISMS (sample state statutes)

MECHANISM	LEGISLATIVE SUBJECT	SAMPLE STATE STATUTE	BRIEF DESCRIPTION OF STATE STATUTE
Escrow Account	Business Opportunities	OHIO REV. CODE §§1334.01-1334.15, 1334.99	Down payment in excess of 20% of the initial payment must be placed in escrow until delivery. Percentage of payments for burial rights to be deposited in a trust fund. In lieu of bonding requirements, subdivider may place 50% of sales receipts in escrow.
	Cemeteries	FLA. STAT. §§559.30-559.525	
	Recreation and Retirement Use Land Sales	KY. REV. STAT. §§367.470-367.486	
Bonding Requirements	Buying Clubs	S.D. COMPILED LAWS ANN. §§37-26-1 to 37-26-11	Clubs accepting prepayments must file cash or surety bond in sum of \$100,000. Seller must post bond, or establish escrow account, in the amount of \$50,000. Seller must obtain a license and post a \$1,000 bond prior to sale. Developer must post a bond equal to 5% of previous year's gross income, but at least \$25,000. In order to receive deposits, agency must have posted \$5,000 bond. Dealers must maintain \$5,000 bond. Studio not yet in operation, but selling contracts, must maintain \$10,000 bond.
	Business Opportunity Sales	VA. CODE §§59.1-202 to 59.1-269	
	Closing Out Sales	R.I. GEN. LAWS §§6-14-1 to 6-14-15	
	Invention Development Service Contracts	FLA. STAT. §501.136	
	Rental Referral Agencies	LA. REV. STAT. ANN. §§51:1700-51:1703	
	Solar Energy Dev. Dealers	Pub. Act. No. 124, 1980 Haw. Sess. Laws	
Health Studio Services	FLA. STAT. §501.012		
Industry Pool	Travel Agencies	HAW. REV. STAT. §469J	Every travel agency to pay biennial fee of \$50 and every sales representative to pay biennial fee of \$25 to the travel agency recovery fund for the benefit of aggrieved consumers.
Mandatory Disclosures	Automobile Repair Work	CONN. GEN. STAT. §§14-65(b) to 14-65(d)	Repair shop must display 24" x 26" sign with mandated language describing consumer's rights. Statute contains extensive mandatory disclosures, warnings, notices, and contract terms. Mandatory cancellation clause in bold-faced type, in a color other than that used for the contract, and in the same language as the contract. Section presents mandatory pre-contract disclosures, contract terms, and contract disclosures. Contains a twelve point disclosure statement.
	Business Opportunities	OHIO REV. CODE §§1334.01-1334.15, 1334.99	
	Home Solicitation	DEL. CODE tit. 6, §§4401-4405	
	Invention Development Service Contracts Time Sharing Plans	FLA. STAT. §501.136 Pub. Act. No. 180, 1980 Haw. Sess. Laws	
Plain English	Electronic Fund Transfers	15 U.S.C. §1603c(a)	An electronic fund transfer contract must contain disclosures which are readily understandable. All consumer agreements must be written in a clear and coherent manner.
	Written Consumer Contracts	N.Y. GEN. OBLIG. LAW §5-702	
Itemized Price Disclosures	Business Opportunities	OHIO REV. CODE §§1334.01-1334.15, 1334.99	All initial payments must be disclosed; also, refund terms, and details of buy-back arrangement. Statement of what the costs will be. Requires complete disclosure in the contract of payments, financing, charges, and other fees. Seller to disclose cost of device, accessories, and installation, and any unrelated incentives designed to promote sales.
	Funeral	ALASKA STAT. §45.45.120	
	Home Improvement Solar Energy Devices	MICH. COMP. LAWS §§445.1101-445.1431 Pub. Act. No. 177, Haw. Sess. Laws (to be codified in HAW. REV. STAT. §481B)	
Cooling-Off Period	Residence Sales	ILL. REV. STAT. Ch. 121-1/2 §262B	Where seller solicits consumer at residence and sale price is in excess of \$25, consumer may cancel the sales contract within 3 full business days.
Affirmation	Correspondence Schools	38 U.S.C. §1786(b)	Enrollment contracts must be affirmed no sooner than 10 days after signed for federal veteran benefits eligibility.
Pro-Rata Returns	Health Studio Services	FLA. STAT. §501.012	Under enumerated conditions consumer is entitled to a refund for unused term of the contract (formula provided). If a buyer dies or is disabled, or seller relocates 25 miles or more, then buyer is entitled to a refund proportionate to the remaining term of the contract.
	Prepaid Entertainment Contract	OHIO REV. CODE §§1345.41-1345.50	

Table I (continued)

MECHANISM	LEGISLATIVE SUBJECT	SAMPLE STATE STATUTE	BRIEF DESCRIPTION OF STATE STATUTE
Limited Contract Duration	Health Spas	GA. CODE §106.1203	No health spa contract shall be valid which charges or obligates the consumer for a period in excess of 36 months.
	Cooperative Purchases (Consumer)	IND. CODE §24-5-0.5-9	It is unlawful to offer such a contract that is to be effective for more than five years.
Limited Advance Payments	Prepaid Entertainment Contract	OHIO REV. CODE §§1345.41-1345.50	Prior to the time facilities are available for use of consumer, maximum payment is \$50 or 10% of the total price, whichever is less.
Ad Substantiation	Energy Savings Claim	WIS. STAT. §100.21	Prohibits claims made without reasonable and currently accepted scientific basis when the claim is made.
	Insulation	MINN. STAT. §§325.984-325.989	Prohibits ads for which there exists no reasonable substantiation at the time the claim is made.
Registration and Licensing	Motor Vehicle Service and Repair	MICH. COMP. LAWS §§257.1301-257.1340	Repair facilities to register, post bond, and employ a certified mechanic in each category of repair it provides (8 categories). Must register. Successfully regulated. ⁵
	Electronic and Appliance Repair	CAL. BUS. & PROF. CODE §§9800-9874	Must register and post substantial bond.
	Transient Sellers	ME. REV. STAT. tit. 32., §§4681-4689	Every solicitor must register annually.
	Subscription Sales of Printed Material	KY. REV. STAT. §§367.510-367.540	
Bans	Endless Chains	S.D. COMPILED LAWS ANN. §37-24-6(14)	It is unlawful to use a plan for distribution of property or services whereby participant pays to join endless chain.
	Solicitation by Law Enforcement Officers	ME. REV. STAT. tit. 25., §3701-3704	No solicitation to benefit law enforcement officers, agency, or association. Exceptions: general promotion of public events, and political campaigns.
	Budget Planning	FLA. STAT. §§559.10-559.13	It is unlawful to provide distribution services to a debtor. Exception: Attorneys.
	Junk Telephone Calls	ALASKA STAT. §45.50.472	It is unlawful to make a recorded advertisement call without prior written consent of the person called.

III. ALTERNATIVE APPROACHES

State legislators and executives are accelerating their efforts to find new and innovative ways to combat fraud in the marketplace. These initiatives complement expanded UDAP legislation by adding "bite" to the state's consumer fraud program. Some of these new efforts serve to ally consumers and prosecutors against dishonest businesses, and have proven to be very effective. In states with strong consumer fraud enforcement agencies these techniques have been successfully combined to form a comprehensive program to control fraud.

Increasing Consumer Access

- **Consumer Representation on Regulatory Boards.** A number of states have begun to require a substantial consumer membership for certain regulatory boards. This movement is an attempt to break up industry dominated boards, which may be motivated only by self-interest.
- **Ombudsmen.** A few states have adopted the Scandinavian approach of mediation, by establishing public advocates or statewide ombudsmen.

Enhancing Program Responses

- **Consumer Education Programs.** A number of enforcing authorities maintain fine education programs. Services range from handbooks, pamphlets, and films, to media releases, seminars, and weekly spotlights.
- **Mediation Projects.** Many State Attorneys General or local prosecutors run excellent civil mediation programs. The majority of these programs have a high success rate in reaching a settlement between merchants and consumers.⁹ A few states have increased the effectiveness of their efforts by computerizing complaints on a statewide basis, which allows them to identify possible subjects for prosecution.
- **Consumer Fraud Units.** These units deter fraud by criminal prosecution of high impact cases. Prosecution coupled with media attention effectively deters mainstream fraud, although it is somewhat less effective with fly-by-night operations.¹⁰
- **Investigative Programs.** Across the country highly successful investigative programs have been introduced. Usually these are undercover surveys conducted with "control" goods to ferret out unethical repair shops. Another approach involves the use of neutral inspectors to re-examine repair assessments or work completed. These methods are enhanced by industry participation.¹¹

IV. AGENDA FOR ACTION

The rationale for investing state resources in the strengthening of consumer fraud responses is obvious: fraud losses have risen to intolerable proportions. State agencies continue to report record level numbers of consumer complaints; the public has become generally mistrustful of commercial transactions; businesses are "turning-in" unethical competitors; and professional associations are "cleaning-house" to avoid media attention and public disparagement.

An effectively devised consumer fraud program must cover (1) curbing rampant abuse, (2) facilitating state enforcement, and (3) encouraging private enforcement. Thoughtful consideration is needed to mesh these three strategies into a single system. Periodic reassessment is also needed: while some frauds are perennial, new frauds appear every day.

Needs Assessment

Initial planning depends on correctly defining the consumer fraud problem, reviewing existing legislative remedies, and examining both informal and formal enforcement mechanisms currently operating to combat the problem.

Identify the consumer fraud problem. While certain frauds are common to all states, others spring up only under certain economic and social conditions. For example, the prevalent abuse schemes such as feeder cattle fraud will occur only in an agricultural state while vacation home frauds will be found in a state with an active tourist industry. Thus, the first step in improving the response to consumer fraud is to identify exactly where the problem areas exist. This information can be obtained in a variety of ways:

- **A uniform reporting system** can be instituted to collect and aggregate data from all state agencies. For example, some states such as Massachusetts keep statewide computerized records on all complaints coming through mediation programs. While computerization is expensive, and will require significant coordination efforts to institute standardized forms and recording procedures, the benefits are substantial. Statewide tracking of fraud allows the enforcing agency to uncover the fly-by-night firms which move often to avoid detection. The tracking system also allows officials to build a stronger case by consolidating numerous complaints against a single vendor.
- **Citizen input** can also identify consumer fraud problems. In Ohio, the Attorney General participates in the Ohio Consumer Protection Coalition. Representatives from every consumer group and interested prosecutors meet informally every two months to exchange information on consumer problems. At the request of the Attorney General's Office, the Coalition also helps to set up public hearings at various locations around the state. The Attorney General's Office will then conduct the hearings to investigate particular consumer problems in connection with its rule-making power.
- **Activity reports** from the State Attorney General or other enforcing agency are often required under UDAP statutes. For example, in Indiana the Consumer Protection Division of the Attorney General is required to make annual reports to the Governor and biennial reports to the General Assembly. These reports can be useful in identifying the scope of existing problems and the emergence of new fraud schemes.

Review existing statutes. Once the problem has been identified, it is necessary to analyze existing laws pertaining to consumer fraud, including the state UDAP statute and other specific statutes in order to:

- Determine whether the deceptive activity is within the purview of the statutes.
- Determine whether the practice or industry is specifically excluded from the UDAP statute and other related laws.
- Evaluate whether or not the existing statutes provide sufficient penalties, clear definitions of prohibited acts, and specific, feasible remedies for consumers and enforcing authorities.

Examine enforcement procedures. In conjunction with this legislation review, enforcement procedures should also be examined. Where the legislative review indicates that current state law provides an adequate response, it is possible that increased consumer fraud protection must be sought through means other than legislative amendments. Alternatives which should be examined include:

- improved enforcement strategies, such as pursuit of high impact cases;
- industry involvement on voluntary regulatory panels;⁵
- active use of media publicity;
- organization within the community to apply pressure on deceptive firms and to educate consumers as to their rights; and
- increasing coordination between city, county, and state enforcement efforts.

New Legislation

If the statutory analysis reveals that current laws will not effectively curb the abuse, additional specific legislation may be required. Enhancement of the UDAP statute, promulgation of supplemental industry-specific legislation, or creation of fraud prevention mechanisms should all be considered to determine which will be effective and impose the least possible burden on the marketplace. Among the key considerations in developing new statutes are the following:

- What are the relative burdens on merchants and consumers?
- Will there be administrative costs and, if so, who will bear them?
- Is the approach susceptible to abuse by the consumer?
- How is this method related to other anti-fraud efforts?
- Is this approach narrow in focus, or will it cover a number of different transactions?⁶

In developing new legislation it is often useful to collect and evaluate information on other states' statutes and pilot programs. If the fraudulent activity is local in nature, neighboring states with similar conditions may provide the most relevant help. Included in the appendices to this report are several examples of innovative consumer fraud statutes. In addition, Table 1 lists several consumer protection mechanisms and provides the statutory citation for each.

It is also important to note that existing statutes should be reviewed from time to time to re-evaluate their relevancy. Statutes which are no longer useful or needed should be repealed.

As with all legislative programs, in the final analysis it is the appropriation of funds which will determine the ultimate success of the strategy. Financing enforcement agencies may be expensive, but the initial funding can be a sound investment: aggressive enforcement can be cost effective. For example, in Texas, for each dollar spent on the Attorney General's consumer protection budget, the office recovered four dollars for the benefit of the state or its consumers.¹² To ensure that the state enforcement agency can carry out its legislative mandate, it is essential that the state match the agency resources with the scope of activity required in its statutes.

Developing Consensus and Support

Industry opposition to consumer fraud legislation is most likely to arise when the proposed statute affects honest and dishonest merchants alike. However, most industries realize that fraudulent activity harms legitimate businesses as well as consumers, and may thus offer support on their own initiative in areas of widespread abuse. Active participation of industry is important and should be encouraged during the needs assessment and legislative drafting stages.

Industry involvement has also been highly advantageous in a number of consumer fraud programs, where the businesses themselves assumed major responsibilities in executing and carrying out fraud prevention activities. For example, in Philadelphia, the automotive repair industry formed an Automotive Technical Assistance Panel (AUTOTAP), which provides an inspection service for consumers with repair complaints. Cases are referred to AUTOTAP by the small claims court clerk. Many repair agencies have agreed to honor AUTOTAP findings and the AUTOTAP affidavit of inspection is admissible in a subsequent small claims proceeding if the consumer is unable to obtain satisfaction from the original repair shop.⁵ Many similar programs across the country have also experienced considerable success with this form of industry support.

State government must also seek the involvement and support of private consumer groups. Active consumer groups often include consumer affairs foundations, consumer protection councils, consumer advocacy programs, legal service agencies, and consumer activist groups. Because these groups often process a substantial number of consumer complaints and are familiar with the fraudulent activities occurring within the state, their experience and expertise can provide valuable input for proposed legislation, and their educational efforts can help develop support within the community.

V. SOURCES FOR FURTHER INFORMATION AND ASSISTANCE

Provided in the Appendix are selections of state consumer fraud statutes exemplifying various approaches discussed in this Brief.

The following written reports, referenced in the text of this Brief, are available from the sources noted in each citation. All documents available from the National Criminal Justice Reference Service (NCJRS) can be obtained by writing to the appropriate program at: Box 6000, Rockville, Maryland 20850.

1. Rothschild, Donald P., and Throne, Bruce C. "Criminal Consumer Fraud: A Victim-Oriented Analysis." *Michigan Law Review* 74 (March 1976): 661-707. (Available from NCJRS Loan Program, Accession Number: 09900.00.035462.)
2. Council of State Governments. "Unfair Trade Practices and Consumer Protection Law - Revision." In *1970 Suggested State Legislation* (Vol. XXIX). Lexington, Kentucky: The Council of State Governments, 1970.
3. U.S. Federal Trade Commission. "FTC Urges State to Enact 'Unfair Trade Practices and Consumer Protection Law'," FTC News Release, Wednesday, August 13, 1969.
4. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Consumer Fraud: An analysis of impact and opportunities for intervention. Survey of consumer fraud law," by J.A. Sheldon and G.J. Zweibel. Washington, D.C.: American Institutes for Research, September 1977. (Available from NCJRS Microfiche or Loan Program, Accession Number: 09900.00.043733, Stock Order Number: 027-000-00672-8; or Superintendent of Documents, GPO-Washington, Washington, D.C. 20402.)
5. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Consumer Fraud: An analysis of impact and opportunities for intervention. Consumer fraud intervention strategies," by J.A. Sheldon and G.J. Zweibel. Washington, D.C.: American Institutes for Research, June 1978. (Available from NCJRS Microfiche or Loan Program, Accession Number: 09900.00.052675, Stock Order Number: AIR-59000-6178-T; or American Institutes for Research, 1055 Thomas Jefferson Street, N.W., Washington, D.C. 20007.)
6. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Consumer Fraud: An Empirical Perspective. Summary Report," by J.G. Shubert, R.E. Krug, and A.M. Rose. Washington, D.C.: American Institutes for Research, November 1978. (Available from NCJRS Microfiche or Loan Program, Accession Number: 09900.00.052676, Stock Order Number: 027-000-00824-1, AIR-59000-11/78; or American Institutes for Research, 1055 Thomas Jefferson Street, N.W., Washington, D.C. 20007.)
7. Iowa Department of Justice, Office of the Attorney General. "1979 Annual Statistics and Report: Consumer Protection Division." Des Moines, Iowa: Consumer Protection Division, 1979. (Available from Consumer Protection Division, Hoover Building, Des Moines, Iowa 50319.)

8. O'Connor, William J. "Plain English." *The Business Lawyer* 34 (April 1979): 1453-1458.
9. U.S. Department of Health, Education and Welfare. "Consumer Complaint Handling in America: Final Report," by Technical Assistance Research Programs, Inc. Washington, D.C.: U.S. Department of Consumer Affairs, 1980. (Available from U.S. Office of Consumer Affairs, RE: TARP Study, HEW-626 Reporters Building, S.W., Washington, D.C. 20201.)
10. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "An Exemplary Project: Connecticut Economic Crime Unit," by D. Whitcomb, L. Frisina, and R. Spangenberg. Washington, D.C.: Government Printing Office, September 1979. (Available from NCJRS Microfiche or Loan Program, Accession Number: 09900.00.060332, Stock Order Number 027-000-00830-5; or Superintendent of Documents, GPO-Washington, Washington, D.C. 20402.)
11. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Exemplary Project Validation Report. Project Candidates: King County (Seattle) Fraud Division of the District Attorney's Office and San Diego County Fraud Division of the District Attorney's Office," by Abt Associates Inc. Washington, D.C.: Government Printing Office, January 1975.
12. Office of the Attorney General of Texas. "Consumer Protection and Antitrust Division Activities Report, 1979." Austin, Texas: Consumer Protection and Antitrust Division, 1979.
13. U.S. Federal Trade Commission. "State Legislation to Combat Unfair Trade Practices," FTC Fact Sheet, Revised February 11, 1980. (Available from NCJRS Microfiche or Loan Program, Accession Number 09900.00.052673, Stock Order Number AIR 5900-TR-12/77.)
14. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Consumer Fraud: An analysis of impact and opportunities for intervention. Technical Report: Phase I," by J.G. Shubert, A.M. Rose, G.J. Zweibel, and D.J. Klaus. Washington, D.C.: American Institutes for Research, December 1977. (Available from NCJRS Microfiche or Loan Program, Accession Number 09900.00.052674.)
15. U.S. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. "Consumer Fraud: An analysis of impact and opportunities for intervention. Technical Report: Phase II," by J.G. Shubert, R.E. Krug, and A.M. Rose. Washington, D.C.: American Institutes for Research, June 1978.
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17. Braden, Sandra S. "Ohio's Newest Consumer Protection: The Prepaid Entertainment Contract." *Akron Law Review* 10 (Spring 1977): 731-747. (Available from NCJRS Loan Program, Accession Number: 09900.00.047060; or University Microfilms, 300 North Zeeb Road, Ann Arbor, Michigan 48106.)
18. Clarey, Robert L. "The Prosecution of Consumer Fraud—New York's New Approach." *Criminal Law Bulletin* 14 (May-June 1978): 197-202.
19. Curry, Michael. "1979 Amendments to the Deceptive Trade Practice—Consumer Protection Act." *Baylor Law Review* 32 (Winter 1980): 51-87. (Available from NCJRS Loan Program, Accession Number: 09900.00.064633.)
20. Kirschner, Nancy M. "Criminal Consumer Fraud: Must the Goals of Deterrence and Compensation Be Mutually Exclusive?" *American Journal of Criminal Law* 7 (November 1979): 355-383. (Available from NCJRS Loan Program, Accession Number: 09900.00.047459.)
21. Wells, Guddy. "What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977." *Baylor Law Review* 29 (Summer 1977): 525-548.

The following individuals may be contacted for further information and advice on development of a comprehensive statewide consumer fraud program:

- Ms. Barbara Gregg
Executive Director
Montgomery County Consumer Affairs Office
611 Rockville Pike
Rockville, MD 20852
(301) 279-1776
- Robert J. Hughes, Attorney
Office of Federal-State Consumer Relations
Federal Trade Commission
Washington, D.C. 20580
(202) 523-3630
- Library Staff
Committee on Suggested State Legislation
Ironworks Pike
Lexington, Kentucky 40578
(606) 252-2291
- Ms. Marsha Muske
Supervisor of Complaint Unit
Office of the Ohio Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
(614) 466-4986
- Ms. Clair Villano
Executive Director
Metropolitan Denver District Attorneys Consumer Office
625 South Broadway
Denver, Colorado 80209
(303) 777-3872

APPENDIX

- A. State UDAP Statute Characteristics Chart
- B. Examples of State UDAP Amendments
 - Contract Protection
 - Procedural Advantages
 - Seller's Protection
- C. Examples of Specific Legislation
 - Increased Definition
 - Fraud Prevention Mechanisms

A. STATE UDAP STATUTE CHARACTERISTICS CHART
(all numbers in thousands of dollars)

	ALA	ALAS	ARIZ	ARK	CALIF	CALIF	COL	CONN	DEL	DC	FLA	GA	HAW	IDAHO	ILL	IND	IOWA	KAN	KY	LA	MAINE	MD	MASS	MICH	MINN	MISS	
PROHIBITIONS																											
False, fraudulent																											
Misleading, deceptive	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Unfair, deceptive acts	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Unconscionable	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Itemized practices	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
EXCEPTIONS																											
Publishers, printers	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Regulated, allowed by law	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
PRIVATE REMEDIES																											
Damages			a		b																						
Multiple damages	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Punitive damages																											
Statutory damages	.1	2											1	5			2						.025	.25			
Attorney's fees	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Rescission	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Injunction	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Class Action	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
PUBLIC REMEDIES																											
Cease and desist injunction	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Cease and desist violation	25	25	10	10	6	10	25	1	5	25	10	10	15	10	25	5	10	10	5	5	10	5	5	5	5	5	
Criminal																											
Civil Penalty		5	5	10	2.5	2	1	2	10	50	2	2											25	25	5		
Restitution	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Receiver	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
License revocation	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Costs	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
ADMINISTRATIVE POWERS																											
Rulemaking	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Subpoena	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Civil investigative demand	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Administrative hearing	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	
AGENCY																											
Attorney General	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Local enforcement	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Special agency	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*

SOURCE: This chart, which appeared in the Survey of Consumer Fraud Law¹, was updated based on state statutes made available during July 1980-January 1981, except for the Alabama statute which was passed in April 1981.

KEY	
†	= Conduct hearings in conjunction with agency's power to issue cease and desist orders
‡	= Conduct hearings in aid of any investigation or inquiry
*	= Conduct public hearings
#	= Local enforcement agencies to assist the attorney general

EXPLANATORY NOTES FOR UDAP CHARACTERISTICS CHART

(1) CIV. CODE §1750 (2) BUS. & PROF. CODE §§321,17200,17500

^aThe right of an individual to bring an action under the UDAP statute is inferred by decision of the Supreme Court of Arizona, In Banc. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974).¹²

^bPrivate and class actions are available under CAL. BUS. & PROF. CODE §§321, 17200, and 17500 (the latter sections provide for damages, punitive damages, and rescission by court decision: *United Farm Workers of America, AFL-CIO v. Superior Court*, 47 Cal. App. 3d 334, 120 Cal. Rptr. 904 [1975]); CAL CODE §1750; and under other California laws, such as the *Consumer Legal Remedies Act*, and the *Song-Beverly Consumer Warranty Act, Id.*, §1791; fraudulent practices are a basis for rescission and damages in CIV. CODE §§1572, 1689, and 1710.¹²

^cFirst violation of the title subjects defendant to a maximum civil penalty of \$300 for each violation; defendant repeating the same violation is subject to fines in the amount of \$500.

A. STATE UDAP STATUTE CHARACTERISTICS CHART (continued)
(all numbers in thousands of dollars)

	MO	MONT	NEB	NEV	NH	NJ	NM	NY	N-CAR	N-DAK	OHIO	OKLA	ORE	PA	RI	S-CAR	S-DAK	TENN	TEXAS	UTAH	VT	VA	WASH	W.VA	WIS	WYO	
PROHIBITIONS																											
False, fraudulent	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Misleading, deceptive	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Unfair, deceptive acts	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Unconscionable	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Itemized practices	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
EXCEPTIONS																											
Publishers, printers	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Regulated, allowed by law	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
PRIVATE REMEDIES																											
Damages	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Multiple damages	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Punitive damages	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Statutory damages	.2			.1				.05			.2	F	.1	.2						.1	.1	.2					
Attorney's fees	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Rescission	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Injunction	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Class Action	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
PUBLIC REMEDIES																											
Cease and desist injunction	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Cease and desist violation	5	10	5	10	25			5	5	10	25	5	10	15	5	1	10	10	5	25	10	5	10	5	10	5	
Criminal																											
Civil Penalty	.5	2	2.5	10	d	5	.5	5	25	25	1	5	2	2	10	1	2	5									
Restitution	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Receiver	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
License revocation	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Costs	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Other	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
ADMINISTRATIVE POWERS																											
Rulemaking	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Subpoena	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Civil investigative demand	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Administrative hearing	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	†	
AGENCY																											
Attorney General	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Local enforcement	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Special agency	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*

EXPLANATORY NOTES (continued)

^dFirst violation of the act subjects defendant to a maximum civil penalty of \$2000, penalty for second and subsequent violations is \$5000.

^eN.Y. EXEC. LAW §63(12) prohibits the use of deception and unconscionable contract provisions; N.Y. GEN. BUS. LAW §349 prohibits the use of deceptive acts and practices; both statutes contain provision for restitution. Violation of the false advertising statute, N.Y. GEN. BUS. LAW §350, subjects defendant to civil penalties.¹²

^fA civil penalty not to exceed \$2000, recoverable only in an individual action, can be awarded if an act or practice is found to be unconscionable.

^gOnce a court has determined that a violation has occurred, the Attorney General may send a copy of the final judgment to the state agency that licenses or certified the defendant. The agency must investigate whether or not to revoke or suspend the defendant's license or permit.

^hRestitution is authorized for violation of the false advertising statute, by §100.18(11)(d); and the right of an individual to bring an action for violation of an injunction issued under that statute is authorized by §100.18 (11)(b)(2). For violation of any general or special order issued under the UDAP statute, both private actions and restitution are available, by §§100.20(5) and 100.20(6).¹² The violation of any special order or rule subjects defendant to civil penalties of \$100-10,000 for §100.20 and \$25-200 for §100.18.

B. Examples of State UDAP Amendments

Contract Protection

VT. STAT. ANN. tit. 9, §2456. Confession of judgment.

Any agreement of a consumer in a contract that a power of attorney is given to confess judgment, or an assignment of wages is given, or any agreement of similar effect, is void and of no force and effect on any party.

ALASKA STAT. §45.50.542. Waiver.

A waiver by a consumer of the provisions of §§471-501 of this chapter is contrary to public policy and is unenforceable and void. (§7 ch 53 SLA 1974)

ALASKA STAT. §45.50.541. Nonnegotiability of consumer paper.

(a) If a contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, the note, instrument or evidence of indebtedness shall have printed on its face the words "consumer paper," and the note, instrument or evidence of indebtedness with the words "consumer paper" printed on it is not a negotiable instrument within the meaning of Uniform Commercial Code (AS 45.05).

(b) Notwithstanding the absence of such a notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. An agreement to the contrary has no effect in limiting the rights of a consumer.

(c) The assignee's liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. (§2 ch 246 SLA 1970)

Procedural Advantages

MD. COM. LAW CODE ANN. §13-302. Deception or damage unnecessary.

Any practice prohibited by this title is a violation of this title, whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice. (An. Code 1957, art. 83, §20D; 1975, ch. 49, §3.)

MASS GEN. LAWS ch. 93A, §9 (6) (Administrative Remedies.)

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

TEX. BUS. & COM. CODE ANN. tit. 2, §17.59. Post Judgment Relief

(a) If a money judgment entered under this subchapter is unsatisfied 30 days after it becomes final and if the prevailing party has made a good faith attempt to obtain satisfaction of the judgment, the following presumptions exist with respect to the party against whom the judgment was entered:

(1) that the defendant is insolvent or in danger of becoming insolvent; and

(2) that the defendant's property is in danger of being lost, removed, or otherwise exempted from collection on the judgment; and

(3) that the prevailing party will be materially injured unless a receiver is appointed over the defendant's business; and

(4) that there is no adequate remedy other than receivership available to the prevailing party.

(b) Subject to the provisions of Subsection (a) of this section, a prevailing party may move that the defendant show cause why a receiver should not be appointed. Upon adequate notice and hearing, the court shall appoint a receiver over the defendant's business unless the defendant proves that all of the presumptions set forth in Subsection (a) of this section are not applicable.

(c) The order appointing a receiver must clearly state whether the receiver will have general power to manage and operate the defendant's business or have power to manage only a defendant's finances. The order shall limit the duration of the receivership to such time as the judgment or judgments awarded under this subchapter are paid in full. Where there are judgments against a defendant which have been awarded to more than one plaintiff, the court shall have discretion to take any action necessary to efficiently operate a receivership in order to accomplish the purpose of collecting the judgments.

Seller's Protection

OHIO REV. CODE ANN. §1345.11(A) (Bona Fide Error.)

In any case arising under Chapter 1345 of the Revised Code, if a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed against the supplier under Division (D) of Section 1345.07 of the Revised Code, no party shall be awarded attorney's fees, and monetary recovery shall not exceed the amount of actual damages resulting from the violation.

MASS. GEN. LAWS. ch. 93A, §9(3) (Demand Letter.)

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for

relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2). The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except

that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

TEX. BUS. & COM. CODE ANN. tit. 2, §17-50 (c). (Consumer to Pay.)

(c) On a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

TEX. BUS. & COM. CODE ANN. tit. 2, §17.55A. Indemnity.

A person against whom an action has been brought under this subchapter may seek contribution or indemnity from one who, under the statute law or at common law, may have liability for the damaging event of which the consumer complains. A person seeking indemnity as provided by this section may recover all sums that he is required to pay as a result of the action, his attorney's fees reasonable in relation to the amount of work performed in maintaining his action for indemnity, and his costs.

TEX. BUS. & COM. CODE ANN. tit. 2, §17.55. Promotional Material.

If damages of civil penalties are assessed against the seller of goods or services for advertisements or promotional material in a suit filed under Section 17.47, 17.48, or 17.50, of this subchapter, the seller of the goods or services has a cause of action against a third party for the amount of damages or civil penalties assessed against the seller plus attorneys' fees on a showing that:

- (1) the seller received the advertisements or promotional material from the third party;
- (2) the seller's only action with regard to the advertisements or promotional material was to disseminate the material; and
- (3) the seller has ceased disseminating the material.

C. Examples of Specific Legislation

Increased Definition

DEL. CODE tit. 6, §4404. Home Solicitation Sales Act (excerpt).
The provisions of §2513 (b) (2) of Title 6 of the Delaware Code notwithstanding, in connection with any door-to-door sale, it is unlawful practice within the meaning of §2513 of Title 6 of the Delaware Code for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language; e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold-face type of a minimum size of 10 points, a statement in substantially the following form:

'YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.'

Beginning one year after the effective date of this section, such statement shall be printed in an ink of a conspicuous color than that used for the rest of the contract and/or receipt.

Fraud Prevention Mechanisms

FLA. STAT. §501.012. Contracts for health studio services.

(1) The Legislature finds and declares that there exist in connection with a substantial number of contracts for health studio services certain practices and business and financing methods which have worked undue financial hardship upon some of the citizens of our state, and that existing legal remedies are inadequate to correct existing problems in the industry. The Legislature finds and declares that the health studio industry has a significant impact upon the economy and well-being of the people of the state and that the provisions of this section regulating health studio contracts are necessary for the public welfare.

(2) For purposes of this section, the following terms shall have the following meanings, unless the context requires otherwise:

(a) "Health studio" means and includes any person, firm, corporation, organization, club, or association engaged in the sale of instruction, training, or assistance in a program of physical exercise which may include the use of a sauna, whirlpool bath, weight lifting room, massage, steam room, or other exercising machine or device. The term also includes any person, firm, corporation, organization, or association engaged in the sale of the right or privilege to use exercise equipment or facilities, such as a sauna, whirlpool bath, weight lifting room, massage, steam room, or other exercising machine or device. "Health studio" does not include bona fide nonprofit organizations which have been granted tax exempt status by the Internal Revenue Service, including but not limited to, the Young Men's Christian Association, Young Women's Christian Association, or other similar organizations, whose functions as health studios are only incidental to their overall functions and purposes.

(b) "Health studio services" means and includes services, privileges, or rights offered for sale or provided by a "health studio."

(3) Every contract for the sale of health studio services shall contain the following, contractual provisions to the contrary notwithstanding:

(a) Provision for the penalty-free cancellation of the contract within 3 days, exclusive of holidays and weekends, of its making, upon the mailing or delivery of written notice to the health studio, and refund upon such notice of all moneys paid under the contract, except that the health studio may retain an amount computed by dividing the number of complete days in the contract's term or, if appropriate, the number of occasions health studio services are to be rendered, into the total contract price and multiplying the result by the number of complete days that have passed since the contract's making or, if appropriate, by the number of occasions that health studio services have been rendered.

(b) Provision for the cancellation of the contract if the health studio goes out of business and fails to provide facilities within 5 miles or moves its facilities more than 5 miles from the location designated in such contract, upon written notice by the buyer, with refund upon such notice of funds paid or accepted in payment of the contract or in an amount computed by dividing the contract price by the number of weeks of the contract's term and multiplying the result by the number of weeks remaining in the contract's term.

(c) Provision for the cancellation of the contract if the buyer dies or becomes totally and permanently disabled during the membership term following the date of such contract, with refund of funds paid or excepted in payment of the contract in an amount computed by dividing the contract price by the number of weeks of the contract's term and multiplying the result by the number of weeks remaining in the contract's term. The contract may require a buyer or the buyer's estate seeking relief under this subsection to provide reasonable proof of total and permanent disability or death.

(d) Provision that the contract shall not be for a period in excess of 36 months, but may be renewable at the end of each 36-month period of time.

(4) Upon entering into a contract for health studio services, the buyer shall be provided with a written contract, which shall include the name, address, and primary place of business of the health studio. Prior to entering into any such contract, the health studio shall also provide the buyer with a current copy of any rules and regulations applicable to the buyer's use of the health studio.

(5) The provisions of this section shall not apply to any contracts for health studio services entered into before the effective date of this act, or to the subsequent renewals of said contracts.

(6)(a) Every health studio which sells contracts for health studio services to be rendered at a planned health studio or a health studio under construction shall maintain a bond issued by a surety company admitted to do business in the state. The principal sum of the bond shall be \$10,000.

Other Compensation Resources

(b) The bond required by paragraph (a) shall be in favor of the state for the benefit of any person injured as a result of a violation of this section. The aggregate liability of the surety to all persons for all breaches of the conditions of the bonds provided herein shall in no event exceed the amount of the bond.

(c) In lieu of maintaining the bond required in paragraph (a), the health studio may furnish to the Department of Agriculture and Consumer Services a certified copy of its financial statement, letter of credit from any foreign or domestic bank, or any other documentation establishing sufficient financial responsibility in at least the amount of the bond required under paragraph (a) as will enable the health studio to satisfy the possible claims against the

bond allowed by paragraph (b). In the event the health studio is controlled by, under common control with, or controls other corporations, and such other corporations agree in writing to satisfy the claims against a bond allowed by paragraph (b), then the financial responsibility of such other corporations shall be considered in determining compliance of this section.

(7) The amendments to this section by chapter 78-419, Laws of Florida, shall not apply to any contracts for health studio services entered into before July 1, 1978, or to subsequent renewals of such contracts.

History.—s. 1, ch. 77-432 §1, 2, ch. 78-419.

Pro-rata return

Pro-rata return

Limited Contract Duration

Bonding

About the National Institute of Justice

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James L. Underwood
Acting Director

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