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## All We are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions

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# All We Are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions

Michael Flynn\* and Karen Slater\*\*

## I. Introduction

Some believe that the legacy of the 1960's can be summed up in the mantra "sex, drugs, and rock n' roll." Yet the 1960's was also a time of heightened awareness of consumer rights.<sup>1</sup> Energized by Ralph Nader's crusade against automobile manufacturers, state legislatures began to enact legal protections for consumers.<sup>2</sup> This era has been appropriately dubbed the "heyday of consumerism."<sup>3</sup> Specifically, states enacted Unfair and Deceptive Trade Practice ("UDAP") statutes.<sup>4</sup> These UDAP statutes either specifically borrowed the language of the 1938 Wheeler-Lea Amendments to the Federal Trade Commission Act ("FTCA")<sup>5</sup> or copied the provisions

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<sup>1</sup> See Michael C. Gilleran & L. Seth Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 A.B.A. J. 58, 58 (May 1986).

<sup>2</sup> <http://www.votnader.org/biography.html> (last visited May 1, 2003).

<sup>3</sup> J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 356 (1992); see also Wayne E. Green, *Lawyers Give Deceptive Trade Statutes New Day in Court*, WALL ST. J., Jan. 24, 1990, at B1.

<sup>4</sup> NAT'L CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 41 (5th ed. 2001).

<sup>5</sup> Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)).

of the Uniform Deceptive Trade Practices Act.<sup>6</sup> All of these “borrowed” or “copied” state laws made unfair and deceptive trade acts or practices illegal.<sup>7</sup>

The primary purpose of these state “little FTC acts” was to protect “the public - that vast multitude which includes the ignorant, the unthinking and the credulous.”<sup>8</sup> However, unlike the FTCA, state UDAP statutes provide for and encourage direct consumer redress by granting consumers a private right of action.<sup>9</sup> Businesses could no longer depend on the scarcity of federal government resources or the lack of political will to shield them from consumers seeking redress in the courts.<sup>10</sup> Consequently, state UDAP statutes became a vital tool for the protection of consumer rights.<sup>11</sup>

The effect of these “little FTC acts,” however, was not limited to protecting consumers. The UDAP statutes were not only designed to deter unfair and deceptive trade practices by businesses against consumers, but also to protect legitimate business from losing customers to unlawful business practices.<sup>12</sup> For example, when either a consumer or a business purchases “a stamp re-use it kit” for \$19.95, which contains only an eraser and a tube of glue, both the consumer and the business should have rights under a state UDAP statute. Any consumer or business that purchases the kit for use may be equally cheated by the ploy. By prohibiting unfair and deceptive trade practices, state legislatures sought to protect both consumers and legitimate business, as well as to encourage fair competition among businesses.<sup>13</sup> This three-fold statutory purpose is grounded in the Federal Trade Commission’s (“FTC”) original charge to prohibit

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<sup>6</sup> Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1628 (1983) [hereinafter *Toward Greater Equality*]; see also UNIF. DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 273, 273-80 & 318-21 (1999).

<sup>7</sup> 17 AM. JUR. 2D *Consumer and Borrower Protection* § 280 (2002).

<sup>8</sup> *Charles of the Ritz v. Fed. Trade Comm'n*, 143 F. 2d 676, 679 (2d Cir. 1944).

<sup>9</sup> Arizona and Iowa are the only states that do not grant a private right of action.

<sup>10</sup> Franke & Ballam, *supra* note 3, at 356-57.

<sup>11</sup> *Id.*

<sup>12</sup> *Toward Greater Equality*, *supra* note 6, at 1624.

<sup>13</sup> Gilleran & Stadfeld, *supra* note 1, at 58.

unfair competition.<sup>14</sup>

This statutory scheme produced results. The 1960's consumer protection movement is credited with creating a more educated consumer. This "educated" consumer is more cautious of the "too good to be true" deal, is more willing to assert legal rights, and yet is also somewhat resigned to the occasional rip-off.<sup>15</sup> Rather than complying with consumer laws, many businesses have met the "educated" consumer challenge by becoming more cunning, subtler, and more innovative in using the marketplace for unlawful gain.<sup>16</sup>

As businesses got better at disguising their unfair and deceptive trade practices, a new sort of consumer emerged.<sup>17</sup> This new consumer includes small business owners, the sole proprietors, and entrepreneurs.<sup>18</sup>

A typical commercial transaction today greatly differs from the traditional notion of an arm's length bargain between two knowledgeable, experienced, and comparably sized business entities.<sup>19</sup> Large corporations make up only a small fraction of the total number of businesses.<sup>20</sup> Today the typical business owner may not be the distinguished looking middle-aged man who works in a three-piece, gray, pinstriped suit from behind his mahogany desk in a penthouse office.<sup>21</sup> Rather, today's typical business owner may be Charlotte, the twenty-two year-old university graduate who runs Surfnet.com from her computer work station in her rental apartment.<sup>22</sup> Small businesses, spurred on by the growth of the

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<sup>14</sup> See Franke & Ballam, *supra* note 3, at 355.

<sup>15</sup> See Morton J. Horwitz, *The Historical Foundation of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

<sup>16</sup> NAT'L CONSUMER LAW CENTER, *supra* note 4, at 4.8.1. See *In re Nat'l Housewares, Inc.*, 90 F.T.C. 512 (1977); see also *In re Holland Furnace Co.*, 55 F.T.C. 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961).

<sup>17</sup> See Roger E. Schechter, *The Death of the Gullible Consumer: Towards A More Sensitive Definition of Deception at the FTC*, 1989 U. ILL. L. R. 571 (1989).

<sup>18</sup> See *id.* at 583.

<sup>19</sup> See *Toward Greater Equality*, *supra* note 6, at 1627.

<sup>20</sup> *Id.* at 1628.

<sup>21</sup> *Id.* (indicating that in 1977, 97% of business had sales of less than \$1,000,000).

<sup>22</sup> *Id.* at 1629 (stating that small businesses "are typically run by inexperienced entrepreneurs who may be little more sophisticated than individuals in the consumer marketplace").

Internet, are “revolutionizing the business of business.”<sup>23</sup>

Today, the bright line that once separated consumers from businesses is not so clear. The consumer in the context of consumer protection laws is now not only the traditional consumer who purchases goods or services for personal use, but also includes the small business owner and entrepreneur who purchases goods and services for commercial use. With this blurring of the line between consumers and businesses, consumer laws that police the marketplace need to be re-examined.<sup>24</sup>

The purpose of this article is to examine the ability of one business entity to sue another business entity using state UDAP statutes. Part II of this article will dissect the fundamental provisions and prohibitions of state UDAP statutes. Part III will compare, contrast, and discuss how various state UDAP statutes treat a UDAP claim by one business against another business. The article will conclude by supplying an answer to the question of whether the 1960's-based UDAP statutes are capable of protecting both consumers and businesses.

## II. The Anatomy of UDAP Statutes

The UDAP statutes of forty-eight states provide a private right of action for unfair or deceptive trade practices.<sup>25</sup> These little FTC acts rely on the federal courts' and the FTC's interpretation of what constitutes an unfair or a deceptive trade practice.<sup>26</sup>

The federal statute defining deceptive trade practices is

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<sup>23</sup> U.S. SMALL BUSINESS ADMINISTRATION, SMALL BUSINESS EXPANSIONS IN ELECTRONIC COMMERCE 2 (June 2000), available at [http://www.sba.gov/advo/stats/e\\_comm2.pdf](http://www.sba.gov/advo/stats/e_comm2.pdf).

<sup>24</sup> See, e.g., FED. TRADE COMM'N, FIGHTING CONSUMER FRAUD: NEW TOOLS OF THE TRADE (Apr. 1998), at <http://www.ftc.gov/reports/fraud97/index.html> (showing an example of recent FTC efforts to address the “new” consumer and reevaluate the reach of existing consumer protection laws).

<sup>25</sup> Arizona and Iowa are the only states that do not provide for a private right of action.

<sup>26</sup> See 15 U.S.C. § 45 (2000) (containing only a broad and general definition in section (n)). Deception constitutes a broader definition than fraud, thus, anything that could be considered fraudulent behavior could also be considered deceptive. Unfairness is not necessarily required for an act to be found deceptive. The two elements operate independently. Unfairness is generally found when practices take advantage of consumers. See The Federal Trade Commission Act Amendments of 1994, § 9, 15 U.S.C. § 45(n) (defining the current FTC standard for an act that constitutes “unfairness”).

expansive.<sup>27</sup> This broad definition of an unlawful practice is expanded even further by federal court rulings that proof of intent, negligence, fraud, or actual deception is not required to establish a deceptive trade practice.<sup>28</sup> The FTC's current standard for determining a deceptive trade practice is that the act or practice must be likely to deceive or mislead consumers acting reasonably under the circumstances.<sup>29</sup> The FTC standard, unlike the federal court standard, limits the protection afforded consumers to those who have acted reasonably.<sup>30</sup>

Many federal courts also agree that any business practice that offends established public policy and is immoral, unethical, oppressive, unscrupulous, or causes substantial injury is an unfair trade practice.<sup>31</sup> Federal courts have further noted that the reason for such a broad definition is to ensure that the courts can react to the endless creativity of those engaged in unfair trade practices.<sup>32</sup> Finally, the federal courts, just as in the case of deceptive trade practices, do not require proof of intent, negligence, or fraud to prove an unfair trade practice claim.<sup>33</sup>

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<sup>27</sup> 15 U.S.C. § 45(n).

<sup>28</sup> Fed. Trade Comm'n v. Amy Travel Serv. Inc., 875 F.2d 564, 574 (7th Cir. 1989) (holding that intent is not required even for monetary redress); *see also* Orkin Exterminating Co. v. Fed. Trade Comm'n, 849 F.2d 1354, 1368 (11th Cir. 1988) (noting that "deceptiveness is often not a component of the unfairness inquiry"), *cert. denied*, 488 U.S. 1041 (1989).

<sup>29</sup> *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984); *see also* Letter by Chairman James C. Miller to Honorable John Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

<sup>30</sup> *Id.*

<sup>31</sup> Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

<sup>32</sup> *Id.* at 240.

<sup>33</sup> *See id.*; *Amy Travel Serv.*, 875 F.2d at 564 (holding that intent is not required, even for monetary redress); *see also* *Orkin Exterminating*, 849 F.2d at 1368. Regardless of the circuit, across the board there are readings that intent is not a necessary component of deception. UDAP liability may be found when a deceptive act results from negligence. *See, e.g.*, *Grove v. Huffman*, 634 N.E.2d 1184, 1188 (Ill. App. Ct. 1994); *Brandon v. Winnett*, No. 01A01-9411-CH00529, 1995 WL 444385, at \*16 (Tenn. Ct. App. July 28, 1995) (holding that negligent misrepresentation constitutes a UDAP violation); *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 198 (Ill. 1992) (concluding that the standard for the UDAP states that fraud is not required, but instead, there only need be proof that a practice has the tendency to deceive).

The FTC's 1994 Reauthorization Act codifies the current FTC definition for unfair trade practices.<sup>34</sup> Specifically, the FTCA now states that an unfair trade practice must be an act or practice that causes or is likely to cause substantial injury, which cannot be reasonably avoided and is not outweighed by the countervailing benefits of the act or practice.<sup>35</sup> This statutory provision goes on to state that the FTC may consider, but not exclusively rely on, a public policy argument to establish an unfair trade practice.<sup>36</sup> Again, even though the FTC standard for unfairness is more restrictive than the federal court standard, proof of intent, negligence, or fraud is not required to establish an unfair trade practice.<sup>37</sup>

The broad federal court and FTC definitions' incorporation of unfair and deceptive trade practices into state UDAP statutes invites victims of unlawful business practices to use the UDAP private right of action to redress these wrongs.<sup>38</sup> The provisions providing for a prevailing party's recovery of attorneys fees and costs are also a significant incentive under the UDAP.<sup>39</sup> Essentially, this fees and costs provision provides funding for private unfair or deceptive trade practice lawsuits.<sup>40</sup> Absent this kind of fee-shifting statutory provision, state UDAP statutes would not be privately enforced as frequently.<sup>41</sup> Although many state UDAP statutes contain idiosyncratic statutory provisions concerning the entitlement and amount of attorney fees and costs awardable to a prevailing party, the attractiveness of this kind of fee-shifting provision is not compromised.<sup>42</sup>

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<sup>34</sup> Federal Trade Commission Act Amendments of 1994, § 9, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (1994) (codified at 15 U.S.C. § 45(n) (2000)); *see also*, 1994 U.S.C.C.A.N. 1787-88 (reprint of the Senate hearings on the Act).

<sup>35</sup> 15 U.S.C. § 45(n) (2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Amy Travel Serv.*, 875 F.2d at 575 (holding that intent is not required, even for monetary redress); *see also Orkin Exterminating Co.*, 849 F.2d at 1368 (noting that "deceptiveness is often not a component of the unfairness inquiry").

<sup>38</sup> *Gilleran & Stadfeld*, *supra* note 1, at 62.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Toward Greater Equality*, *supra* note 6, at 1628.

<sup>42</sup> *See generally* Debra E. Wax, *Award of Attorneys' Fees in Actions Under State Deceptive Trade Practice and Consumer Protections Acts*, 35 A.L.R. 4th 12 (1985) (providing an overview of the wide number of cases in various states

At first blush, there appears to be no reason why businesses should not be able to take advantage of the prohibitions and remedies afforded by state UDAP statutes. If businesses may use state UDAP statutes, then the incentives in these statutes should apply to business victims as well. A business's private right of action under a state UDAP statute would provide protection for business owners – in particular, small business owners.<sup>43</sup>

### III. The Business Plaintiff in State UDAP Lawsuits

Whether a business can sue another business under a state UDAP statute hinges on the standing provisions of the various state statutes.<sup>44</sup> Of the forty-eight states that provide for a UDAP private right of action, all define “who can sue” as either “a person” or “a consumer” who is injured by an unfair or deceptive trade practice.<sup>45</sup> At this point, the ease of broadly grouping states according to their UDAP statutory provisions and case precedent ends. Whether a business can sue another business for a UDAP violation completely depends on how the state statute defines “a person” or “a consumer” entitled to sue under the statute, and the state's courts' interpretation of the UDAP provision. The remainder of this section will attempt to group and sub-group all forty-eight states.

A group of fourteen states limits who can sue to a person or a consumer who purchases or leases goods for personal, family, or household use.<sup>46</sup> Under these types of statutes, a business entity is

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regarding attorneys fees and costs under deceptive trade or consumer protection statutes).

<sup>43</sup> Green, *supra* note 3, at B1.

<sup>44</sup> See Edward X. Clinton, Jr., *Business Standing Under the Illinois Consumer Fraud Act: An Attempt to Resolve the Confusion*, 17 N. ILL. U.L. REV. 71, 71 (1996) (discussing a business's standing under the Illinois statute).

<sup>45</sup> See, e.g., ALASKA STAT. § 45.50.531(a) (Michie 2001); ARK. CODE ANN. § 4-88-113(f) (Michie 2002); COLO. REV. STAT. §§ 6-1-113(1)(a)-(c) (2002); DEL. CODE ANN. tit. 6, § 2533(a) (2002); GA. CODE ANN. § 10-1-373(a) (2002); 815 ILL. COMP. STAT. 505/10a(a) (2002); LA. REV. STAT. ANN. § 51:1409(A) (West 2002); MD. CODE ANN., COMM. LAW I § 13-408(a) (2002); MICH. COMP. LAWS ANN. § 445.911 (West 2002); N.H. REV. STAT. ANN. § 358-A:10(I) (2002); N.Y. GEN. BUS. § 349(h) (Consol. 2002); N.J. STAT. ANN. § 56:8-2.12 (West 2002); S.D. CODIFIED LAWS § 37-24-31 (Michie 2002); TENN. CODE ANN. § 47-18-109(a)(1) (2002); VA. CODE ANN. § 59.1-204(A) (Michie 2002).

<sup>46</sup> Fourteen states (and the District of Columbia) that follow this construction include: Alabama, California, Indiana, Kentucky, Maine, Mississippi, Missouri, Montana, Ohio, Pennsylvania, Rhode Island, Utah, Wisconsin, and Wyoming. See

essentially unable to sue another business for an unfair or deceptive trade practice.<sup>47</sup>

Four other states grant a UDAP private right of action to “a person” or “a consumer,” but do not include businesses in that definition.<sup>48</sup> Absent the inclusion of businesses in the statutory definition, a business entity does not appear to have standing to bring a UDAP cause of action against another business.<sup>49</sup>

An additional group of thirty states grants a UDAP private right of action to “a person” or “a consumer” and specifically includes business entities within the reach of that provision.<sup>50</sup> This would seem to permit a lawsuit by one business against another business, however, within these states, the issue of business against business UDAP lawsuits has not been presented and decided by any court.<sup>51</sup>

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ALA. CODE § 8-19-3(2) (2002); CAL. CIV. CODE § 1761(d) (West 2002); IND. CODE § 24-5-0.5-2(a)(1) (2002); KY. REV. STAT. ANN. § 367.220(1) (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 5, § 213(1) (West 2002); MISS. CODE ANN. § 75-24-15(1) (2002); MO. ANN. STAT. § 407.025(1) (West 2002); MT. CODE ANN. § 30-14-133 (2002); OHIO REV. CODE ANN. § 1345.01(A) (West 2002); 73 PA. CONS. STAT. ANN. § 201-9.2 (2002); R.I. GEN. LAWS § 6-13.1-5.2(a) (2002); UTAH CODE ANN. § 13-11-3(2) (2002); WIS. STAT. § 421.301(17) (2002); WYO. STAT. ANN. §§ 40-14-204, 14-206 (Michie 2002); *see also* Charlotte E. Thomas, *The Quicksand of Private Actions Under the Pennsylvania Unfair Trade Practices Act: Strict Liability, Treble Damages, and Six Years to Sue*, 102 DICK. L. REV. 1, 10-11 (1997).

<sup>47</sup> *See* Thomas, *supra* note 46, at n.73-74 (citing a number of cases holding that non-consumers are precluded from bringing suit under statutes containing this language); *see also* Clinton, Jr., *supra* note 44, at 71.

<sup>48</sup> These states include Alaska, Nevada, New York, and West Virginia. *See* ALASKA STAT. §§ 45.50.531(a), 50.561(4) (Michie 2001); NEV. REV. STAT. 598.0916, 598.0917 (2002); N.Y. GEN. BUS. LAW § 349(h) (Consol. 2002); W. VA. CODE § 46A-6-102(b) (2002).

<sup>49</sup> *See generally* Clinton, Jr., *supra* note 44 (discussing businesses’ standing under the Illinois statute, 815 ILL. COMP. STAT. 505/10a(a)).

<sup>50</sup> Such states include Arkansas, Connecticut, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Michigan, New Hampshire, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Washington. *See, e.g.*, ARK. CODE ANN. §§ 4-88-102(4), 88-113(f) (Michie 2002); DEL. CODE ANN. tit. 6, § 2531(5) (2002); FLA. STAT. ch. 501.203(7) (2002); S.C. CODE ANN. § 39-5-10(a) (Law. Coop. 2002).

<sup>51</sup> This group includes Arkansas, New Mexico, North Dakota, Oregon, South Carolina, and South Dakota. *See* statutes cited *supra* note 50.

The twenty-four remaining states are difficult to categorize because of indigenous and peculiar state court opinions addressing the issues of a business suing another business under the relevant state UDAP statute. Several state courts have definitively decided that business entities have a UDAP cause of action.<sup>52</sup> Colorado presents a good example of this group of states. The Colorado statute permits “any person” to sue for a UDAP violation.<sup>53</sup> The Colorado Supreme Court defines “any person” to mean a person who can establish that the defendant in the lawsuit engaged in an unfair or deceptive trade practice in the course of the defendant’s business, which significantly impacts the public as actual or potential customers of the defendant.<sup>54</sup> Therefore, the Colorado Supreme Court chose to define who can sue under its UDAP statute by defining not who a plaintiff may be, but rather what a plaintiff must prove.<sup>55</sup> The key to a business suing another business for a UDAP violation in Colorado is whether the business plaintiff can prove up an unfair or deceptive trade practice by the defendant and also show some kind of public interest in permitting the business plaintiff to recover for the UDAP violation.<sup>56</sup>

Tennessee courts reached the same result that the Colorado court did, albeit in a different manner. The Tennessee UDAP statute was amended in 1989 to include “other persons” within the definition of who can sue for a UDAP violation.<sup>57</sup> The Tennessee UDAP statute also specifically states that one of the purposes of the UDAP statute is to protect legitimate businesses.<sup>58</sup> After several lower court decisions denied business entities standing to bring a UDAP claim, the Supreme Court of Tennessee, in *ATS Southeast, Inc. v. Carrier Corp.*, ruled that the term “other persons” in the UDAP statute allowed business entities to sue other businesses for unfair and

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<sup>52</sup> See, e.g., *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998) (determining whether a business has a cause of action under COLO. REV. STAT. § 6-1-102(6) (2002)).

<sup>53</sup> COLO. REV. STAT. § 6-1-113(2) (2002).

<sup>54</sup> *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998).

<sup>55</sup> *Id.*

<sup>56</sup> *Fiberglass Component Prod. v. Reichhold Chems., Inc.*, 983 F. Supp. 948, 961 (D. Colo. 1997).

<sup>57</sup> *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 628 (Tenn. 2000) (citing TENN. CODE. ANN. §§ 47-18-109(a)(4)(A), (B), (D) (1995 & Supp. 1999)).

<sup>58</sup> TENN. CODE. ANN. § 47-18-102(2) (2001).

deceptive trade practices.<sup>59</sup>

The way that the Tennessee Supreme Court came to its ruling in *ATS Southeast, Inc.* illustrates the problems many courts have with this question.<sup>60</sup> The Tennessee court focused on the plain language of the 1989 amendment to the Tennessee UDAP statute and concluded that the job of the court is “to say . . . and obey” the clear language of a statute.<sup>61</sup> The court went on to criticize the lower courts for ignoring the intent and specific language of the Tennessee UDAP statute and for ruling that since a corporation is not consumer it cannot sue for UDAP violations.<sup>62</sup> Importantly, however, the Tennessee Supreme Court’s decision is somewhat contradictory, considering other provisions of the Tennessee UDAP statute, which define consumers as natural persons, and limit the term “goods,” when used in the statute, to those acquired for personal, family, or household use.<sup>63</sup> The Tennessee Supreme Court effectively ruled that the 1989 amendments to the UDAP statute were intended to trump other statutory provisions, which leaned towards more restrictive application of the UDAP statute. In the end, the law of Tennessee does permit one business to sue another business for unfair and deceptive trade practices.<sup>64</sup>

In contrast to the Tennessee Supreme Court’s decision broadening the scope of suits under its UDAP statute, is the Maryland District Court’s treatment of business entities in UDAP lawsuits.<sup>65</sup> Maryland is a state that defines “any person” in the UDAP statute to

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<sup>59</sup> *ATS Southeast*, 18 S.W. 3d at 630.

<sup>60</sup> *See ATS Southeast*, 18 S.W. 3d at 627-30.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> TENN. CODE ANN. § 47-18-103(2) (2001); TENN. CODE ANN. § 47-18-103(5) (2001). “Goods” means any tangible chattels leased, bought, or otherwise obtained for use by an individual for personal, family, or household purposes or a franchise, distributorship agreement, or similar business opportunity. The court in *ATS Southeast*, however, makes no mention of this definition, and looks solely at the language of § 47-18-109(a)(1) (“[a]ny person . . . may bring an action [] to recover actual damages”) and § 47-18-109(4) (“[i]n determining whether treble damages should be awarded, the trial court may consider, among other things: . . . (c) [t]he damage to the consumer or other person.”). *ATS Southeast*, 18 S.W.3d at 628-29.

<sup>64</sup> Jeffrey L. Reed, *Comment: The Tennessee Consumer Protection Act: An Overview*, 58 TENN. L. REV. 455, 478 (1991).

<sup>65</sup> *See Penn-Plax Inc. v. Schultz, Inc.*, 988 F. Supp. 906, 911 (D. Md. 1997).

specifically include business entities.<sup>66</sup> In addition, Maryland, much like Tennessee, also defines “consumer goods” in the UDAP statute to mean goods purchased and used for primarily personal, family, and household use.<sup>67</sup> However, unlike Tennessee, the Maryland District Court ruled that a business entity could not sue another business for a UDAP violation.<sup>68</sup> The Maryland District Court held that if the Maryland legislature had intended to include competitors within the reach of the UDAP statute, it would have specifically stated that.<sup>69</sup> The court curiously based this reasoning on legislative history from Connecticut, rather than Maryland, and further posited that the term “any person” was really intended to define who could be a defendant in a UDAP claim.<sup>70</sup>

By way of further comparison, the Michigan federal courts produced conflicting decisions when faced with the same question presented to the Tennessee Supreme Court. The District Court for the Eastern District of Michigan, in 1990’s *Winn Oil Co. v. American Way Service Corp.*, ruled that business entities may fall within the meaning of a person under the UDAP statute, but could not maintain such a claim because the legislature intended the statute to protect only consumers in transactions with businesses for personal, family, or household goods.<sup>71</sup> However, in *Action Auto Glass v. Auto Glass Specialists*, in 2001, the District Court for the Southern District of Michigan ruled that the UDAP statutory definition of any person includes businesses as both plaintiffs and defendants and would permit a business entity to sue even a competitor for unfair and deceptive trade practices.<sup>72</sup> Michigan consumers and businesses still wait for a decision to resolve this conflict.

Minnesota presents a different spin on the issue of whether a business can sue another business under a state UDAP statute. The

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<sup>66</sup> MD. CODE ANN., COM. LAW I § 13-101(h) (2002) (“‘Person’ includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.”).

<sup>67</sup> *Id.* § 13-101(d).

<sup>68</sup> *Penn-Plax, Inc.*, 988 F. Supp. at 911.

<sup>69</sup> *Id.* at 910.

<sup>70</sup> *Id.* at 911.

<sup>71</sup> *Wynn Oil Co. v. Am. Way Serv. Corp.*, 736 F. Supp. 746, 757 (E.D. Mich. 1990).

<sup>72</sup> *Action Auto Glass v. Auto Glass Specialists*, 134 F. Supp. 2d 897, 903 (W.D. Mich. 2001).

Minnesota Supreme Court, in *Ly v. Nystrom*, first noted that the term “consumer” is not in the Minnesota UDAP statute.<sup>73</sup> The court hastened to add, however, that the clear purpose of the Minnesota statute is to protect consumers.<sup>74</sup> The court noted that “[t]he intrastate practice of fraud has grown into a field of great profit and great damage both to individual citizens and to honest businessmen.”<sup>75</sup> The court concluded that the plaintiff’s purchase of a restaurant was akin to a consumer transaction and would therefore permit the plaintiff to bring a UDAP statutory claim against the defendant restaurant seller.<sup>76</sup> This analysis seems to indicate that the Minnesota Supreme Court believed that when a business acts like a consumer, it may sue another business for unfair and deceptive trade practices.

A Virginia case demonstrates how idiosyncratic the court rulings on this issue can be. The District Court for the Eastern District of Virginia, in *H.D. Oliver Funeral Apartments, Inc. v. Dignity Funeral Services, Inc.*, was faced with a plaintiff’s claim that the defendant published a false and misleading advertisement.<sup>77</sup> The court found that the plaintiff business’s claim constituted a “consumer transaction” under Virginia’s UDAP statute, yet the court also ruled that a competitor business did not have standing to bring an unfair or deceptive trade practice claim.<sup>78</sup> The court based this ruling on its application of the “400 year old ‘mischief rule’ of statutory construction” applicable in Virginia.<sup>79</sup> The “mischief rule” requires that every statute must be read to promote the ability to remedy the mischief at which the statute is directed.<sup>80</sup> In this context, a false and misleading advertisement would seem to fall into the category of mischief at which Virginia’s unfair and deceptive trade practice

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<sup>73</sup> *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 310.

<sup>77</sup> *See H.D. Oliver Funeral Apartments, Inc. v. Dignity Funeral Services, Inc.*, 964 F. Supp. 1033, 1033-34 (E.D. Va. 1997).

<sup>78</sup> *Id.* at 1039; VA. CODE ANN. § 59.1-198 (Michie 2002). “‘Consumer Transaction’ means: . . . (2) [t]ransactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged.” *Id.*

<sup>79</sup> *H.D. Oliver*, 964 F. Supp. at 1038.

<sup>80</sup> *Id.* at 1039.

statute is directed. However, the court, noting that the Virginia UDAP statute was intended to be liberally construed to promote fair dealing between suppliers and consumers, concluded that a lawsuit by one competing business against another is not within the reach of the Virginia statute.<sup>81</sup>

This survey and comparison of state UDAP statutes and the court opinions construing these statutes reveal some interesting data. First, the issue of business against business UDAP statutory claims is not a widely litigated issue. Second, the only consensus that can be drawn from this review is that some of the court opinions contain internal conflicts and conflict with other court opinions. Third, many state UDAP statutes contain inconsistent provisions even after clarifying amendments have been enacted. These inconsistent and even contradictory statutory provisions provide little guidance to courts or consumers trying to sort out statutory coverage. Finally, the idea of one business suing another business for unfair and deceptive trade practices using the state UDAP statute seems foreign to many jurists.

#### **IV. Conclusion**

Where does the foregoing analysis of the various state UDAP statutes and unsettling case law leave the question of whether UDAP statutes can be used to protect “consumer businesses?” Perhaps a study of the Florida UDAP statute presents the state legislative and state court roles in extending UDAP protection to businesses. One case study is instructive of the role of both state legislatures and state courts in resolving the issue of whether a UDAP statutory claim is available to a business in a lawsuit against another business.

The Florida UDAP statute, which is modeled after the FTCA, prohibits deceptive and unfair trade practices in trade or commerce.<sup>82</sup> In 1993, the Florida UDAP was amended to include a “firm, association, joint venture, partnership . . . corporation and any other group or combination” within its definition of a “consumer.”<sup>83</sup> On its face, it appears that business entities are consumers under the UDAP statute. Florida thus grants a private right of action to a “consumer who has suffered a loss as a result of a violation of [the statute]” and specifically authorizes that “such consumer may recover actual

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<sup>81</sup> *Id.*

<sup>82</sup> FLA. STAT. ch. 501.203 (2002).

<sup>83</sup> *Id.* ch. 501.203(7).

damages, plus attorney's fees and court costs . . . ."<sup>84</sup> From this statutory language it appears that a business would possess a claim for deceptive and unfair trade practices. In addition, the Florida UDAP statute explicitly states that a purpose of the Florida law is to protect businesses and foster fair competition and that a UDAP claim is in addition to any other statutory or common law cause of action.<sup>85</sup> In combination, these statutory provisions clearly suggest that businesses have the right to bring an unfair and deceptive trade practice claim against other businesses.

However, many Florida judges disagreed. Relying on inapplicable case law, reluctant to see through the intended purpose of the UDAP statute, or hesitant to recognize that both consumers and businesses need protection from deceptive trade practices, Florida courts have produced untidy precedent. The District Court for the Southern District of Florida ruled on the first two cases to test the impact of the 1993 amendments to the Florida UDAP statute. Florida federal courts decided, in *Nieman v. Dryclean USA Franchise Company, Inc.*<sup>86</sup> and *Bell Avon, Inc. v. Petroleum Protective Systems, Inc.*,<sup>87</sup> that a properly pled unfair and deceptive trade practice claim is available to business entities.<sup>88</sup> Both courts relied heavily on the amended section of the Florida UDAP statute, which lists the protection of legitimate business enterprises as an intended purpose of the statute.<sup>89</sup> Then the District Court for the Middle District of Florida addressed the same issue in *Tampa Bay Storm, Inc. v. Arena Football League, Inc.*<sup>90</sup> In this case, a third federal court agreed that the 1993 amendments to the Florida UDAP statute permitted business entities to sue another business for unfair and deceptive trade practices.<sup>91</sup> This court not only relied on the amended purpose section of the Florida UDAP statute, but also the amended definition of

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<sup>84</sup> FLA. STAT. ch. 501.211(2) (2002).

<sup>85</sup> *Id.* ch. 501.202(2).

<sup>86</sup> 178 F.3d 1128 (11th Cir. 1999).

<sup>87</sup> No. 96-933-CIV-Moore, slip op. at 4 (S.D. Fla. Mar. 27, 1997) (on file with author).

<sup>88</sup> *Id.*

<sup>89</sup> FLA. STAT. ch. § 501.202(2) (2002).

<sup>90</sup> No. 96-29-CIV-T-17C, 1998 WL 182418 (M.D. Fla. Mar. 19, 1998).

<sup>91</sup> *Id.* at \*7.

consumer, which specifically included business organizations.<sup>92</sup>

Perhaps the most interesting case interpreting the 1993 amendments to the Florida UDAP statute is *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corporation*.<sup>93</sup> In this lawsuit by a medical claims management business against a health service provider business, the defendant brought a counterclaim that the plaintiff used unfair and deceptive trade practices in its claims management business.<sup>94</sup> The District Court in the Middle District of Florida again ruled that a health service provider business would have standing to bring a UDAP claim under Florida law against a claims management business.<sup>95</sup> Based on these four cases decided between 1997 and 1999, the federal courts seemed to think the Florida UDAP statute, as amended in 1993, applied to business against business lawsuits.

As these federal court decisions were being decided, another judge in the District Court for the Southern District of Florida published a contrary opinion in the case of *Big Tomato v. Tasty Concepts, Inc.*<sup>96</sup> The court cited two Eleventh Circuit cases<sup>97</sup> in ruling that Florida's UDAP statute only applies to "consumers," and not to a business in a lawsuit against a competitor for damages.<sup>98</sup> In one of the cited cases, *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, using the reasoning from a Florida state appellate court decision,<sup>99</sup> the court held that a damages action under the UDAP statute can only be maintained by a plaintiff who has not been previously engaged in the business involved in the lawsuit.<sup>100</sup> Finally, the court acknowledged that the 1993 amendments to the Florida UDAP statute actually expanded the definition of consumers to include businesses and corporations, but that such amendment did not alter the prohibition

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<sup>92</sup> *Id.* at \*8.

<sup>93</sup> 46 F. Supp. 2d 1276 (M.D. Fla. 1999).

<sup>94</sup> *Id.* at 1280-81.

<sup>95</sup> *Id.* at 1286.

<sup>96</sup> 972 F. Supp. 662 (S.D. Fla. 1997).

<sup>97</sup> See *Babbit Elecs., Inc. v. Dynascan Corp.*, 38 F.3d 1161 (11th Cir. 1994); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990).

<sup>98</sup> See *Big Tomato*, 972 F. Supp. at 663-64.

<sup>99</sup> *Darrell Swanson Consol. Servs. v. Davis*, 433 So. 2d 651, 652 (Fla. Dist. Ct. App. 1983).

<sup>100</sup> *M.G.B. Homes*, 903 F.2d at 1494.

against businesses suing competitors under the statute.<sup>101</sup> A few years later, in 1999, the District Court for the Middle District of Florida agreed with the court in *Big Tomato* and barred use of the statute by a competitor in *Nassau v. Unimotorcyclists Society of America, Inc.*<sup>102</sup>

Finally, in 1999 the Florida District Court of Appeals heard the issue for the first time in *Warren Technology, Inc. v. Hines Interests Limited Partnership*.<sup>103</sup> In this case, the court ruled that the plaintiff business did not have a UDAP claim against the defendant business because the plaintiff's cause of action arose prior to the effective date of the 1993 amendments to the Florida UDAP statute.<sup>104</sup> The court held that regardless of whether the pre- or post-1993 amended version of the UDAP statute applied, neither version authorized this particular business's claim against another business.<sup>105</sup> The court, noting that the plaintiff corporation would fit the 1993 amended definition of a consumer under the UDAP statute, posited that only when such a business plaintiff is acting in the capacity of a consumer in a business-to-business transaction would a UDAP claim be permissible.<sup>106</sup> In this case, the court described the status of the plaintiff business as a producer or manufacturer, and not a consumer.<sup>107</sup>

Not unlike other states, the Florida courts have clearly struggled to produce consistent precedent concerning a business entity's right to sue another business for unfair and deceptive trade practices. With the conflicting federal and state court opinions in mind, the Florida legislature amended the UDAP statute by first specifically including "business . . . or any other commercial entity, however denominated" in the definition of a consumer.<sup>108</sup> The legislature then went on to amend the private right of action under the UDAP by replacing the term "consumer" with the word "person" to describe who can bring an unfair and deceptive trade practice

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<sup>101</sup> See *M.G.B. Homes*, 903 F.2d at 1494.

<sup>102</sup> 59 F. Supp. 2d 1233 (M.D. Fla. 1999).

<sup>103</sup> 733 So. 2d 1146 (Fla. 3d Dist. Ct. App. 1999).

<sup>104</sup> *Id.* at 1147.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> FLA. STAT. ch. 501.203(7) (2002).

claim.<sup>109</sup> Under Florida law, the legal definition of a person includes a business entity.<sup>110</sup> With these amendments, the Florida legislature adopted the case precedent authorizing a business entity, regardless of its status in the transaction, to sue for damages from unfair and deceptive trade practices by another business.

UDAP statutes in thirty states are currently equipped to include a private right of action by one business against another business for deceptive and unfair trade practices. In those states, the question becomes whether or not the courts have the will to step up and sanction unlawful and deceptive business practices, regardless of who is the particular victim or perpetrator. The answer depends in part on courts adopting a new construct, which states that businesses can be victims too!

Among the other states, which restrict the application of UDAP statutes to consumers and typical consumer transactions, Florida demonstrates that even at a most unlikely time, state legislatures can be moved to include businesses as plaintiffs in unfair and deceptive trade practice claims. When state legislatures or state courts refuse to grant standing to small businesses to pursue a UDAP claim this is not measured deregulation or judicial restraint, but rather avoidance and abdication. Today's small business is part of today's consumer. Effective consumer protection demands that consumers and businesses be treated alike under UDAP statutes.

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<sup>109</sup> *Id.* ch. 501.211(1).

<sup>110</sup> *Id.* ch. 1.01(3).

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