

United States Country Consumer Law Report

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United States Consumer Protection

A detailed analysis of all legal powers of the various jurisdictions of the United States to protect consumers is beyond the scope of this research. Generally, it can be said in this context that matters of interstate and foreign commerce fall to the federal government and intrastate to the states and municipal subdivisions with jurisdiction of geographical scope.¹ However, as the same ‘wires’ are used in Internet transactions of all kinds, these boundaries are not absolute and with other localised bases for exercise of jurisdiction such as harm, acts, presence, etc., there can be overlap of enforcement powers including under state and local consumer and criminal laws and licensing regulations.

Numerous federal, state and local authorities have jurisdiction in a specific area which may also include consumer protection, including via online transactions. Two ready examples are the market conduct controls on insurance overseen by state insurance departments² and the truth in lending rules under federal and state laws that apply to consumer credit transactions and enforced by an array of banking and other financial institution regulators such as the United States Office of the Controller of the Currency, the Federal Depositor Insurance Corporation, the Office of Thrift Supervision, the Federal Reserve Bank, etc. However, an in-depth analysis of these specific areas of consumer protection and powers is beyond the scope of this research, although online fraud involving consumers could readily be subsumed within both sets of rules.³ Rather, this report will explore the unfair and deceptive acts and practices (UADP) laws that comprise the main sources of US consumer legal protection. These broader consumer protection powers may not specifically address online issues as a separate classification but would likely include these within their broad consumer protection jurisdictional remit. It will also consider the governmental bodies that enforce these and that include federal, state and local consumer protection agencies with administrative powers and law enforcement agencies which also include state attorneys general, typically a state’s top law enforcement officer. This will focus particularly on the Federal Trade Commission Act and the FTC and comparable state laws and bodies, as exemplified by New York State. Both jurisdictions also have more specialized consumer protection laws governing, e.g., privacy, advertising, consumer credit, information security and online transactions.

Private enforcement is as well is possible under consumer, tort and contract laws by the consumer via individual claims including via small claims courts which are

¹ It has been held that states can regulate interstate commerce when a commercial activity threatens the health or welfare of its citizens. See, e.g., *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Nondiscriminatory regulation to pursue a legitimate state local interest and with only incidental impact on interstate commerce will be sustained unless this impact is disproportionate to the claimed benefits. *Pike v Bruce Church*, 397 U.S. 137, 142 (1970)(citing *Huron*). The Federal government can expressly pre-empt state regulation in an area, such under the CAN SPAM Act regarding unsolicited commercial email. However, as will be discussed *infra*, there remains some state carve outs from pre-emption and state-based claims with higher damages have been sustained.

² Twenty-four states exempt insurers from their consumer unfair and deceptive practices laws. See C. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Nat’l Consumer Law Center Washington D.C. February 2009). Their deceptive and unfair acts would likely only be amenable to administrative sanction under state insurance ‘market conduct’ laws and regulations unless their conduct amounted to criminal fraud or a contractual breach of the utmost good faith obligation.

³ Insurance and banking are excluded from FTC authority as well. See 15 U.S.C. § 45 (a)(2).

prevalent and often geared to consumers with low filing fees, evening hours and the ability to proceed *pro se* as well as consumer class actions which enable restitution to large numbers of consumers for smaller damage amounts which would could preclude a consumer from bringing an action. For example, even a \$35.00 filing fee in small claims court, such as that charged in New York State, could be more than the individual loss sustained, a disincentive to seeking redress. Yet where millions of American consumers suffer this loss, the total obtained via deceptive or fraudulent practices would be significant. Class actions can often obtain redress that criminal actions against the parties cannot.

In addition to government bodies, there are at the local, state, and national level many non-governmental organisations with a primary focus on consumer protection, empowerment and advocacy that encompass many issues and methodologies. There is an umbrella organization, The Consumer Federation that seeks a level of coordination and cooperation among the many other consumer-oriented bodies via an annual national meeting. While this report will attempt to provide an overview of the examples of these consumer-oriented entities and to identify some best practices, it will focus more in-depth on a limited number of organisations operating nationally that appear to have significant impact on consumers themselves and policymakers. These include the National Consumer Law Center, The Consumers Union and the National Consumers League. We met with representatives from the NCLC and the NCL.

The Law

A layering of the federal and state unfair and deceptive acts and practices (UADP) laws comprise the main sources of consumer legal protection from predatory, deceptive, and unscrupulous business practices. The federal law is Section 5 of the Federal Trade Commission Act, described in depth below. It and the strongest state UADP statutes based on it have been noted to encompass broad prohibitions against both ‘deceptive’ and ‘unfair’ conduct generally.⁴ These statutes vary in their wording and construction, but, in contrast to bans on specific deceptive acts, the former generally is flexible enough to permit enforcement against new means of deceit; the latter, action against ‘practices such as harassment, high pressure sales tactics, and one-sided contract terms’ unfair to consumers and that can distort the marketplace without actual deception.⁵

Section 5, however, does not provide for private enforcement by consumers.⁶ Therefore, unless the FTC undertakes an investigation and enforcement proceeding, the Act has, practically if not legally, a limited reach.⁷ The FTC, in our interview, acknowledged that it could only address a limited number of enforcement actions

⁴ See C. Carter, *supra* note 2 at 11.

⁵ *Ibid.*

⁶ Only the Iowa state UADP law fails to provide for any private enforcement. See *ibid* at 3. It is interesting that in our interview with the National Consumer Law Center’s Washington office Managing Attorney, Lauren K. Saunders, she cited the Iowa Attorney General’s office as among the most activist in consumer protection litigation, perhaps to compensate for this.

⁷ A correlative lack of compliance with these provisions is suggested and also as a consequence of selective and limited enforcement by the FTC. See National Consumer Law Center Issues Brief ‘Hold Wrongdoers Accountable to the Individuals They Harm’, 2-4 (NCLC Washington D.C. November 2009).

chosen for their broader impact due to its resource limitations. Seeking to remedy the enforcement gap and since consumers were not always protected under state criminal laws which might not reach the act in question, for example, merely misleading conduct, all of the states have enacted state versions of UDAP laws with varying scope and remedies. While many are very effective enforcement tools, others are not without significant limitations as will be discussed below.

A. Federal Consumer Law

Unfair and Deceptive Practices, Section 5, Federal Trade Commission Act

The Federal Trade Commission is the primary federal enforcer of the market place with remits of both direct consumer protection and competition enforcement ultimately for the benefit of consumers. It was created and given this mandate by the Federal Trade Commission Act (the Act) which as noted, subject to certain limitations,⁸ ‘provided the Commission with broad law enforcement authority over virtually every sector in our economy; commerce on the Internet falls within the broad sweep of this statutory mandate.’⁹ While the FTC also enforces numerous specialized consumer protection laws, which will be addressed below, its primary direct consumer protection remit is Section 5(a) of the Act. This declares unlawful, ‘unfair or deceptive acts or practices in or affecting commerce’. (Codified at 15 U.S.C. Sec. 45(a)(1)).¹⁰

The US SAFE WEB ACT and Section 5

The US SAFE WEB Act of 2006, in order to address the borderless nature of the Internet, e commerce and the growing problem of cross-border deception and fraud, amended the FTC Act, to extend jurisdictional reach of Sec. 5(a). It now includes those acts or practices that involve ‘foreign commerce’ and that ‘cause or are likely to cause reasonably foreseeable injury within the United States’¹¹ or ‘involve material conduct occurring within the United States.’¹² The FTC indicated that this broader jurisdiction and the authority to initiate compulsory process to obtain evidence and to share information with foreign law enforcement as well as keep information confidential has been an effective tool in its arsenal. It views especially the ability under the US SAFE WEB Act to seek redress for the citizens of other countries as well as US citizens to be a key factor that promotes greater cooperation from foreign authorities and avoids challenges by US actors to its jurisdiction where foreign victims are involved.

⁸ See note 3, *supra*. Common carriers in transport and wholesale meatpacking industries are also excluded under section 5(a)(2). These are industries within the jurisdiction of other federal regulators.

⁹ R. Pitofsky, Prepared Statement of the Federal Trade Commission on ‘Internet Fraud’ before the Subcommittee on Investigations of the Governmental Affairs Committee, US Senate (Washington D.C. 10 February, 1998), <http://www.ftc.gov/os/1998/02/internet.test.htm>.

¹⁰ The competition remit is also to be found in this section in its further declaration of ‘unfair methods of competition’ as unlawful.

¹¹ 15 U.S.C. § 45(1)(a)(4)(a)(i).

¹² *Ibid.* at (ii).

The FTC recently completed a review of the US SAFE WEB Act for report to Congress as required by the law after three years. It concluded that in those 3 years the FTC had relied on its powers to institute 17 civil investigations in the US and to respond to 38 requests for information sharing. While it appears the FTC is still in the process of negotiations to build arrangements to formalize the cooperation with several countries, the FTC opined that the US SAFE WEB ACT provisions should be permanently extended to remove any hesitance to continue with these negotiations or to share information on the part of foreign authorities with the possibility that the powers would sunset in 2013.

The need for the US SAFE WEB Act (and as the FTC stated in our interview, such powers in the laws of other countries, especially the ability to obtain redress for foreign consumers) is indicated by the number of 'cross-border' complaints filed by both US and foreign consumers in its 'Consumer Sentinel Network',¹³ showing 23%, 15% and 12% of complaints respectively in 2006, 2007 and 2008 had a cross-border aspect. While this however includes U.S. cross-border complaints, the FTC notes in its report to Congress that four out of five US consumer complaints in this category involved foreign companies, although most were not identified as such as they were not likely to know that a foreign actor was involved. While there was a downward trend in terms of total numbers as the percentages above indicate, the total reported economic loss to US consumers from foreign actors during the three-year period was approximately \$700 million, a figure that it states is under inclusive as not all consumers report or when they do, do not include the loss.

Substantive tests for 'unfair' and 'deceptive'

For almost 25 years after 'deceptive and unfair acts or practices' were added to the Act's ban on 'unfair methods of competition', the FTC and the courts addressed them as a single substantive standard in defining their scope.¹⁴ However, since the 1960s, the FTC has differentiated the significance of each.¹⁵

'Unfair' Standard

¹³ This is an online, investigative database network comprising two databases: one automated database with consumer complaint information provided by consumers to the FTC and other law enforcement and other organizations (including some civil society consumer protection organizations such as the Better Business Bureau, etc.) and an identity theft database with information from a variety of sources, including banks. Access to the former is limited to participating domestic and foreign law enforcement agencies; access to the Identity Theft Clearinghouse, to the law enforcement agencies and limited information access to other domestic government agencies, consumer (credit) reporting agencies and other private entities that register and comply with a security and confidentiality checklist. See, e.g., <http://www.theiacp.org/idsafety/enforcement/investigation/?fa=consumer_sentinel_network. Also see the Agreement, <http://news.consumersentinel.gov/mailings/20080317/confidentiality-agreement.pdf>. The FTC has discretion with respect to the sharing with other than the domestic law enforcement agencies. The consumer entering a report on the FTC website is told that his complaint is for statistical purposes and that there might not be a response. The FTC tracks the reporting trends to identify matters of significance for its intervention, whether an enforcement action or an industry investigation. See FTC, Consumer Sentinel Network, <http://www.ftc.gov/sentinel/>.

¹⁴ A. Horvath, J. Villafranco, S. Calkins, 'Deceptive and Unfair Practice' in ABA SECTION OF ANTITRUST LAW CONSUMER PROTECTION LAW DEVELOPMENT (American Bar Association Publishing 2009) at 2.

¹⁵ Ibid.

An 'unfair' act or practice is one that meets a three-part test that it 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'¹⁶ This definition is incorporated into the Act as a 1994 jurisdictional limit/standard of proof imposed by Congress on the FTC,¹⁷ largely codifying the FTC's prior 'Unfairness Policy Statement'.¹⁸ This clarified that 'unfair' conduct did not need to be immoral, unethical, oppressive, or unscrupulous¹⁹ and that established public policy may be considered as evidence of unfairness but is not controlling or the primary consideration.²⁰ All parts of the test must be met.

A 'substantial harm' will likely be economic but may include a threat to health or safety.²¹ It will have significance in 'magnitude' in that it may involve a large harm to a small number of people or a small harm to a large number of people.²² The FTC does not consider that emotional distress ordinarily will comprise a substantial harm.²³ The countervailing benefits to the consumer or competition arising from the practice must be balanced against the harm. The practice will only be 'unfair' if it is 'injurious in its net effects' For example, as the FTC noted, 'A seller's failure to present complex technical data²⁴ on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article.'²⁵ Here, if the harm resulting from this omission is greater than the benefit to the consumer in lower costs, the test will be met. The 'unavoidable' nature of the harm involves something, such as a sales technique, that essentially prevents consumers from making their own decisions,²⁶ i.e., high-pressure sales tactics, missing information or sales intended to exploit vulnerable and credulous groups of consumers.²⁷ Included among the conduct that the FTC has reached as 'unfair' includes misleading (including by omission), false or unsubstantiated advertising; coercive and high pressure sales tactics including to vulnerable populations such as children²⁸ or desperate homeowners delinquent on mortgages seeking to save their homes;²⁹ and practices that violate other laws³⁰ and (more rarely) that promote unsafe conditions.³¹

¹⁶ 15 U.S.C. § 45(n).

¹⁷ See 15 U.S.C. § 45(n). Also, see A. Horvath, et.al., *supra* note 13, at 60.

¹⁸ Letter from the FTC to Hon. Wendell Ford and Hon. John Dunforth, Committee on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction ('Unfairness Policy Statement', reprinted in *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

¹⁹ See A. Horvath, et al., *supra* note 13, at 57-61.

²⁰ See 15 U.S.C. § 45(n).

²¹ Unfairness Policy Statement, *supra* note 17.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See A. Horvath, et al., *supra* note 13 at 62.

²⁸ *Ibid.*, at 65.

²⁹ See FTC Press Release, 'Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams' (06/04/09)(many were found to be marketing on the Internet).

³⁰ This can include common law contractual breach, see e.g., Griffin Systems Inc., 117 F.T.C. 515 (1994)(unfair to refuse to comply with any term or condition of auto service contract), and conduct violative of other specific statutes, see, e.g., 15 U.S.C. § 1614 (Fair Credit Practices Act the violation of which is deemed an unfair or deceptive act or practice in violation of the FTC Act for administrative enforcement by FTC); also see C & D Electronics, 109 F.T.C. 72 (unfair practice to market TV cable decoders that were illegal to use under Cable Communications Policy Act).

Deceptive advertising can be ‘unfair’ even if it does not meet the requirements of ‘deceptive practices’, discussed below. It can also amount to both. The Commission has use charges of unfair practice to address a variety of online issues, including failing to advise when a ‘free’ use of a website expired and charges were made without authorization, the offering of ‘free’ credit reports without disclosing that the consumer was also being enrolled in an expensive credit monitoring program, the unauthorized download of adware onto a computer.³² The FTC has as well found Sony BMG’s sale of CD’s with digital rights management software that downloaded to the user’s computer hard drive without informing the consumer³³ and the failure to adequately secure consumer personal information to be unfair practices.³⁴

‘Deceptive’

Deceptive practices have as well is a three-part test that the FTC established after a review of deception case law in its Statement of Deception Policy in 1983. As set forth in that document, the FTC found that certain elements should exist in all deception cases:³⁵

First, there must be a representation, omission or practice that is likely to mislead the consumer. ...³⁶

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of

³¹ See Beck’s Am, Inc, 127 F.T.C. 379 (1999)(advertisement showing beer drinking on boat promoting hazardous behaviour).

³² See A. Horvath, supra note 13, at 65.

³³ Sony BMG Music, (FTC 2007), <http://www.ftc.gov/os/caselist/0623019/index.shtm>.

³⁴ See, eg, Cardsystems, Inc. (FTC 2006), <http://www.ftc.gov/os/caselist/0523148/0523148complaint.pdf>.

³⁵ The Commission was as well seeking to address the deception standards for other sections of the Act that govern specific false advertisements. As noted, while Section 5 of the Act declares unfair or deceptive acts or practices unlawful, Section 12, however, specifically prohibits false advertisements likely to induce the purchase of food, drugs, devices or cosmetics and Section 15 defines a false advertisement for purposes of Section 12 as one which is ‘misleading in a material respect.’ See Letter from the FTC to Hon. John D. Dingell, Chair, House of Representatives Committee on Energy and Commerce, Commission Statement of Policy on Deception (Washington D.C. 14 October 1982), reprinted in Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

³⁶ The FTC noted that previous practices found misleading or deceptive in specific cases to ‘include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.’ Ibid.

the practice. In other instances, evidence of materiality may be necessary.³⁷

Thus, the Commission will find an act or practice deceptive if there is a material misrepresentation, omission, or other practice that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment.³⁸ Materiality is presumed for certain kinds of claims: any express, intended implied claim, or omission significantly concerning health, safety, and items of likely concern to reasonable consumers such as cost, purpose and effectiveness are considered material.³⁹ Other categories include failure to have a reasonable basis of substantiation for a claim at the time the claim is made. One commentator has noted that the FTC has relied on the implied claims in metatags in combination with the visible claims on a website to find that it created the misleading and unsubstantiated impression that the product in question cured a list of diseases.⁴⁰ Failure to disclose material facts can be a deception. If disclosure is necessary to prevent a claim, representation or reasonable belief from being misleading to consumers, that must be clear and conspicuous. The Commission has defined what this must comprise in electronic environments in at least one settlement order⁴¹ and recently revised its endorsement rules for the first time in 30 years to require blogs, among others, to disclose when they have received any cash or in-kind payment to review a product.⁴²

No scienter is required for a deceptive practice; it is a strict liability finding where the elements are met with the focus on the mind of the ordinary consumer. Correspondingly, since the key focus is on whether the practice is likely to mislead the reasonable consumer, there is no requirement to show an actual injury or that the practice caused a deception in fact.⁴³ This standard is considered necessary for preventative action by the FTC although actual reliance by a particular consumer may

³⁷ Ibid.

³⁸ Ibid.

³⁹ See A. Horvath, *supra* note 13 at 3-4.

⁴⁰ See C. S. Broadway, 'Invisible Claims: The FTC's regulation of Internet Metatags', Paper presented at the annual meeting of the International Communication Association, Marriott Hotel, San Diego, CA, May 27, 2003, http://www.allacademic.com/meta/p111518_index.html (citing e.g., In the Matter of Michael D. Miller (2000), <http://www.ftc.gov/os/2000/05/michaelcmp.htm>).

⁴¹ See Consent Decree, *U.S. v. Bayer Corp.* (D.N.J. 2000) (providing that:

In an advertisement communicated through an electronic medium (such as television, video, radio and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable. < <http://www.ftc.gov/os/2000/01/sterlingdecree.htm> > .

⁴² Notice of Adoption of Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255, (2009),

<http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>

⁴³ See *FTC v Freecom Communications*, 102 F.3d 1192 (10th Cir. 2005), ¶ 26.

<http://openjurist.org/401/f3d/1192/federal-trade-commission-v-freecom-communications-inc>.

be necessary for individual redress.⁴⁴ This is clearly a key factor in the FTC's privacy enforcement efforts. It has been able to apply the deception standard in many instances to sanction failure to conform with stated privacy policies and implied representations understood by consumers with regard to the safety of their personal data to prosecute data breaches and other misuse of personal data without disclosure or authorization by the data subject.

It has been noted that the FTC broadly relies on the deception standard to address a range of circumstances and technologies but is more 'sparing' in its use of the unfair standard.⁴⁵ However, it is clear that the FTC has a broad general consumer protection remit under either standard. It takes the position that these govern the conduct in question no matter the media, including the Internet, as long as the impact on commerce test is met. Yet, it is clear that the FTC has focused much attention on enforcement and education to address the risks to consumers in Internet transactions. As seen from a publication detailing its enforcement efforts from 1996-2003, 300 actions were brought addressing a great variety of unfair and deceptive practices online.⁴⁶ A review of these is illustrative of the reach of the Act.

Rules and Guides on what comprises violative conduct

The Commission has authority to publish rules to implement the Act⁴⁷ and other legislation it enforces. It also published guides on a variety of issues. In contrast to the rules which are secondary legislation, guides are only administrative interpretations of the law that are intended to help advertisers comply with the Federal Trade Commission Act and not themselves binding law.⁴⁸ In any law enforcement action challenging an allegedly deceptive or unfair practice, the Commission would have the burden of proving that the challenged conduct violates the FTC Act.

The Commission has interpreted the former to encompass commercial transactions on the Internet where appropriate. For example, it considers 16 CFR 435, Commercial Practices: Mail or Telephone Order Merchandise, analogous to the Distance Selling Regulations, to apply to merchandise ordered on the Internet. The new Endorsement

⁴⁴ As noted by the Tenth Circuit Court of Appeals in *Freecom Communications, supra*, Section 13(b) of the Act codified at 15 U.S.C. § 53(b) " provides the remedy for a § 5 violation. Although § 13(b) does not expressly authorize a court to grant consumer redress (i.e., refund, restitution, rescission, or other equitable monetary relief), § 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress. In cases where the FTC seeks injunctive relief, courts deem any monetary relief sought as incidental to injunctive relief." See *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir.1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir.1994).

⁴⁵ See A. Horvath, *supra* note 13 at 2.

⁴⁶ See FTC, Law Enforcement, Internet Cases (last updated 2003), <http://www.ftc.gov/bcp/internet/cases-internet.pdf>.

⁴⁷ The FTC generally uses a different rulemaking procedure than other federal bodies. Called Magnuson-Moss rulemaking, this requires more procedures than those needed for rulemaking pursuant to the Administrative Procedure Act ("APA"), including two notices of proposed rulemaking, prior notification to Congress, opportunity for an informal hearing, and, if issues of material fact are in dispute, cross-examination of witnesses and rebuttal submissions by interested persons. See Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 57a, 57b). The APA will apply when specified by specific legislation.

⁴⁸ See 'Note', 16 CFR § 17, Commercial Practices, Application of Guides in Preventing Unlawful Practices.

Guide, previously discussed, was promulgated to revise the old one when consumers complained that they could not tell who was an advertiser online and who was providing independent reviews of products in the context of social media. Further recognizing that commercial actors may have difficulty applying the rules for consumer protection under both standards that apply to all commercial activities to the online environment, the Commission published papers with guidance for online advertisers as to how rules and guides can be complied with.⁴⁹

Other consumer protection legislation

The Commission also enforces a variety of specific consumer protection statutes such as the Equal Credit Opportunity Act, Truth-in-Lending Act, Fair Credit Reporting Act, the Do-Not-Call Implementation Act of 2003 (telemarketing opt out registry), the Children's Online Privacy Protection Act (COPPA), the Fair and Accurate Credit Transactions Act of 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CANSPAM) and other laws that prohibit specific trade practices.⁵⁰ These generally provide that violations are to be treated as if they were 'unfair or deceptive' acts or practices under Section 5(a). It is viewed that these have been helpful in reaching conduct that might not otherwise uniformly been viewed as unfair or deceptive and in defining industry-wide, harmonized standards of conduct.

CANSPAM Act

The CANSPAM Act⁵¹ was designed to address the risks posed by unsolicited commercial emails, or 'spam', often the vehicle for delivering malware or which had other unsavoury content. The CS Act does not prohibit spam. Rather, it is considered by some commentators to effectively legalize spam but regulate it. The CAN SPAM Act bans false or misleading header information and prohibits deceptive subject lines in 'commercial email messages' or one that has as its 'primary purpose' the promotion or advertisement of a product or service including the content of a website. It also requires that unsolicited commercial email recipients be provided with a method for opting out of receiving such email that must be complied with within 10 business days and requires that the email must be identified as an advertisement. In addition to enforcing the statute in most instances, the CAN SPAM Act charged the FTC with issuing rules, *inter alia*, for the required labelling of sexually explicit commercial email and the criteria for determining the primary purpose of a commercial email in the first place that trigger the requirements for truthful information in the origin, nature and subject line by senders of commercial email. Various conduct is criminalised, including as an infringement of the Computer Fraud and Abuse Act in connection with a 'protected computer' (basically any computer connected to the Internet). The CAN SPAM Act sets out sanctions for violations. These include fines and jail sentences for criminal infringement and fines for civil enforcement by the FTC and other specified regulatory agencies with particular jurisdiction. Actual or statutory damages are possible under the private right of action

⁴⁹ See 'Dot Com Disclosure: Information about Online Advertising' (FTC May 2000); 'Advertising and Marketing on the Internet' (FTC September 2000).

⁵⁰ A complete list and summary of the 40 consumer laws with FTC oversight can be found at <http://www.ftc.gov/ogc/stat3.shtm>.

⁵¹ 15 U.S.C §§ 7701-7713.

limited to ISPs and civil enforcement actions by the FTC, and a range of regulators and state law enforcement officers.

In limiting the civil and state enforcement, the CAN SPAM Act sought to ensure a harmonized regime for the regulation of commercial email. It pre-empted the stricter laws of 30 states that were in place by 2004, many of which required a specific technical identification as commercial that would make filtering easier in contrast to the more general 'clear and conspicuous' standard under the federal act.⁵² There remain however residual powers for states under the following provisions:

- (1) IN GENERAL — This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception* in any portion of a commercial electronic mail message or information attached thereto.
- (2) STATE LAW NOT SPECIFIC TO ELECTRONIC MAIL.—This Act shall not be construed to preempt the applicability of—
 - (A) *State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or*
 - (B) *Other State laws to the extent that those laws relate to acts of fraud or computer crime.*

Commentators have noted that these provisions have left considerable scope for state action,⁵³ with the 'falsity and deception' exception labelled as narrow as the 'Grand Canyon'.⁵⁴

CAN SPAM Act also allows states (attorney generals or other competent agencies), acting as *parens patriae* to bring actions on behalf of its citizens, including to recoup damages, although there is a cap. The FTC can intervene and remove the action to federal district court.

The effectiveness of the CAN SPAM Act's opt out regime has been criticized, notably by consumer security experts who advise consumers not to click on the link which for many such emails only serves to validate that the address is an active one thereby triggering further spam. The lack of a private remedy to others than ISPs has been noted to prevent businesses which have incurred considerable expense and harm to their networks from bringing actions. However, there is a growing jurisprudence that the term internet service provided need not be limited to commercial ISPs.⁵⁵ While ISPs are not likely to bring an action against a particular spammer unless the level of spam on its servers reaches a significant level,⁵⁶ the larger commercial ISPs have brought a significant number of successful private actions. Additionally, there is a

⁵² See R. Cain, 'When Does Preemption Not Really Preempt? The Role of State Law After Can-Spam', 3 I/S: J. L. & Pol'y for Info. Soc'y 751, 757 (Winter 2007-2008).

⁵³ *Ibid.*

⁵⁴ D. Johnson, 'The Tagged.com Spam Cases: New York and Texas Attorney General Actions Show the Effectiveness of States' Retained Powers to Regulate Spam' (11 November 2009), http://www.digitalmedialawyerblog.com/2009/11/the_taggedcom_spam_cases_new_y.html.

⁵⁵ See, V. Reid, 'Recent Developments in Private Enforcement of the CAN SPAM Act' (Expresso 2010), Available at: http://works.bepress.com/vanessa_reid/1, at 12 et seq.

⁵⁶ *Ibid.*

growing body of case law permitting claims and damages under state laws that overlap CANSPAM provisions and arguably intended to be pre-empted.⁵⁷

Children's Online Privacy Protection Act⁵⁸

This Act protects the online privacy of children under 13 years of age by allowing parents to control what information is collected from them. Under the Act's implementing Rule promulgated by the FTC,⁵⁹ operators of commercial websites and online services directed to or knowingly collecting personal information from children under 13 must: (1) notify parents of their information practices; (2) obtain verifiable parental consent before collecting a child's personal information; (3) give parents a choice as to whether their child's information will be disclosed to third parties; (4) provide parents access to their child's information; (5) permit parents to prevent further use of the collected information; (6) not require a child to provide more information than is reasonably necessary to participate in an activity; and (7) maintain the confidentiality, security, and integrity of the information.

In order to encourage industry self-regulation, the Act has a 'safe harbor' provision which allows industry groups and others to request the Commission's approval of their self-regulatory guidelines that would govern participating websites' compliance with the Rule.

The law also pre-empts stricter state laws, providing that 'No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section.' However, the statute specifically grants the states attorneys general jurisdiction where they believe that the interests of a state citizen are threatened or adversely affected to bring, as *parens patriae*, 'a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction to—

(A) enjoin that practice;

(B) enforce compliance with the regulation;

(C) obtain damage, restitution, or other compensation on behalf of residents of the State; or

(D) obtain such other relief as the court may consider to be appropriate.'⁶⁰

The extent of state enforcement under this law is not known, but the FTC has brought a number of high profile enforcement actions against a range of actors, including insurance companies, clothing retailers and others.

The Commission has just begun a review and consultation process of COPPA seeking input as to its effectiveness and whether changes are required in light of the growing

⁵⁷ See, generally, *ibid.* Also, see, V. Reid, *supra*.

⁵⁸ 15 U.S.C. §§ 6501–6506.

⁵⁹ 16 C.F.R. Part 312.

⁶⁰ Section 1305.

number of children with mobile broadband devices, etc.⁶¹ This consultation ends in June.

Other Laws and Application in the Online Environment

Although as discussed, the FTC seeks to interpret the FTC Act and its rules and guidelines to the Internet environment as just another medium where practices are done, it appears that not every law will be so interpreted, especially where its wording uses words from the offline environment. A recent report suggests that this is the case law trend arising under the Fair and Accurate Transactions Act which amended the Fair Credit Reporting Act in 2003 to help prevent identity theft by making it a violation of the FCRA for merchants, etc to ‘print’ electronically a receipt that fails to truncate the debit/credit card number to no more than 5 digits and the card’s expiration date. This minimized the personal financial information that could be exposed to third parties, especially when receipts were discarded. The law provided for private enforcement with statutory damages of \$100 per violation with no upper recovery cap which has led to numerous class action cases being filed against large vendors.

However, on December 2, 2009, in *Shlahtichman v. 1-800 Contacts, Inc.*,⁶² the Federal District Court for the Northern District of Illinois found that FACTA’s prohibition against the electronic printing of a debit or credit card’s expiration date on receipts did not apply to e-mail order confirmations. In its decision the Court ruled that an email confirmations are not ‘electronically printed’ nor provided at the point of sale as required under the Act. The Court noted that this was consistent with several other decisions regarding not only email confirmations but computer displays in online purchase transactions as ‘print’ commonly refers to tangible, paper receipts and not computer displays’.

While it may have been the intent of FACTA to address the risk that attends with little paper receipts and the physical copies that get retained by vendors, these decisions are troubling for two reasons. First, the risk of ID theft would seem just as likely where this information is contained in emails. Second, such literal construction smacks of an era when computers were new and words like ‘writing’, ‘printing’, or ‘signature’ were still to be grappled with by the courts. While this narrow construction may be an attempt to control the scope of private enforcement on the merits of the claim, such precedent as to the meaning of ‘print’ in an electronic environment could prove harmful in more serious fraud claims or, indeed, enforcement of illegal content cases, eg, child abuse images. It also shows that the FTC’s approach need not be followed by the courts.

Enforcement Procedure and Remedies

Having considered the substantive elements of key laws governing conduct online, it is worth brief consideration of the enforcement capabilities and procedure of the FTC under the FTC Act. Key is the fact that the FTC has itself only civil enforcement

⁶¹ See Press Release, ‘FTC Seeks Comment on Children’s Online Privacy Protections; Questions Whether Changes to Technology Warrant Changes to Agency Rule’ (24 March 2010), <http://www.ftc.gov/opa/2010/03/coppa.shtm>.

⁶² 2009 U.S. Dist. LEXIS 112379 (N.D. Ill. Dec. 2, 2009).

authority under the Act.⁶³ This enforcement is via both administrative and judicial processes.⁶⁴

Administrative Enforcement

Administrative enforcement involves the FTC making an initial finding that a practice violates the law via either (1) adjudication or (2) rulemaking, reflecting the dual role of the FTC as a regulator with rule making and enforcement authority.

1. Adjudication

Section 5(b) of the FTC Act authorizes the Commission to maintain an administrative adjudication to challenge “unfair or deceptive act[s] or practice[s].” The Commission can issue a complaint detailing its charges when it has “reason to believe” that the law has been violated. If the respondent elects, it can effect a settlement of the charges via a consent agreement without having to admit liability. This requires it to consent to the entry of a final order that waives all rights of judicial review. If the Commission accepts such a proposed consent agreement, it places the order on the record for thirty days of public comment (or such other period as the Commission specifies) before determining the order as final.⁶⁵ This procedure has the benefit of a consequence that is negotiated with the respondent and thus can be more creative than might otherwise be achieved, i.e., such as agreements to adhere to an approved industry code of practice that can influence others in the same industry, which the FTC has agreed, for example with Doubleclick (involving non-transparent data collection in contrast to stated policy) and the Network Advertising Initiative. It can also be resolved relatively inexpensively and quickly.

Administrative Trials

If, however, respondent contests the stated charges, the matter is decided before an administrative law judge (“ALJ”) in an adversarial administrative trial that follows the FTC’s procedural rules. Staff from the Bureau of Consumer Protection act as prosecutors of the complaints or ‘complaint counsel’.⁶⁶ The ALJ issues an initial decision which sets forth findings of fact and conclusions of law with a outcome recommendation based on the former. Thus, it will recommend the entry of an order to cease and desist or dismissal of the complaint. Either the complaint counsel or the respondent, or both, may appeal the initial decision to the full Commission.⁶⁷

Upon appeal of an initial decision, the matter is briefed with oral argument before the Commission that subsequently issues its final decision and order. The respondent against whom an order is issued may appeal it. There are various criteria for the locus of the appeal, including any court of appeals within whose jurisdiction the respondent

⁶³ The Department of Justice would have jurisdiction, ordinarily, where a law includes criminal penalties.

⁶⁴ See FTC, Office of General Counsel, ‘A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority’ (July 2008), <http://www.ftc.gov/ogc/brfovrw.shtm>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

resides or carries on business or where the challenged practice was employed.⁶⁸ If affirmed on appeal, the circuit court of appeals enters its own enforcement order.

Enforcement of FTC Orders

Nearly all Commission orders are final and binding on the respondent within 60 days after service on the respondent unless stayed by the Commission or the appellate court. Violations of final orders subject the respondent to potential liability for civil penalties up to \$11,000 for each violation. The penalty is assessed by a district court in a suit brought to enforce the Commission's order.⁶⁹ The court may also issue injunctions in the nature of mandamus and "such other and further equitable relief" as it deems appropriate.⁷⁰

Consumer Redress

After the completion of proceedings, the Commission may seek redress for the injury caused to consumers by the respondent's acts that were the subject of the administrative proceedings in a federal district court.⁷¹ The FTC must show that the conduct was such as "a reasonable man would have known under the circumstances was dishonest or fraudulent."⁷²

As will further be noted, the states' attorneys general sometimes join the FTC in the various proceedings seeking consent orders or voluntary assurances of compliance as well as actions for enforcement and redress, pursuant to the 'mini-FTC' acts that exist at the state level.

Civil Penalties against Non-Respondent Third Parties

Where the Commission has determined in a litigated administrative adjudication that a practice is unfair or deceptive and has issued a final 'cease and desist' order, other parties who thereafter violate the standards articulated by the Commission in the order can be liable for civil penalties.⁷³ The Commission must show that the violator had "actual knowledge that such act or practice is unfair or deceptive and is unlawful" under Section 5(a)(1) of the FTC Act.⁷⁴ Here the Commission typically shows it provided the violator with a copy of the Commission's determination or a "synopsis" thereof.

(2) Rulemaking

⁶⁸ Sec. 5(c), FTC Act, 15 U.S.C. Sec. 45(c).

⁶⁹ Sec. 5(1), FTC Act 15 U.S.C. Sec. 45(1).

⁷⁰ Ibid.

⁷¹ Sec. 19, FTC Act, 15 U.S.C. Sec. 57 b.

⁷² Ibid.

⁷³ The Commission has recently requested that Congress authorize it to directly impose civil penalties. See FTC Statement before the Senate Committee on Commerce, Science and Transportation on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers (Washington D.C. 4 February 2010)(also seeking to apply a more streamlined rulemaking process followed by other agencies).

⁷⁴ Sec. 5(m)(1)(B), FTC Act, 15 U.S.C. Sec. 45(m)(1)(B)).

Rather than administrative adjudications against a single respondent, the Commission may instead promulgate trade regulatory rules to remedy unfair or deceptive practices that occur on an industry-wide basis.⁷⁵ Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the Commission is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of the Act. This requires rulemaking proceedings with opportunities for informal hearings at which interested parties are accorded limited rights of cross examination. To bring a rulemaking proceeding, the Commission must have reason to believe that the practices to be addressed by the rulemaking are “prevalent”.⁷⁶

Similar to final orders, once the trade regulation rule is promulgated, anyone violating the rule “with actual knowledge” that such act is unfair or deceptive or “knowledge fairly implied on the basis of objective circumstances” and prohibited is liable for civil penalties of up to \$11,000 per violation. The Commission cannot impose the penalties directly but must file suit in district court.⁷⁷ A violator is liable for injury caused to consumers and the FTC can similarly pursue recovery in an action for consumer redress.⁷⁸

Judicial Enforcement

As the preceding discussion show, that a determination by the FTC under either avenue that a practice is unfair or deceptive, still requires the Commission to seek a court’s help to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules. The Commission, however, has the ability to challenge a practice directly in court without an agency determination. Section 13(b) authorizes the Commission to seek preliminary and permanent injunctions to remedy a violation of “any provision of law” that it enforces where it has “reason to believe” a person is violating, or “about to violate” that provision. The Commission can seek the preliminary injunction of the conduct in question pending completion of an FTC administrative proceeding. In other instances requiring it, the Commission may seek a *permanent* injunction.⁷⁹

B. States’ Consumer Protection Law

As noted, “by 1981, every state in the United States had statutes providing for consumer protection enforcement by a state agency, commonly... the state attorney general-with broad enforcement authority.”⁸⁰ As with the federal law, state UDAP laws comprise the core of consumer protection although there are other specifically targeted laws that could reach same conduct. They can be divided into two categories: ‘little FTC laws’ and ‘Uniform Deceptive Trade Practices’ acts.⁸¹ The following sections will seek to provide a brief overview of the kinds of provisions and their

⁷⁵ See note 47, *supra*.

⁷⁶ Sec. 18, FTC Act, 15 U.S.C. Sec. 57a(b)(3).

⁷⁷ Sec. 5(m)(1)(A), FTC Act, 15 U.S.C. Sec. 45(m)(1)(A).

⁷⁸ See *ibid*, Sec.19.

⁷⁹ *Ibid*.

⁸⁰ *Ly v. Nystrom*, 615 N.W2d 302 (Minn. 2000).

⁸¹ See A. Horvath, *supra* note 13 at 375.

differences which are perceived to have various problems of enforcement and, consequently, effectiveness.

To give rise to jurisdiction over a cross-border defendant involved in dodgy transactions, including over the Internet, the state must have both subject matter and *in personam* jurisdiction. In terms of the former, as with the federal UDAP, many are broadly worded and noted to be broadly interpreted with ensuing flexibility to reach an array of conduct⁸² to the extent that these laws grant authority to bring civil enforcement actions under the statute itself.⁸³ Therefore, these will likely apply to online conduct that meets the substantive tests for unfair or deceptive or whatever other provisions govern. To address the if they fall within the jurisdictional reach of the state pursuant to its specified long-arm jurisdictional powers generally (tests of local acts or harm in state, etc.) or as specifically provided in a statute. Civil proceedings within a state against a non-resident person must also meet a U.S. Constitutional test of fairness and substantial justice based on having sufficient contacts with the forum state.⁸⁴

Even single or isolated activity in a state has been found sufficient where it is related to the controversy, including in an online environment. For example, in New York State, that which this report will examine in a bit greater depth, the highest court, the Court of Appeals ruled in *Deutsche Bank Securities, Inc. v. Montana Board of Investments*,⁸⁵ that even an electronic communication, an instant message, could serve as the basis for long-arm jurisdiction, noting that the foreign defendant, the State of Montana Investment Board had by IM negotiated the terms leading to the conclusion of this substantial transaction, a \$15 million sale of bonds. The Court further noted that New York's long-arm statute provides that “‘a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state’ (CPLR 302 [a] [1]). By this “ ‘single act statute’ . . . proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.”⁸⁶

Here the claim arose from the IM transaction, meeting this test for what is called ‘specific jurisdiction’. The defendant was a professional investor who had benefited from the ability to transact business in the security markets of New York. It should, therefore, have been put it on notice (fairness and due process) that it could answer for its conduct in New York State. The Court of Appeals concluded that “New York's interest in protecting its residents as well as its preeminence as a commercial and financial capital” and its “ very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here” warranted the exercise of

⁸² Ibid.

⁸³ A private claimant could otherwise bring an action sounding in contract, tort, or equity. A criminal action could as well be pursued by the State to the extent the acts in question gave rise to fraud or some other common law or statutory crime. But, with respect to the latter, the victim is not likely to have financial redress.

⁸⁴ *International Shoe v. Washington*, 326 U.S. 310 (1945).

⁸⁵ 7 N.Y.3d 65 (2006), available at: http://www.law.cornell.edu/nyctap/I06_0071.htm.

⁸⁶ Ibid.

jurisdiction. The Court stated “Indeed, the ability to access a local forum applying a well-established, commercially sophisticated body of law is certainly as important to New York businesses as are our extensive financial and communications resources.”

Before considering the various state provisions and differences, it is worth noting that the National Consumer Law Center has identified the key elements of state UDAP laws with the greatest potential for effective enforcement as those with strong provisions as to the following:

1. Scope of statute

- a. Broadly prohibits unfair or unconscionable acts
- b. Broadly prohibits deceptive acts
- c. Provides the state agency substantive rulemaking authority

2. Lack of preconditions to public enforcement

- a. Allows public enforcement without requiring a showing of the defendant’s intent or knowledge

3. Available remedies

- a. Equitable relief
- b. Restitution for consumers
- c. Civil penalty amount for initial violations⁸⁷

Overview

As previously noted, state consumer protection law comprises those targeted at varying specific practices or industries and as well the more general provisions under the UDAP.⁸⁸ With at least 51 jurisdictions having UDAP laws,⁸⁹ there is great variety. It is also noted that in numerous instances, whole industries are carved out of state consumer protection laws, often where there is a specialist regulator such as for utilities, insurance⁹⁰ or other ‘regulated practices.’⁹¹ The concern with ‘regulated practices’ is their interpreted scope. The National Consumer Law Center has identified that Michigan’s strong statute was recently ‘gutted’ by a court decision interpreting an exception for “a transaction or conduct specifically authorized under” laws administered by a state or regulatory board to exclude entire industries if subject to any regulation or licensing.⁹² Some fifty-three professions or industries are listed as subject to licensing alone.⁹³

The need for such state consumer protection laws arose because:

⁸⁷ See, National Consumer Law Center, State-by-State Summaries of State UDAP Statutes, Appendix B, Consumer Protection in the States (January 2009).

⁸⁸ See A. Hovarth, *supra* note 13 at 376.

⁸⁹ Many local jurisdictions have enacted such laws as well. *Ibid.*

⁹⁰ See note 2, *supra*. Also, utilities are exempt in 16 states. See C. Carter, *supra* note 2 at 5.

⁹¹ A. Hovarth, *supra* note 13 at 376.

⁹² See C. Carter, *supra* note 2 at 13 (citing *Liss v. Lewiston-Richards, Inc.*, 732 N.W.2d 514 (Mich. 2007)).

⁹³ See Michigan Dept. of Energy, Labor & Economic Growth, ‘Verify a License’, <http://www.dleg.state.mi.us/verify.htm>.

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

Consumers had even fewer tools at their disposal. A consumer who was defrauded often found that fine print in the contract immunized the seller or creditor. Consumers could fall back only on claims such as common law fraud, which requires rigorous and often insurmountable proof of numerous elements, including the seller's state of mind. Even if a consumer could mount a claim, and even if the consumer won, few states had any provisions for reimbursing the consumer for attorney fees. As a result, even a consumer who won a case against a fraudulent seller or creditor was rarely made whole. Without the possibility of reimbursement from the seller, consumers could not even find an attorney in many cases.⁹⁴

State consumer protection laws are typically civil in nature and although some allow for criminal sanction in serious cases, prosecution of civil and criminal enforcement is usually in civil courts.⁹⁵ Some state statutes, e.g., Colorado, Indiana, and Oregon's, provide an exhaustive list of conduct that is proscribed and for which consumers can seek redress.⁹⁶ While these can clearly identify the conduct, they are considered to be among the weakest UDAP laws due to the inability to address new types of unfair and deceptive practices.⁹⁷ The most effective laws are considered those with a broad ban on deception and unfairness. Illinois has a combination of both: a statute with dozens of identified unlawful practices (e.g., use of a chain referral system upon which a promised rebate is conditioned on an actual sale, failure to provide a receipt on merchandise over \$25 or a notice of cancellation, sale to consumer of records that can be obtained without cost) and a broad ban on unfair and deceptive and 'unconscionable' practices. The statute includes but does not limit unfair and deceptive to:

the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.⁹⁸

⁹⁴ See C. Carter, *supra* note 2 at 6.

⁹⁵ *Ibid.*

⁹⁶ As A. Hovarth, et al, *supra* note 13 at 377, note 7.

⁹⁷ *Ibid.* at 11.

⁹⁸ Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Consolidated Statutes § 505 (2).

A further limitation on a statute's consumer protection reach is found in laws that require the consumer to establish intent or scienter. While most do not, several, such as Arkansas, Nevada and Wyoming, require a showing that false representations were knowingly made and Utah that there was an 'intent to deceive'.⁹⁹ South Dakota has perhaps the most onerous. Its seemingly broad ban on deception is undermined by the requirement that the consumer prove that the deception was intentional and knowing.¹⁰⁰ The South Dakota law does not, moreover, have a ban on unfair practices.¹⁰¹

While many state's laws are premised on the FTC Act and nearly half specifically provide that they are to be interpreted according to its construction or that its jurisprudence is guiding but not binding¹⁰² states vary in their construction of terms and application. This is perhaps in part due to the variation in statutory wording and the role of *res judicata*. For example, many states continue to follow the old FTC test of 'unfairness' called the 'Cigarette Rule' considered in a rule involving the warnings on cigarette packages.¹⁰³ There the FTC identified three factors that served as identifying whether an act was unfair:

- whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness.
- whether it is immoral, unethical, oppressive, or unscrupulous.
- whether it causes substantial injury to consumers (or competitors or other businessmen).¹⁰⁴

Under this test equal emphasis is given to the public policy and the injury. Under the new FTC test the focus is on whether there is an unjustified harm to the consumer based on a benefits analysis. Public policy can be considered as tending to show a harm, but will usually not be controlling of itself unless so clear as to preempt discussion of whether there is a consumer injury.¹⁰⁵

Similar to the federal law, numerous state laws make a violation of other statutes a *per se* violation of the UDAP statute. However, in some the difference between a *per se* violation and not can turn on who brings the action, with the attorney general action only comprising *per se* violations.¹⁰⁶ While most states don't require that the state agency establish intent or additional elements of proof, a higher burden can attach for private litigants such as a showing of 'reliance' on the deception or 'causation' of an injury in order to obtain damages even in what purports to otherwise be a *per se* infringement.¹⁰⁷ Colorado, Indiana, Nevada, North Dakota, and Wyoming, however,

⁹⁹ See A. Hovarth, *supra* note 13 at 377.

¹⁰⁰ See C. Carter, *supra* note 2 at 11.

¹⁰¹ *Ibid.*

¹⁰² See A. Hovarth, *supra* note 13, at 378.

¹⁰³ See, M. Greenfield, 'Unfairness Under Section 5 of the FTC Act and Its Impact on State Law', 46 *Wayne Law Review* 1869 (2001).

¹⁰⁴ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), at note 5 (quoting from FTC 1964 rule).

¹⁰⁵ See FTC Statement on Unfairness Policy, *supra* note 18.

¹⁰⁶ See A. Hovarth, *supra*, at 377, note 7.

¹⁰⁷ *Ibid.*

do condition the state's remedies upon proof of knowledge or intent in 'all or a significant number of circumstances.'¹⁰⁸

Minnesota illustrates who can initiate various enforcement proceedings within a state. The Minnesota Attorney General is charged with enforcing certain laws regarding unfair practices in business and commerce, including the False Advertising Act, (FAA)(Minn. Stat. § 325.67), the Consumer Fraud Act (CFA) (Minn. Stat. § 325F.69); and the Deceptive Trade Practices Act)(DPTA), (Minn. Stat. § 325D.13). Under §8.31 the attorney general has the authority to investigate and enforce specific enumerated statutes which include the FAA and the CFA and generally those that regulate "unfair, discriminatory, and other unlawful practices in business, commerce, or trade" which sweeps in the DTPA. (County prosecutors can also bring enforcement proceedings.)

This section also provides for private remedies for the enumerated statutes permitting an individual who has suffered an injury caused by the defendant's conduct to bring a private action under what is called Minnesota's "private attorney general statute." This permits recovery of damages, costs, equitable relief and attorney fees.¹⁰⁹ (The Deceptive Trade Practices Act, however, is not enumerated and only permits an injunction.) The Supreme Court of Minnesota has, however, determined that while such an injured person need not be the consumer, i.e., the direct purchaser,¹¹⁰ the private attorney general provision while intended to allow any individual injured by a violation of statute but only where the cause of action benefits the public. However, the Minnesota Supreme Court has held that where a recovery is only for a one to one transaction, it only benefits the claimant.¹¹¹ The attorney general can as well seek any of these available remedies.

Uniform Deceptive Trade Practices Act

A number of states have adopted a version of the UDPTA which was promulgated in 1964 by the National Conference on Uniform State Laws, an 118-year old body of recognized expert lawyers appointed by state governments to draft uniform laws for the states' consideration in critical areas of law where uniformity would add clarity and stability.¹¹² The UDPTA generally addresses the following acts in the course of a business or trade:

- Passing off goods or services as those of another
- Causing likelihood of confusion as to the source, sponsorship, approval, or certification of goods or services
- Deceptive representations or designations of geographic origin in connection with goods or services
- Disparagement of goods, services, or business of someone else by false or misleading statements

¹⁰⁸ See C. Carter, *supra* note 2 at 17.

¹⁰⁹ Minn.Stat. § 8.31, subd. 3a (1998).

¹¹⁰ See *Group Health Plan v. Phillip Morris, Inc.*, 621 N.W.2d (Minn. 2001).

¹¹¹ *Ly v. Nystrom*, 615 N.W2d 302 (Minn. 2000).

¹¹² Twelve states are reported to have adopted either the 1964 or the revised 1966 version of the Uniform Act into their law but with their own modifications. See, A. Horvath, *supra* note 13 at 379. These include Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, New Mexico, Ohio, Oklahoma and Oregon. *Ibid*.

- Bait and switch advertising by failing to disclose a limited quantity or intending not to sell as advertised
- False or misleading statements as to the reason for/amount of/existence of a price reduction
- False representations that goods are original or new if altered, deteriorated, used, reconditioned, reclaimed or second-hand.
- False statements that goods or services are of a particular quality or grade, style or model if they are of another
- Any other conduct that creates a similar likelihood of confusion or misunderstanding¹¹³

As noted, some of these are designed to protect competitors and other, consumers.¹¹⁴ Actual competition or confusion is not required to be shown by the Uniform Act. The remedy in the Uniform Act is limited to injunction with costs to the prevailing party¹¹⁵ although as adopted in the states usually permits monetary redress in the form of civil penalties, statutory per violation damages either directly to the consumer or to a victim's fund.¹¹⁶ The scope of the various statutes can limit application to commercial transactions involving a consumer who is purchasing or leasing goods or services for personal, household, or family purposes under the definition of a consumer.

Generally the states that have adopted it grant the attorney general the power to enforce it, although there are other administrators of the Act at the state level such as a consumer protection commissioner which may under the statute need to refer the matter to the AG.¹¹⁷

Other Laws

As with the federal statutes, the states while relying largely on their general consumer protection laws with broad definitions of unfair and deceptive to reach the vast majority of online conduct involving consumers, have as well other laws that can be applied. State attorney generals typically have broad state law enforcement powers and can usually bring enforcement actions under both criminal and civil statutes and regulations that address fraud, contests, gambling,¹¹⁸ phishing, information security, false advertising, and as well various industry-specific laws.

For example, rather than rely on an unfair standard to protect the security and privacy of personal information, the Massachusetts Office of Consumer Affairs and Business Regulation (a state level FTC-like body) recently promulgated a wide information security rule (further to a requirement under the security breach notification law) that mandates that any individual person or legal entity regardless of where that individual or entity may be located that owns, licenses (a legal issue/debate beyond this analysis), stores or maintains 'personal information' about a Massachusetts resident

¹¹³ Revised Uniform Deceptive Trade Practices Act (1966), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.htm.

¹¹⁴ See, A. Horvath, *supra* at 379.

¹¹⁵ Revised UDTPA (1966) § 3 (a),(b).

¹¹⁶ See A. Horvath, *supra* at 382.

¹¹⁷ *Ibid.*

¹¹⁸ See C. Humphrey, State Gambling Law Summary Chart (noting states with express Internet ban provisions)(2007), <http://www.gambling-law-us.com/State-Law-Summary/>.

must develop and implement a written information security program applicable to any records containing such information and appropriate to the circumstances based on size, scope, and nature of business and amount and type of information and the need for its confidentiality. 'Personal information' is defined to mean the first name (or initial) and last name of a resident of the Commonwealth, along with one or more of the following data elements related to that individual:

- Social Security number;
- Driver's license number or state-issued identification card number; or
- Any financial account number, credit card number, or debit card number - either with or without any security or access code, PIN, or password that would permit access to such accounts

The rule addresses standards requiring security reasonably consistent with industry standards. The written, risk-based information security plan is required to be developed and contain administrative, technical and physical safeguards to ensure the security and confidentiality of records containing personal information. It specifically mandates the plan include the following:

- Security policies for employees that take into account whether and how access may be allowed, how to keep, access, and transport records containing personal information outside of business premises, including:
 - Encryption (technology neutral) of transmitted records and files containing personal information, to the extent technically feasible, where stored on laptops and other portable devices and/or that will travel across public networks or wirelessly;
 - Secure user-authentication protocols and access-control measures, including controls over user identifiers, passwords and access, to the extent technically feasible;
 - A system for monitoring unauthorized use; and
 - Up-to-date firewalls, anti-virus definitions and anti-malware programs.
- Measures to prevent terminated employees from accessing records containing personal information;
- Contractual obligations for compliance with third-party service providers with access to personal information.
- Review security measures annually, and update the plan as required by a material change in the business operations;
- Develop and maintain a procedure for actions taken in response to any breach of security;
- Train employees about and discipline employees for violation of the policy;
- Designate one or more employees to maintain, supervise and implement the plan.¹¹⁹

¹¹⁹ 201 CMR 17.00: Standards for the Protection of Personal Information of Residents of the Commonwealth, available at: <http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf>.

This is a HIPAA-like (U.S. Health Insurance Portability and Accountability Act) security rule with specific implementation standards based on best practice for putting in place an information security process based on what is called the virtuous cycle of ‘Plan, Act, Do, Change’ the core of most internationally agreed standards. So, it is a specific rule that adds flesh to the not unusual statutory requirements for ‘adequate’ or ‘reasonable’ security, such as exists under the Data Protection Act 1998.

Violators are subject to a civil penalty of up to \$1500 per infringement. It is not clear if this is a ‘per record’ amount which could bring a substantial sanction for security breaches where these measures are not taken. The rule is extraterritorial in scope and although readily enforceable against those who are contracted out of state providers, how it could be enforced against those persons in other jurisdictions directly collecting personal information from Massachusetts residents is unclear, absent significant contacts with Massachusetts.

Other sui generis laws or pending bills dealing with online consumer protection or safety issues include those addressing:

- ‘Sexting’ and that provide for education about and sanctions for the transmission by minors of photos of themselves nude or otherwise harmful to minors to another minor.¹²⁰
- Spyware¹²¹
- WiFi terminal equipment security¹²²
- RFID use¹²³
- Phishing¹²⁴
- Automobile ‘black box’ and rental car GPS monitoring¹²⁵
- Cyberstalking¹²⁶
- Electronic luring or solicitation of children¹²⁷
- Spam and other bulk email¹²⁸

¹²⁰ See National Conference of State Legislatures, 2010 Legislation related to Sexting, <http://www.ncsl.org/default.aspx?TabId=19696>.

¹²¹ See National Conference of State Legislatures, Internet Adware or Spyware Legislation (showing that as of 2007, five states, California, Hawaii, Louisiana, New York and Rhode Island had adopted such legislation and that it was pending before 18 other state legislatures), <http://www.ncsl.org/default.aspx?tabid=13469>.

¹²² See, eg, California Business and Professions Code § 22948.5, requiring all manufacturers of WiFi wireless terminal equipment to provide default security settings or notices to consumers on the equipment how to enable security, <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=1211992602+0+0+0&WAISaction=retrieve>.

¹²³ See NCSL, supra note 106 at Privacy Legislation related to RFID, <http://www.ncsl.org/default.aspx?tabid=13468>.

¹²⁴ See *ibid* at Phishing Legislation, (noting the 2007 adoption of phishing legislation in Illinois and Montana), <http://www.ncsl.org/default.aspx?tabid=13478>.

¹²⁵ See *ibid*, Event Data Recorder Legislation, (noting California legislation to require prior notice to consumer and to prohibit downloading of black box data without consent or court order and California and New York legislation prohibiting rental car companies from using electronic surveillance or GPS monitoring to impose fees, charges or penalties arising from renter’s use (could use, therefore, for theft, service location), <http://www.ncsl.org/default.aspx?tabid=13445>.

¹²⁶ See *ibid*, Electronic Harassment or ‘Cyberstalking’ Laws (noting that 47 states have adopted specific provisions to include electronic communications means within stalking and harassment legislation), <http://www.ncsl.org/default.aspx?tabid=13495>.

¹²⁷ See *ibid*, Electronic Solicitation or Luring Laws (noting that 46 states have such specific provisions), <http://www.ncsl.org/default.aspx?tabid=13448>.

New York State

The following will seek to provide a very brief overview of consumer protection enforcement in New York State. This state was chosen for its fairly proactive status with regard to online consumer protection and well-developed consumer protection institutional structures. These include the NY State Attorney General's Office, the NYS Consumer Protection Board, the New York State Small Claims Court system, numerous county and city consumer protection agencies, including the New York City Department of Consumer Affairs.¹²⁹

NYS Consumer Protection Board

This body was created by law in 1970. The Board is composed of the heads of other state agencies also with a consumer protect remit: the chairman of the public service commission, the superintendents of banking and insurance, the commissioners of agriculture and markets, environmental conservation, economic development and health, the director of the state office for the aging, and the secretary of state.¹³⁰ There is an appointed executive director. The Board is charged with protecting, educating and representing New York consumers. It does this, acting through its Executive Director by: 'publicizing unscrupulous and questionable business practices and product recalls; conducting investigations and hearings; enforcing the "Do Not Call Law"; researching issues; developing legislation; creating consumer education programs and materials; responding to individual marketplace complaints by securing voluntary agreements; and, representing the interests of consumers before the Public Service Commission."¹³¹ It is also charged with coordinating the consumer protection activities of all state agencies that perform such functions.

It is limited in its enforcement activities and powers to specific areas. The attorney general is required by law to coordinate the enforcement powers of his office with the activities of the Board,¹³² although it is not clear how this occurs; the Board is in return required to cooperate with the Attorney General.

The most meaningful functions of the Board are its consumer representation, consumer complaint handling, mediation and ombudsman activities and, as well, its policy advocacy before state and federal agencies such as the FTC. It also undertakes some key consumer education initiatives.¹³³ However, it clearly pales in power,

¹²⁸ See *ibid*, State Laws related to Unsolicited Commercial or Bulk Email Laws (noting that 37 states have laws regarding unsolicited email advertising, fraudulent or unsolicited commercial email, including a minority that seek to proscribe/regulate other bulk email; but also noting a recent decision by the Virginia Supreme Court (*Jaynes v. Virginia* (2008) finding that Virginia's law that would apply to bulk email with political or religious content was constitutionally invalid under the 1st Amendment, available at : <http://www.courts.state.va.us/opinions/opnscvwp/1062388.pdf>.)

¹²⁹ For a list of the various NY government consumer protection bodies, see Consumer Action Website, 'State, County and City Government Protection Offices'(Federal Citizen Information Center), <http://www.consumeraction.gov/state.shtml>.

¹³⁰ NY Exec. L.§ 550.

¹³¹ CPB 'Mission Statement', <http://www.consumer.state.ny.us/mission.htm>.

¹³² *Ibid*.

¹³³ See, generally. CPB Website, <http://www.consumer.state.ny.us/mission.htm>.

reputation, profile and possibly effectiveness in most of these areas when contrasted with the Attorney General, an elective office, explored here below.

New York Attorney General

The AG is the chief legal officer of New York State, a position that has existed for nearly 400 years. The office has broad functions in representing the State and as well the public interest and vast powers of investigation and enforcement. As has been noted by the US Court of Appeals for the 5th Circuit:

The office of attorney general is older than the United States and older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.¹³⁴

New York has retained this traditional autonomy. As noted by the AG, ‘ although the Attorney General acts independently of the Governor, the Governor or a state agency may request the Attorney General to undertake specific criminal investigations and prosecutions.’¹³⁵ The NYAG has 650 assistant attorneys general and over 2,000 staff that comprises scientists, investigators, forensic accountants, legal assistants, and support staff, with over a dozen regional offices throughout New York State.

Although we made repeated requests for an interview with the NY Attorney General's Office via various channels, including informally through friends that work there, we did not get a reply. The author attributes this as possibly due to the political situation in New York State. The NYAG, Andrew Cuomo (son of former Governor Cuomo), is a very likely candidate for Governor in the next election who will be very

¹³⁴ *State of Florida, ex. rel Shevin v. Exxon Corp.*, 526 F.2d 266 (1976). When contrasted with other AG's, it is suggested that the New York Attorney General has greater than usual powers of investigation and prosecution with respect to conduct to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase of securities under New York State's General Business Law. The NYAG has the power, under Article 23-A, § 352 (Martin Act, 1921). See ‘New York State's Martin Act: A Primer’ (Dechert, LLP 2004)(noting that this allows the AG broader powers than the SEC), http://www.dechert.com/library/FS_2004-04.pdf

¹³⁵ See ‘Offices of the Attorney General’, http://www.ag.ny.gov/our_office.html.

careful about the controls on interviews and direct access to his staff in light of the leaks plaguing the current Governor and the scandal that brought down his predecessor AG and former Governor, Elliott Spitzer. He is a respected attorney and politician. He has a notable history of public service. Any comments as to the political nature of the office are merely intended to reflect this reality.

Thus, the instant information has been obtained totally from external sources and from the NYAG's own policy and results announcements which are numerous and have a deterrent, consumer education and political effect. The following will explore the NY consumer protection statutes and then the Internet specific enforcements that the AG has pursued thereunder. It will then explore some other interesting initiatives by the AG.

New York Consumer Protection Statutes

The underpinnings of the Attorney General's consumer protection activities are largely three statutes: Executive Law § 63(12) and General Business Law §§ 349.¹³⁶ The following will consider each, in turn.

NY Executive Law § 63(12) empowers the NYAG to bring a proceeding for injunctive relief and/or "restitution and damages" against persons committing repeated or persistent fraudulent or illegal acts. The Court of Appeal has held that scope of this provision is broad and that any conduct which violates state or federal law or regulation is actionable.¹³⁷ Thus, the New York Attorney General has authority within New York State (and outside it to the extent that the statute violated contemplates acts outside of NY and long-arm jurisdiction would be found) that is much broader than that of the FTC. While the conduct must occur more than once, persistent or repeated does not require a showing of substantial numbers of illegal or fraudulent acts.¹³⁸ To obtain injunctive relief, the AG must only show "potential to deceive", i.e., "whether the act complained of has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud."¹³⁹

GBL § 349 makes unlawful 'Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.' The courts of New York have construed the intent of this section as a 'broad, remedial statute ... directed towards giving consumers a powerful remedy'.¹⁴⁰ The elements of a violation of GBL § 349 are proof that:

- (1) the practice was deceptive or misleading in a material respect and
- (2) the plaintiff was injured (not required for AG to obtain injunction).

There is no requirement under GBL § 349 that a plaintiff prove that the defendant's practices and acts were intentional, fraudulent or even merely reckless. There is also further no need to prove reliance upon defendant's deceptive practices, although to recover damages under the statute is necessary to prove an actual injury, although not

¹³⁶ Section 350, GBL prohibits false advertising.

¹³⁷ *People v. Ford Motor Co.*, 74 N.Y.2d 495 (1989).

¹³⁸ *People v. Princess Prestige Co.*, 42 N.Y.2d 104 (1977).

¹³⁹ *People v. General Electric Co., Inc.*, 756 N.Y.S.2d 520 (2003)((citations omitted), quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 (1977)).

¹⁴⁰ *BNI NY v. De Santo*, 675 N.Y.S. 2d 753 (1998)

necessarily an economic harm.¹⁴¹ In 1995, the Court of Appeals revised the threshold to require that the omission or misrepresentation comprising the misleading and deceptive act be 'likely to mislead a reasonable consumer acting reasonably under the circumstance',¹⁴² and thus conforming to FTCA policy.¹⁴³ It has been held on its face to apply to all economic activity with a broad reach that 'provides needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'¹⁴⁴ The practice in question must have been consumer oriented or consumer related which is in contrast to numerous other state laws that have been held to apply to private business disputes.¹⁴⁵

The Attorney General is afforded broad enforcement powers under the statute and, upon 5 days notice to the infringing party and an opportunity to respond, can bring an action in the name and on behalf of the people of the state of New York to enjoin the unlawful practices and to obtain restitution. A person injured can bring an action in his own name to recover actual damages, or \$50 whichever is greater. If the person can show a wilful or knowing violation, he may, at the discretion of the court, recover treble damages up to \$1,000.¹⁴⁶ A prevailing party may be awarded reasonable attorney's fees.¹⁴⁷ Where the conduct is shown to be perpetrated against one or more elderly persons, an additional civil penalty, not in excess of \$10,000 can be imposed.

The statute, therefore, with this flexibility and scope has been relied on by individuals and notably the AG to address a range of Internet-related matters. These have included:

Fandango.com 2010 settlement with Fandango.com an online movie ticket seller, one of 22 well-known online retailers whose customers are often presented with a discount or cash-back incentive offer as they complete their purchase. A pop-up window appears on their computer screens promising a \$10 coupon on their next purchase. If consumers enters their e-mail addresses to redeem that coupon, their personal information, including credit or debit card number, was automatically transferred by the retailer to Webloyalty.com or another discount club company. The company then automatically billed the consumer's credit or debit card a monthly fee for a membership. If consumers did not cancel the membership by contacting the company within a specified time, they were charged a recurring monthly fee. E-mails notifying consumers of the cancellation policy were typically disregarded by consumers as spam, or automatically screened out as spam by e-mail systems. The monthly amounts often go undetected, sometimes for years.

Fandango.com agreed to cease sharing customer data, provide prior and adequate notice of Fandango agreed to end the practice of sharing customers' credit and debit card information with discount program sellers and to reform its practices to protect online shoppers from being deceived by providing advance notice of the charges that can be occurred. The company must pay \$400,000 into a consumer redress fund.

¹⁴¹ 85 N.Y. 2d 20 (1995);

¹⁴² *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y. 2d 20 (1995).

¹⁴³ See text and accompanying notes 36-38, *supra*.

¹⁴⁴ *Karlin v. IVF America*, 93 N.Y. 2d 282 (1999).

¹⁴⁵ See A. Horvath, *supra* note 13 at 520. Cf. *Ly v. Nystrom*, 615 N.W2d 302 (Minn. 2000).

¹⁴⁶ See GBL § 349(h).

¹⁴⁷ *Ibid*.

Investigations continue with respect to the other retailers.

Freelotto.com 2010 Plasmanet, owner of Freelotto.com settled with AG for deceptive and misleading advertisements. Consumers can play on FreeLotto.com without charge if they agree to receive emails from PlasmaNet and visit the site every day. Consumers do not have to visit daily if they purchase the “FreeLotto Automatic Subscription Ticket” (“F.A.S.T.”) service, for \$14.99 per month and can program it to automatically play the sweepstakes games for them. The NYAG found that as of March 2006, PlasmaNet began sending deceptive and misleading emails to FreeLotto.com players notifying them of “pending” prizes between \$300 and \$10,000,000 and directing them to “CLICK TO CLAIM” their prize winnings. They had not won a prize but were unknowingly purchasing FreeLotto.com’s “F.A.S.T.” service.

The AG further found that PlasmaNet used deceptive and misleading banner advertisements to generate FreeLotto.com registrations, stating that the viewing consumer had, in fact, already won a prize, without disclosing that the consumer had to register with FreeLotto.com and agree to receive advertising from PlasmaNet in order to collect it.

PlasmaNet must pay \$1.5 million in penalties, costs, and fees to New York State and will make 3 months worth of refunds to eligible consumers over the next six months. PlasmaNet must also significantly reform its advertising practices.

Tagged.com 2009 settlement for deceptive acts in sending 60 million misleading emails to email contacts of subscribers purporting to be from them and stating falsely that Tagged members had posted private photos online for their friends to view. These were constructed to appear as if they had been sent directly from members’ personal email accounts instead of from Tagged.com. The emails falsely stated that “[name] sent you photos on Tagged.” If a member had added a personal image to the website, Tagged also included that picture in these fraudulent email solicitations. When recipients of the fraudulent emails tried to access the photos, they were told that they had to sign up for Tagged.com. The company would then deceptively gain access to the new members’ personal email contacts to send out more fraudulent invitations.

A consent settlement was agreed with Tagged.com with \$500,000 in fines and costs with a commitment to reform email practices.

Symantec and McAfee 2009 settlement in connection with its practice of automatically renewing its customers’ online subscriptions without adequate notice or consent.

The companies agreed to: clearly disclose any automatic renewal program, provide an easy, transparent, and automated means to opt out of renewal, provide electronic notification to consumers before and after renewal of the subscription and refund consumers who request it within 60 days of being charged. The companies will also clearly disclose the length of time that they will continue to support and provide updates to any purchased software. Symantec and McAfee will also pay a combined \$750,000 to the Attorney General’s office to settle all claims.

Lifestyle Lift 2009 settlement with plastic surgery company that had its employees post anonymous customer reviews on various websites and Internet message boards to trick consumers into thinking these were from satisfied customers posting their own stories. The practice which is called ‘astroturfing’ (a play on words using the fake grass ‘astroturf’ to indicate a false grassroots campaign) was found by the AG to constitute deceptive commercial practices, false advertising, and fraudulent and illegal conduct under New York and federal consumer protection law.

The company will not promote Lifestyle Lift’s services on the Internet without clearly and conspicuously disclosing that they are responsible for the content. Its employees will no longer pose as consumers and it will pay \$300,000 in penalties and costs to New York State.

Magsforless.com 2008 settlement with online magazine vendor failing to fulfil order or provide refunds. The AG found that the company immediately charged the customer’s credit card or PayPal account. Customers were then notified that magazines may not arrive for up to 12 weeks. When the magazines failed to appear after the waiting period expired, it was usually too late for customers to dispute the charge with their credit card company or PayPal.

The company agreed to improve its Website and ordering processes with orders processed in 7 days, notify all customers of the settlement and provide full refunds to consumers who never received magazines (to date \$350,000) and pay the State \$100,000 in penalties.

EMH Group, LLC 2007 settlement with jewelry online auction firm had its employees secretly place bids on its own online auctions which inflated the price of goods by a total of \$5 million.

The company owner and the group is banned from the online auction industry for 4 years, must pay \$400,000 in fines and costs, and be monitored by the AG if it resumes this business.

Priceline, Travelocity, and Cingular Wireless 2007 settlement with large online advertisers for deceptively installing adware on computers without full notice and consent.

The companies had to cease using that adware, provide consumers with full disclosure of the name of the applicable adware program and any bundled software; brand each advertisement with a prominent and easily identifiable brand name or icon; fully describe the adware and obtain consumer consent to both download and run the adware; make it practicable for consumers to remove the adware from computers; obtain consent to continue serving ads to legacy users; require their affiliates to meet these requirements.

US Search.com 2007 investigation and Assurance of Discontinuance with personal information company that collected and sold non-public personal financial information without proper disclosure or consent infringing §349 and in violation of the US Gramm-Leach-Bliley as there was not an exempt lawful purpose for the disclosure.

The company was sold before the AOD and the new owner gave assurances that there were no plans to resume such practices.

Facebook 2007 settlement after AG finding that its failure to address and respond to pornography delivery and sexual solicitation to minors was infringement of § 349 in light of its representations that it was a safe site for minors, including a NY Times article containing statements by its privacy officer detailing Facebook's protections for its under-18 users, saying that communication is limited to those who are affiliated with the minors' networks (such as their schools).

The settlement required Facebook to put in place new safety measures, disclose them prominently, have a confidential mechanisms for reporting abuses, respond to complaints about nudity, pornography or harassment within 24 hours, have an independent examiner and to whom users and non-users must have easy online access.

People v. Lipsitz¹⁴⁸ Section 349 held enforceable against a state resident whose email magazine sales 'scam' was targeted outside the state by means of global electronic communication. The fact of the Internet for the defendant's transactions did not affect jurisdictional analysis, since, according to the court, the focus is primarily on the location of the messenger, in an early case on this issue.

Paypal

2004 Deceptive and misleading statements by Paypal about its terms and conditions and that it gave its customers 'the rights and privileges expected of a credit card transaction' led to 2004 settlement with NYAG to pay \$150,000 and reform its User Agreement to reflect clearly terms and conditions.

2006 AG agreement with credit card companies to pay refunds for Paypal processed sales not fulfilled.

NYAG joined a 27-state action against PayPal in 2006 again arising from its disclosure policies.

Other

A survey of New York State law identifies at least 35 other consumer protection laws at least some of which apply in the online environment. As with other states, these target specific practices or industries.¹⁴⁹ For example, in *Doe v Great Expectations*,¹⁵⁰ the Court held that NY's Dating Service Law, GBL § 394(c)(3) which caps the fees that a social referral service may charge a client where it does not guarantee a

¹⁴⁸ 663 N.Y.S. 2d 468 (1997).

¹⁴⁹ See T. Dickerson, 'A Consumer Law Update: The Judge's Guide to Federal and New York State Consumer Protection Statutes' (June 2006)(Annual survey by former small claims court judge now sitting in the Appellate Division), available at:

http://207.29.128.60/courts/9jd/TacCert_pdfs/CONSUMERLAW2006.pdf.

¹⁵⁰ 10 Misc. 3d 618 (NYS Civ.Ct. 2005).

minimum number of referrals per month to \$25 applied to Internet dating service where the company was based in NY.

The NYAG procured legislation to include online sales within the law governing mail order and telemarketing sales requirements, akin to the Distance Selling Regulations regarding information about the seller and fulfilment requirements. (2007)

More recently, the AG authored a new law 'E STOP' that requires all registered sex offenders to register their email accounts, screen names and any other Internet identifiers with the state Division of Criminal Justice Services (DCJS). This information is held in a database and made available to social network site operators who can scan the data against their own users to remove sexual predators from the sites. Most large sites have agreed to the scanning process. Facebook and MySpace reportedly removed 3,500 registered offenders as a result.

The NYAG provides a considerable amount of consumer education with publications and neighbourhood seminars, including those targeted at senior citizens.

New York City Department of Consumer Affairs

The New York City 1969 Consumer Protection Law prohibits "deceptive or unconscionable trade practices in the sale, lease, rental or loan ... of any consumer goods and services, or in the collection of consumer debts." It authorizes the Department of Consumer Affairs to adopt rules and regulations that protect the public from these.

In addition, the Department also licenses 57 industries and enforces the laws governing these industries. Through regular inspections, DCA keeps a check on businesses and can intervene directly when consumers have complaints. Businesses with a DCA license are subject to sanctions and penalties if they violate any of the laws and rules DCA enforces.

The Department is extremely proactive and regulates nearly all of the retail and other commerce in New York City. It engages in much consumer education and is involved in regulating transactions online and via other electronic communications. It will act against any online vendor with a New York City address and can intervene in the case of deceptive email promotions, if a business makes an offer that reaches New Yorkers via e-mail, takes payment and doesn't make good on its agreement.

Some actions the DCA has taken in online consumer protection include:

Recent consumer alerts and cautions to banks about a new campaign of aggressive enrolment solicitations by text message for overdraft protection. Under new federal regulations, banks will not be able to automatically enrol customers in overdraft checking which is estimated to cause a significant loss of fees for banks.

Recent settlement with a real estate company engaging in online advertising was found to engage in deceptive advertising concerning, inter alia, closing costs on foreclosed homes that were available for sale. The DCA brought suit against the

company and then entered a settlement agreement that required reforms to the practices in question and restitution to 36 purchasers and fines of \$100,000.

Online publication of a consumer 'Internet Scam Guide: A Web of Lies'

Financial literacy program for seniors, including internet fraud

Online 'Consumer Campus' for college students on consumer protection, identity theft, credit card traps, and government resources. In cooperation, the City University of New York (CUNY) distributes information about Consumer Campus to more than 200,000 students via email.¹⁵¹

C. Civil Society: U.S. Consumer Protection Organizations

There is a very significant level of consumer activism in the United States at the local, state and national levels. What is sometimes referred to as the 'consumer movement' takes many forms, formal and otherwise, and involves many actors. However, there are many US non-profit organizations engaged in a vast range of activities on many, diverse, consumer-related issues. For example, the Consumer Federation of America, an umbrella organization, has 300 members and a quick scan of a 'consumer handbook' listing of just 34 such groups on a US government website illustrates the different nature and issues these can encompass.¹⁵² Yet, these activities can perhaps be grouped into overarching categories of advocacy, education, whistleblowing or watchdog activity and representation. There are as well groups using a consumer banner that represent anti-consumer positions¹⁵³ or groups that are also exclusively industry member, not-for-profit advocacy groups on issues also of concern to consumers but that have multiple purposes which can include consumer education or complaint reporting.¹⁵⁴

Neither of the above scenarios is intended as a judgement of its effectiveness or the worth of its positions or outcomes; rather a categorization outside of consumer movement group. It is clearly impossible to comment on even a statistically significant sampling of the groups within the scope of this report. Also, we could not identify any consumer group devoted exclusively to Internet related issues. Hence, the author chose two well-respected national consumer groups with some diversity in their missions and means on which to focus primarily: the National Consumer Law Center and the National Consumers League. Both granted interviews. The following briefly reports on these organizations and as well on the Consumers' Union.

The National Consumer Law Center is a not-for-profit, tax exempt organization which has its headquarters in Boston, Massachusetts and an office in Washington, DC. It does not appear to be funded by any industry but relies on charitable contributions and the income from its consumer law publications and training conferences and certain paid expert consultant services that it offers to consumer

¹⁵¹ See Consumer Campus, <http://www.nyc.gov/html/dca/html/initiatives/campus.shtml>.

¹⁵² See Consumer Action Website, 'National Consumer Organization' (Federal Citizen Information Center), <http://www.consumeraction.gov/resprt2.shtml>.

¹⁵³ See, e.g., Free Press 'Astroturf: Exposing the Fake Grassroots', <http://www.freepress.net/astroturf>.

¹⁵⁴ See, e.g., AntiPhishing Working Group, <http://www.antiphishing.org/index.html>.

lawyers. The National Consumer Law Center receives government funding under Title IV of the Older Americans Act in order to improve the quality and accessibility of legal assistance for vulnerable older Americans with consumer problems. It is a member of the Consumer Federation of America.

The NCLC has as its primary focus on advocacy, both legislative and pro bono litigation, and training to protect the rights of low income and other vulnerable consumers and to advance economic justice. In this regard, it concentrates on fairness in financial services, wealth building and financial health, stopping predatory lending and consumer fraud, and protection of basic energy and utility services for low income families. Other vulnerable populations on whose issues it also focuses include immigrants, elders, homeowners, former welfare recipients, victims of domestic violence and military personnel.

The NCLC's expertise in consumer law is nationally recognized and its work cited by courts in construing consumer issues.¹⁵⁵ Its excellent reports on state consumer laws are annexed to this report.

Its advocacy issues often have an online or electronic transaction aspect to them, for example it has authored several reports and position letters on electronic benefits payments and their legal consequences,¹⁵⁶ a recent, important issue since the elderly and those receiving income or other assistance are being forced into electronic payment systems such as direct deposit and prepaid debit cards. Its 2007 letter to the Federal Reserve regarding the need for reform in electronic payment regulations is illustrative of some of the issues.¹⁵⁷ It notes that diverse rules governing seemingly similar payments systems are complex and varying in their rights and protections. Also of concern here is that it is often the merchant and not the consumer chooses the electronic payment method, affecting the consumer's rights. The NCLC urges harmonized regulation by the Fed of all methods to ensure equal protection. It also seeks rules prohibiting excessive fees to cancel pre-authorized payments and bank rules requiring approval of the consumers' pre-authorized automated payment cancellations by the payee originator so that payments continue until these are received.¹⁵⁸

Some Commentary from interviews, analysis of organization

The NCLC is a serious legal consumer protection organization. It coordinates with the other national organizations on issues falling within its mission, endorsing some positions, but usually takes the lead on the financial issues (an approach often used by the various organizations to maximize resources). With the growth of online banking, m commerce, and electronic payment methods, vigorous consumer advocacy will continue to be necessary, especially since consumers are often disadvantaged in their dealings with financial institutions and subject to many fees and penalties as a result. It views self-regulation in consumer protection as generally ineffective; seeing co-

¹⁵⁵ See, e.g., *O'Brien v. Cleveland*, 423 Bankruptcy Rep. 477 (USBC, D.N.J. 2010)(citing to NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING 667 (6th ed. 2007)).

¹⁵⁶ See *Electronic Benefits: Electronic Delivery of Federal and State Benefits, Issues for Low Income Recipients*, http://www.consumerlaw.org/initiatives/electronic_benefits/.

¹⁵⁷ See annexed Letter to Federal Reserve Chair, 2007.

¹⁵⁸ *Ibid.*

regulation and oversight as a minimum. It advocates strongly the need to implement and preserve private enforcement rights by consumers with financial redress since the regulators cannot address many individual harms. It views judicious and ethical class actions as essential to redress the smaller consumer harms that can only be done as a group. The problems encountered here could be addressed by an appointed public interest law advocate funded by a portion of proceeds recovered, like the whistleblower approach. (The FTC thought as well that class actions were important but that a whistleblower scheme of compensation for attorney's fees in any event might tilt an advocate, even if it were the FTC, to only those schemes with a larger recovery.)

It considers that the deregulatory trends of the last decade or more have seriously harmed the consumer and notes the level of lobbying activity to preserve the status quo despite the obvious consequences of the lack of oversight.

National Consumer League

This is also a national organization and member of the Consumer Federation of America. It also works with other national organizations such as Consumers Union, NCLC, and trade unions, etc., on issues where the remit is broader than its own or where joined/pooled resources are needed. The NCL does partner with some corporate donors on certain projects where it is made clear that it will take its positions as it determines and need not clear them prior to making them.

The NCL focuses on a variety of consumer related issues. However, it has been active in a number of online fraud prevention programs. The first of these is its Fakechecks.org, a clever online consumer education site that takes a test and check your skills approach, running the consumer through various online wire transfer and check scams.¹⁵⁹ It is very well done.

NCL is also the founding member of Alliance Against Fraud that its report includes the FTC, the U.S. Postal Service, the Office of the Comptroller of the Currency, 30 state AGs, trade unions, the Canadian Mounted Police and others. It has a focus on providing members with news about the latest internet and telemarketing scams and its members have organized a 'FAST' network, under the Internet Fraud Watch name, a single point of contact mechanism whereby the members all take consumer complaints online and via hotline numbers from consumers anywhere and forward them to the appropriate agency point of contact according to zipcode or telephone area code of the caller. The consumer gets told where it has been sent for handling. Some 39,000 complaints have been handled by the network in the last 3 years.

It believes that online consumer fraud requires a layered focus of efforts. While the legal framework is substantively sufficient, recovering losses for victims is a problem. Reform, especially international may be needed here but because of the multijurisdictional aspect, NCL regards this as difficult.

Rather greater impact or 'splash' from efforts to prevent fraud in the first place. Here it believes that the local, nongovernmental efforts can have great effect, that there is value in diverse approaches, and points to the 'red flag' system on Craig's List as an

¹⁵⁹ See Fakechecks.org, <http://www.fakechecks.org/index.html>

example of quick action to highlight a scam and remove it. Other intermediaries can play a key role. ISPs need to take on greater educational role, especially with parental controls. Family online safety programs can help, and notes that of the AntiPhishing Working Group. It believes that URL blocking effectiveness is limited in its effectiveness as the operators move too quickly (although other reports note that the banks manage to get such sites removed within 4 days by ISPs in contrast to sites with other illegal content). Better technological investigative tools are needed for law enforcement and notes that this is starting to happen around the country, for example, in 2009, Washington State AG McKenna procured authorization for a digital forensic lab.

It too believes that private enforcement is key to consumer protection and that disgorgement of illegal profits is necessary for a real deterrent effect. It points to the FTC pre-acquired account marketing scam (see Fandango.com in NY) that only came to light and attracted the AGs attention after a class action had been filed. Budgetary reasons will always dictate what regulators can do and fighting fraud is a 'boots on the ground' issue.

Private industry can help. For example, Western Union has spent money and time to educate its employees to recognize the signs of fraud in wire transfers. This has proved successful in reducing levels. It needs to be acknowledged and encouraged. Consumers should also be encouraged to report attempts/fraud to feed information back into the education loop, according to the NCL.

Other

One of the key reasons that the NCL was included in this report was an innovative education program that it organizes and sponsors: Life Smarts.¹⁶⁰ A teen quiz contest program in which teams of students from 30 states participate, including online. There are state contests and an annual national contest which will be held in April in Miami. An online curriculum for self study is available at Life Smart U. with other learning activities offered to coaches and students. In excess of 60,000 students participate annually. The curriculum includes online safety and financial skills.

Consumers Union

This is a very well known consumer group in the US and famous for its independence in testing and reporting on consumer products and services in a magazine called 'Consumer Reports'. It is funded only from its membership fees and subscriptions. These reports were relied on by consumers as trusted reviews of value, safety, effectiveness. The CU has put Consumer Reports online.

It does as well issue advocacy via a staff of lobbyists. It is part of the Consumer Federation.

The Consumers Union is working hard to exploit new technology and media to stay relevant in an online world where so many sites have consumer reviews and feedback can be instantaneous via Twitter, etc. It maintains a Facebook page, Twitter following and provides for blogging comments. It uses this for consumer education. For

¹⁶⁰ See Life Smarts, <http://www.lifesmarts.org/>.

example, the current blog is by Professor Liz Warren addressing the current financial reform proposals.¹⁶¹

It has performed an online watchdog function on at least one issue: blogs and endorsements, tracking complaints about websites and bloggers whose independence in reviewing was unknown. It reportedly had to stop when it ran out of funding. The recent reform of the rules by the FTC may help but a public interest watchdog such as the CU whose own independence is its hallmark would give teeth to the issue.

¹⁶¹ Consumers Union, <http://www.consumersunion.org/>.