

Contents

	CD-Rom Contents	xxxiii
Chapter 1	First Considerations	
	1.2 About This Manual.	1
	1.3 General Preparation for UDAP Clients.	1
Chapter 2	UDAP Scope	
	2.1 General Principles	3
	2.1.3 Liberal Construction of UDAP Scope Sections	3
	2.1.4 Interpretations of “Trade or Commerce”	3
	2.1.5 Interpretations of “Goods”	3
	2.1.6 Interpretations of “Merchandise”	4
	2.1.7 Interpretations of “Services”	4
	2.1.8 Interpretations of “Personal, Family, or Household Use”	4
	2.1.8.1 General	4
	2.1.8.2 Is the Test Objective or Subjective?	4
	2.1.8.4 Listing of Consumer Transactions	5
	2.1.8.5 Transactions Not Found to Be for Consumer Purposes	5
	2.1.8.6 Texas Case Law Defining “Consumer Transaction”: “Consumer” Not Limited to “Personal, Family or Household Purposes”	5
	2.2 Exempted Transactions	5
	2.2.1 Credit.	5
	2.2.1.2 Does a Credit Transaction Involve “Goods or Services”?	5
	2.2.1.5 Specific Statutory Exemptions.	6
	2.2.1.6 Does Other Legislation Occupy the Field of Credit Regulation?	6
	2.2.1.6.2 Federal and state banking laws	6
	2.2.1.6.3 Effect of Truth in Lending Act.	7
	2.2.2 Debt Collection	7
	2.2.3 Where There Is No “Purchase”	8
	2.2.3.1 Where Transaction Involves No “Purchase”	8
	2.2.3.2 Where Purchase Is Not from UDAP Defendant	10
	2.2.3.3 Where Someone Other Than Consumer Pays.	10
	2.2.4 Post-Sale Activities.	10
	2.2.5 Real Property and Mobile Homes	11
	2.2.5.1 Are Real Estate Sales Covered?	11
	2.2.5.1.1 Real estate sales involve “trade or commerce,” “property,” and “merchandise”	11
	2.2.5.1.2 Does real estate sale involve “goods or services”?	11
	2.2.5.1.3 The isolated sale of real estate by owner	12
	2.2.5.1.4 Special consideration for mobile home sales.	12
	2.2.5.2 Services, Personalty Related to Real Estate Are Covered.	12
	2.2.6 Residential Leases; Mobile Home Parks.	12

2.2.6.1	Coverage	12
2.2.6.2	Does Other State Regulation of Landlord-Tenant Relations Displace UDAP Coverage?	12
2.2.8	Campground and Other Membership Clubs	12
2.2.9	Pyramid Sales, Franchises, Securities, Business Opportunities	13
2.2.9.2	Franchises and Other Investments	13
2.2.9.3	Securities Transactions	13
2.2.9.4	Work at Home Schemes and Other Personal Business Opportunities	13
2.2.10	Employer-Employee and Internal Business Disputes	14
2.2.11	Personal Injury Suits	14
2.2.12	The Texas Exemption for Large Transactions	14
2.3	Exempted Sellers	15
2.3.1	Insurance Companies	15
2.3.1.1	Does the UDAP Statute Apply to Insurance Practices?	15
2.3.1.3	State Insurance Code Displacement of UDAP Applicability	15
2.3.1.4	The Filed Rate Doctrine and Primary Jurisdiction	15
2.3.2	Utilities	16
2.3.3	Regulated Industries	16
2.3.3.2	UDAP Statutes Exempting Specific Regulated Entities or All “Regulated Practices”	16
2.3.3.3	UDAP Statutes Exempting “Practices Permitted by Law”	16
2.3.3.3.1	Mainstream precedent	16
2.3.3.3.2	Minority of courts confuse regulated with permitted	17
2.3.3.4	Are Permitted Practices Exempt Even Without an Explicit Statutory Exclusion?	18
2.3.3.5	State Law Displacement of UDAP Coverage	19
2.3.3.5.1	Introduction	19
2.3.3.5.2	Impact of explicit statutory language on statute’s cumulative or exclusive effect	19
2.3.3.5.3	Jurisdictions that reject displacement	19
2.3.3.5.4	Other jurisdictions adopt a balancing approach	19
2.3.3.5.5	Whichever approach adopted, most UDAP claims are not displaced by other state regulation	19
2.3.3.6	Exhaustion of Administrative Remedies	20
2.3.3.6.1	Must consumer exhaust administrative remedies?	20
2.3.3.6.2	The doctrine of primary jurisdiction	20
2.3.4	Nonmerchant Sellers and Isolated Occurrences	20
2.3.5	Nonprofit Organizations and Schools	20
2.3.6	Government and Quasi-Government Agencies As Sellers	21
2.3.8	Wholesalers and Other Indirect Parties	21
2.3.9	Lawyers	22
2.3.10	Medical Professionals	23
2.3.11	Other Professionals	24
2.3.12	Out-of-State Transactions	24
2.4	Persons Excluded from UDAP Protections	25
2.4.1	Recipients of Insurance Payments; Third-Party Beneficiaries; Donees; Assignees	25
2.4.1.2	Recipients of Insurance Payments	25
2.4.1.3	Donees	25
2.4.1.4	Third-Party Beneficiaries	25
2.4.1.5	Assignees of Consumers’ Claims	26
2.4.1.6	Other Third Parties	26
2.4.2	Where Consumer Is Now Deceased	26
2.4.3	Loan Guarantors	26

2.4.4	Out-of-State Residents	27
2.4.5	Merchants; Corporations; Government Entities	27
2.4.5.2	Can Businesses Bring UDAP Actions?	27
2.4.5.3	Can Government Entities Bring UDAP Claims?	29
2.4.6	Investigators	29
2.5	Conflict with the FTC Act and Other Federal Law	29
2.5.1	General Principles of Federal Preemption	29
2.5.2	The FTC Act	30
2.5.3	Federal Banking and Credit Disclosure Laws	30
2.5.3.2	National Bank Act	30
2.5.3.3	OTS Regulation of Savings and Loan Associations	30
2.5.3.4	Alternative Mortgage Transactions Parity Act	31
2.5.3.5	Federal Regulation of State-Chartered FDIC-Insured Banks	31
2.5.3.7	Real Estate Settlement Procedures Act	31
2.5.3.8	Truth in Lending Act	31
2.5.4	Federal Vehicle, Boat, and Mobile Home Standards	31
2.5.5	Federal Transportation and Shipping Laws	31
2.5.6	Federal Communications Laws	32
2.5.7	Federal Securities and Commerce Laws	32
2.5.8	Federal Health Care Laws	32
2.5.9	ERISA	33
2.5.10	Federal Tobacco Regulation	34
2.5.11	Other Federal Statutes	34

Chapter 3

Demonstrating That a Practice Is a UDAP Violation

3.1	Getting Started	37
3.1.2	Expansive, Liberal Application of UDAP Statutes	37
3.2	<i>Per Se</i> Violations	37
3.2.2	<i>Per Se</i> Violations Enumerated in the UDAP Statute	37
3.2.2.2	Practices Outside Specific UDAP Prohibitions Are Still UDAP Violations	37
3.2.3	<i>Per Se</i> Violations of State UDAP Regulations	37
3.2.4	Finding of Common Law Fraud Necessitates Finding a UDAP Violation	38
3.2.6	Violation of the FTC Act, Other Laws Where the Statute Itself States a Violation Is Unfair or Deceptive	38
3.2.7	Violations of Other State, Federal Laws As <i>Per Se</i> UDAP Violations	38
3.2.7.1	Importance of Finding Violations of Other Laws <i>Per Se</i> UDAP Violations	38
3.2.7.3	Precedent Finding Violations of Other Laws to Be <i>Per Se</i> UDAP Violations	38
3.2.7.3.1	California, the District of Columbia, and Nevada UDAP statutes explicitly adopt and Texas UDAP statute explicitly rejects <i>per se</i> approach	38
3.2.7.3.3	State UDAP regulations finding statutory violations to be <i>per se</i> UDAP violations	38
3.2.7.3.4	Courts may determine that statutory violations are <i>per se</i> UDAP violations	38
3.2.7.3.5	Courts that reject the <i>per se</i> approach	39
3.2.7.3.6	Examples of statutory violations found to be <i>per se</i> UDAP violations	39
3.2.7.4	Arguing That a Statutory Violation Is a <i>Per Se</i> UDAP Violation	40
3.2.7.4.1	Violation of another statute as an unfair practice	40
3.2.7.4.2	Violation of another statute as deceptive practice	40
3.3	Proving UDAP Claims Without <i>Per Se</i> Violations	40

3.3.2	Develop the Facts	40
3.3.4	Point Out General UDAP Standards	40
3.3.4.3	Unfairness and Unconscionability As Evolving, Expansive Concepts	40
3.4	Sources of UDAP Precedent and Guidelines	41
3.4.4	State UDAP Regulations	41
3.4.4.1	Authority and Procedure to Enact Regulations	41
3.4.4.2	Precedential Effect of UDAP Regulations	41
3.4.5	FTC Cases, Other Guidelines	41
3.4.5.1	FTC Cases, Other Guidelines Are Important Sources of UDAP Precedent	41

Chapter 4

General Principles As to UDAP Violations

4.2	Deception, Statutory Fraud	43
4.2.2	Relationship of Deception to Unfairness, Unconscionability	43
4.2.3	Comparison of Deception with Fraud, Misleading Practices	43
4.2.3.1	Comparison with Common Law Fraud	43
4.2.3.2	Statutory Fraud; Misleading Practices	43
4.2.4	Intent Unnecessary	44
4.2.4.1	Intent Generally Not Required	44
4.2.4.2	Where Statute Explicitly Requires Proof of Intent	44
4.2.5	Knowledge Unnecessary	44
4.2.5.1	Knowledge Generally Not Required	44
4.2.5.2	Where Proof of Seller's Knowledge Is Required	45
4.2.6	Despite Good Faith Efforts	45
4.2.7	Despite Cessation of Practice	45
4.2.8	Despite Industrywide Practice	45
4.2.9	Actual Deception Unnecessary; Likelihood or Capacity for Deception Sufficient	45
4.2.10	Puffing As a Defense	46
4.2.11	Vulnerable Consumers Specially Considered	47
4.2.11.1	The FTC Standard	47
4.2.11.2	State UDAP Case Law	47
4.2.12	Materiality May Be Presumed and Reliance Is Unnecessary	47
4.2.12.2	The FTC Standard	47
4.2.12.3	State UDAP Case Law	47
4.2.12.3.1	Proof of reliance generally not required	47
4.2.12.3.2	Small minority require reliance	48
4.2.12.3.3	No reliance required in nondisclosure or mis- disclosure cases	48
4.2.12.3.5	Where reliance required, it need not be reasonable reliance	48
4.2.12.3.6	Presumption of reliance where misrepresentations are material	49
4.2.12.4	Requirement That Representation Be Material	49
4.2.12.5	Relationship of Reliance to Causation	49
4.2.13	Ambiguous But Literally True Statements, Partial Truths, and Pictures Can Be Deceptive	49
4.2.14	Failure to Disclose	50
4.2.14.1	Overview	50
4.2.14.2	The FTC Standard	50
4.2.14.3	State UDAP Precedent	51
4.2.14.3.1	General standards	51
4.2.14.3.3	Special duty to disclose for fiduciaries	51

4.2.14.3.4	Must the nondisclosure be knowing?	51
4.2.14.3.5	Must the seller intend that others rely on the omission?	51
4.2.14.3.6	Must the seller have an independent duty of disclosure?	51
4.2.14.3.7	Must the consumer investigate?	51
4.2.14.3.8	Specific nondisclosure holdings	51
4.2.14.3.10	Electronic disclosures	52
4.2.15	Contract Defenses Do Not Apply to UDAP Cases	52
4.2.15.2	Parol Evidence Rule	52
4.2.15.3	Privity of Contract	53
4.2.15.4	Disclaimers, Merger Clauses, Limitations on Liability or Remedies, and Other Contract Clauses	54
4.2.15.5	Voluntary Payment Doctrine	54
4.2.15.6	Unclean Hands or Lack of Care by the Consumer	55
4.2.15.8	Other Contract Defenses	55
4.2.16	Tort Defenses Do Not Apply to Deception Claim	56
4.2.16.1	Contributory Negligence and Other Tort Doctrines	56
4.2.16.2	Economic Loss Rule Generally Does Not Apply to UDAP Claims	56
4.2.17	Subsequent Clarification Does Not Prevent Deception	57
4.2.17.2	Subsequent Consumer Conduct or Other Occurrence Can Not Cure Deception	57
4.2.17.3	The Georgia Exception	57
4.2.18	Immediate Customer's Deception Unnecessary	57
4.2.19	Oral Deceptions and Not Just Advertised Deceptions Are Actionable	57
4.2.20	Money-Back Guarantee Does Not Sanitize Fraud	58
4.3	Unfairness	58
4.3.2	The Current FTC Unfairness Standard	58
4.3.2.1	Standard Enacted by Congress in 1994	58
4.3.2.2	Substantial Consumer Injury	58
4.3.2.3	Injury That Consumer Can Not Avoid	58
4.3.3	Unfairness Standards Under State UDAP Statutes	59
4.3.3.1	Unfairness Broader Than Deception	59
4.3.3.2	Primacy of State Statutory Language and Intent and State Regulations	59
4.3.3.4	State UDAP Use of "S&H" Unfairness Definition in Lieu of the Current FTC Definition	60
4.3.3.5	The "S&H" Standard Described	61
4.3.3.7	Alternative State Definitions	61
4.3.5	Systematic Breach of Contract As Unfair	62
4.3.9	Illegal Conduct	62
4.3.11	Taking Advantage of an Emergency Situation	63
4.3.12	Unconscionable Practices As Unfair Practices	64
4.4	Unconscionability	64
4.4.1	Importance of Unconscionability Standard	64
4.4.2	Definitions of Unconscionability in UDAP Statutes and Regulations	64
4.4.3	UDAP Case Law Defining Unconscionability	64
4.4.4	Taking Advantage of Vulnerable Consumers	64
4.4.5	Price Unconscionability	64
4.4.8	Other UDAP Unconscionability Decisions	65
4.4.9	Other Sources of Unconscionability Precedent	65
4.4.9.1	General	65
4.5	Unsubstantiated Claims	65
4.5.1	General	65

4.5.2	FTC Standards	65
4.5.3	State UDAP Precedent	66
4.6	Deceptive Pricing Inducements	66
4.6.1	Bait and Switch	66
4.6.3	Deceptive Pricing and Bargain Sales	66
4.6.3.1	Deceptive Pricing in Comparison to a Reference Price	66
4.6.3.2	Other Deceptive Pricing Techniques	66
4.6.5	Low Balling; Charging Higher Prices Than Agreed Upon.	66
4.6.7	Conditions or Limitations on Offers	66
4.7	General Misrepresentations Regarding Product and Seller	67
4.7.1	Product Characteristics, Uses, and Benefits.	67
4.7.5	Product Quantity and Size	67
4.7.7	Seller's and Product's Approval, Affiliation, and Endorsement.	67
4.7.7.1	Approval or Affiliation	67
4.7.7.2	Unlicensed or Unregistered Sellers.	67
4.7.7.3	Endorsements	67
4.7.8	Manufacturer's and Seller's Status; Fictitious Names	67
4.9	Deceptive Performance Practices	68
4.9.2	Delay and Nondelivery	68
4.9.3	Damaged and Defective Goods.	68
4.9.4	Used as New; Prior Use	68
4.9.5	Substitution of Displayed Products	68
4.9.8	Deceptive Billing Practices	68
4.10	Anti-Competitive Conduct	69
4.10.1	Application of UDAP Statutes to Antitrust Cases	69
4.10.2	Challenging Consumer Abuses As Anti-Competitive	70
4.11	Invasion of Privacy	70

Chapter 5

Specific Unfair or Deceptive Practices

5.1	Credit and Collections	73
5.1.1	Debt Collection, Other Creditor Remedies	73
5.1.1.1	Debt Collection	73
5.1.1.1.1	Introduction and important sources of UDAP precedent	73
5.1.1.1.5	Misrepresentations as to legal consequences of debt nonpayment	73
5.1.1.1.6	Harassment	73
5.1.1.1.7	Collecting debts or amounts that are not owed	73
5.1.1.2	FTC Credit Practices Rule	73
5.1.1.2.1	General overview	73
5.1.1.2.4	Confession of judgment provision	73
5.1.1.2.11	Attempts to circumvent FTC Credit Practices Rule	74
5.1.1.3	Challenging Other Creditor Remedies	74
5.1.1.3.2	Case law finding creditor remedies unfair or deceptive	74
5.1.1.4	Abuse of Process, Inconvenient Venue	74
5.1.1.5	Unfair and Deceptive Repossession and Pawnshop Practices	74
5.1.1.5.1	Unfair contract provisions	74
5.1.1.5.2	Deceptive contract provisions	74
5.1.1.5.3	Unfair and deceptive repossession conduct	74
5.1.1.5.4	Unfair or deceptive practices relating to redemption, collateral sales, deficiencies, and surpluses	74
5.1.1.5.5	Pawnbrokers' sale of pawned goods	75
5.1.1.6	Unfair and Deceptive Foreclosure Practices	75
5.1.2	Foreclosure Assistance, Credit Repair, and Credit Counseling	75
5.1.2.1	Foreclosure Assistance Scams	75

	5.1.2.1.1 Advice, referral, and bankruptcy scams	75
	5.1.2.1.2 UDAP claims in sale-leaseback and similar scams	75
	5.1.2.1.3 Other claims against homesavers	76
	5.1.2.1.4 Claims against other parties and against the house	76
	5.1.2.2 Credit Repair Organizations	76
	5.1.2.2.2 Federal Credit Repair Organizations Act	76
	5.1.2.2.3 State credit repair laws	77
	5.1.2.2.5 UDAP approaches	77
	5.1.2.2.6 Car dealers and other sellers as regulated by state credit repair laws	78
	5.1.2.2.7 Applicability of federal credit repair statute to sellers . . .	78
	5.1.2.3 Credit Counselors, Debt Settlement, and Debt Elimination.	78
	5.1.2.3.1 The credit counseling industry	78
	5.1.2.3.2 Legal claims	79
	5.1.2.3.3 Abuse of non-profit status	81
	5.1.2.3.4 Debt settlement or negotiation agencies	83
	5.1.2.3.5 Debt elimination	84
	5.1.3 Loan Brokers.	84
	5.1.3.1 General	84
	5.1.3.3 Yield Spread Premiums	84
	5.1.4 Improvident Extension of Credit.	85
	5.1.4.1 General	85
	5.1.4.3 Applying General UDAP Prohibitions to Improvident Extension of Credit	85
	5.1.4.4 Other Claims	85
	5.1.4.5 Falsification of Credit Application by Seller or Broker	85
	5.1.4.5.1 Nature of the problem	85
	5.1.4.5.2 The consumer's legal claims	86
	5.1.4.5.3 Computing the consumer's damages	86
	5.1.4.5.4 Consumer's clean hands	86
	5.1.5 Violations of Federal and State Credit Laws As UDAP Violations	86
	5.1.5.1 Truth in Lending Violations	86
	5.1.5.2 RESPA Violations	86
	5.1.5.3 Discriminatory Extension of Credit	86
	5.1.5.4 Violations of State Credit Laws	86
	5.1.5.5 Attempts to Evade Credit Legislation	87
	5.1.6 Exorbitant Credit Charges	87
	5.1.6.2 Other Unfairness or Unconscionability in Credit Charges	87
	5.1.6.3 Uncovering Deception in Excessive Charge Cases	87
	5.1.7 Deception, Coercion, and Violation of Credit Contract	87
	5.1.7.1 Misrepresentation of Credit Terms	87
	5.1.7.2 Nondisclosure of True Credit Terms	88
	5.1.7.2.1 General	88
	5.1.7.3 Coercive Tactics	88
<i>new subsection</i>	5.1.7.5 Banking Agency Guidelines	88
	5.1.8 Special Issues in Home Mortgage Loans	88
	5.1.8.1 Negotiation, Closing, and Loan Terms	88
<i>replacement heading</i>	5.1.8.3 Servicing and Escrow Practices	89
	5.1.8.4 Payoff of Mortgage	89
	5.1.8.5 Equity Stripping	89
	5.1.9 Credit Cards and Related Services	89
<i>replacement heading</i>	5.1.9.1 Credit Card Marketing and Terms	89
	5.1.9.2 Credit Card Finders	91
	5.1.9.3 Unauthorized Credit Card Charges	91
	5.1.9.4 Credit Balances	91

new subsection
new subsection
new subsection

5.1.9.5	Credit Card Loss Protection and Reporting Services	91
5.1.10	Bank Accounts, Checks, Other Payment Methods	92
5.1.10.1	Deposit Accounts	92
5.1.10.2	Check Cashing	92
5.1.10.3	“Telechecks” and Unauthorized Electronic Fund Transfers	92
5.1.10.3.1	Introduction	92
5.1.10.3.5	UCC determines consumer rights concerning unauthorized telechecks	92
5.1.10.3.6	The EFTA and NACHA rules determine consumer rights concerning unauthorized electronic funds transfers	92
5.1.10.3.8	FTC Telemarketing Rule and state statutes apply to both telechecks and electronic funds transfers	93
5.1.10.4	Remittances	93
5.1.10.5	Live Check Solicitations	93
5.1.10.6	Gift Cards and Gift Certificates	93
5.2	Contracts, Warranties, and Legal Rights	94
5.2.1	Contract Language for Non-English Speaking Consumers	94
5.2.1.2	UDAP Claims	94
5.2.1.3	Other Statutory Requirements	94
5.2.2	Plain English Contract Language	94
5.2.3	Unfair and Unenforceable Adhesion Contract Terms	94
5.2.3.3	State Precedent Concerning Unenforceable Contract Terms	94
5.2.4	Contractual Misrepresentations	94
5.2.4.1	Deception Concerning the Nature of the Document Being Signed	94
5.2.4.2	Oral Representations Inconsistent with the Contract	95
5.2.5	Breaches of Contract	95
5.2.5.1	Mere Breach of Contract May Not Be UDAP Violation	95
5.2.5.2	Systematic Breach of Many Consumer Contracts As UDAP Violation	95
5.2.5.3	Entering into Contract with No Intention to Fulfill Obligations	95
5.2.5.4	Deception Accompanying the Contract Breach	95
5.2.6	Refunds and Cancellation Rights	96
5.2.7	Guarantees, Warranties, and Service Contracts	96
5.2.7.1	Breach of Warranties As UDAP Violations	96
5.2.7.1.1	Introduction	96
5.2.7.1.2	UDAP statute may apply where breach of warranty claim is unavailable	96
5.2.7.1.3	Warranty breach as per se UDAP violation	96
5.2.7.1.4	Aggravating circumstances can turn breach of warranty into UDAP violation	97
5.2.7.1.5	Magnuson-Moss breach of warranty violation as a per se UDAP violation	97
5.2.7.2	Service Contracts	97
5.2.7.2.1	Duplication of warranty rights	97
5.2.7.2.2	Deceptive marketing techniques	97
5.2.7.2.3	Failure to pay consumer claims under the service contract	97
5.2.7.3	Misrepresentations Concerning the Status of a Guarantee	98
5.2.7.3.1	General	98
5.2.7.3.2	Thirty day, “50-50” warranties	98
5.2.8	Other Misrepresentations of Legal Rights and Requirements; Misrepresentation of Law vs. Fact	98
5.2.9	Merchant’s Slow Payment on Judgment Owed Consumer	98
5.3	Insurance	98

5.3.2	Relation of UDAP to State Unfair Insurance Practices Act (UNIP)	
	Legislation	98
5.3.2.1	UNIP Legislation Described	98
5.3.2.2	Effect of UNIP Statute in a UDAP Action.	99
5.3.2.2.1	UNIP standards as guides for determining UDAP	
	violations	99
5.3.2.3	Private UNIP Actions As Alternative to UDAP Action	99
5.3.2.3.1	Utility of a private UNIP claim	99
5.3.2.3.2	Implying a private UNIP remedy	99
5.3.3	Unreasonable Refusal or Delay in Paying Claim As a UDAP Violation . .	100
5.3.3.1	Refusal to Pay.	100
5.3.3.2	Parties Liable for Unfair Claims Settlement Practices	100
5.3.3.7	Failure to Conduct an Adequate Investigation As UDAP Violation . .	100
5.3.3.8	Insurer’s Failure to Disclose and Deception in the Claims	
	Settlement Process.	100
5.3.3.11	Is a Pattern of Unfair Claims Payments a Precondition to a	
	UDAP Action?	100
5.3.3.12	UDAP Claim Distinguished from Claim Based on Insurer’s	
	Breach of Contract.	100
5.3.3.13	Litigating the Bad Faith Refusal As a UDAP Claim	100
	5.3.4 Misrepresentation Concerning Policy Coverage and Features	101
5.3.6	Twisting; Sale of Unnecessary Insurance; Other Unfair or Deceptive Sales	
	Schemes	101
5.3.7	Unfair Discrimination	101
5.3.10	Credit Insurance	101
5.3.10.1	Introduction.	101
5.3.10.2	Failure to Disclose Excessive Cost or Kickbacks.	102
5.3.10.3	Marketing Deception, Illusory Coverage	102
5.3.10.4	Coercion in Selling Credit Insurance.	102
5.3.10.4.6	Other resources concerning coercion	102
5.3.10.5	Purchase of Excessive Credit Property Insurance.	102
5.3.11	Force-Placed Automobile Insurance	102
5.3.11.10	Selecting Legal Claims	102
5.3.12	“Packing” Non-Credit Insurance in Conjunction with Credit Sale	103
5.3.12.1	Insurance Packing Described	103
5.3.12.2	Insurance Packing As a UDAP Violation	103
5.3.13	Mortgage Insurance.	103
5.4	Automobiles, Mobile Homes, Travel	103
5.4.1	Automobile Repairs and Towing	103
5.4.1.1	Introduction	103
5.4.1.2	Estimates, Repair Orders.	103
5.4.1.3	Replaced Parts and Invoices	103
5.4.1.4	Misrepresentation That Work Is Required or of Type of Work	
	Performed; Shoddy Work	104
5.4.1.7	Bill Collecting Practices	104
5.4.2	Discovery in Automobile Sales Cases	104
5.4.2.2	Deal Files and File Jackets	104
5.4.2.6	Finance Facsimiles, Finance Reserves, and the Credit Application. .	104
	5.4.2.13 Individuals to Depose	104
5.4.3	“Back End” Sales: Rust-Proofing, Financing, Insurance, Service	
	Contracts, Documentary Charges, and Other Add-Ons	106
5.4.3.2	“Packing” of Back-End Charges	106
5.4.3.4	Dealer Kickbacks on Financing	106
5.4.3.4.2	ECOA challenges.	106
5.4.3.4.4	UDAP challenges.	106

replacement heading

new subsection

	5.4.3.6	Service Contracts, Extended Warranties	106
	5.4.3.6.3	Does the contract provide meaningful benefits?.	106
	5.4.3.6.5	Who must provide benefits on the service contract	107
	5.4.3.7	Credit Insurance and Other Insurance Products	107
	5.4.3.8	Documentary Fees and Other “Paper” Charges	107
	5.4.3.8.2	UDAP challenges	107
	5.4.4	Unfair Dealer Negotiation Practices	107
	5.4.4.2	Dealer’s Illegal Use of Consumer Credit Reports	107
	5.4.4.3	“Unhorsing” and Selling the Consumer’s Trade-In Prematurely . .	107
	5.4.4.4	Dealers Hiding Trade-Ins’ Negative Equity	107
	5.4.4.5	Dealer Failing to Payoff the Lien on the Consumer’s Trade-In . . .	108
	5.4.4.7	Playing Fast and Loose with the Paperwork	109
	5.4.4.8	Misrepresentations As to Consumer Cancellation Rights; Three-Day Cooling-Off Period Under Credit Repair Laws and California Statute	109
	5.4.5	Yo-Yo (Spot-Delivery) Abuses	110
	5.4.5.1	Successful Consumer Litigation Challenges	110
	5.4.5.1.2	Litigation approaches and the organization of this section	110
	5.4.5.2	Dealer’s Right to Cancel the Yo-Yo Transaction	110
	5.4.5.2.1	Absent valid contingency clause, no right to cancel	110
	5.4.5.2.2	Contingency must be in writing	110
	5.4.5.2.3	Cancellation allegedly based on credit application misstatements	110
	5.4.5.2.4	Absence of dealer signature does not create a valid contingency	110
	5.4.5.2.5	Does contingency clause comply with state law?.	111
	5.4.5.2.6	Where contingency placed in a separate document or conflicts with other loan terms	111
	5.4.5.2.9	Misrepresentations that the sale is final	111
	5.4.5.2.10	Consumer remedies where cancellation not valid	111
	5.4.5.3	Importance of ECOA and FCRA Claims	111
	5.4.5.3.1	Introduction	111
	5.4.5.3.3	Is the dealer a covered creditor?.	111
	5.4.5.3.4	The counter-offer defense	111
	5.4.5.3.5	Other dealer defenses	112
	5.4.5.3.6	ECOA and FCRA remedies	112
	5.4.5.4	Where Consumer Goes Home with a Car, But No Credit Disclosures or Two Sets of Disclosures	112
	5.4.5.5	Dealers Almost Always Improperly Structure the Yo-Yo	112
	5.4.5.5.2	Is it an illegal condition precedent or an illegal condition subsequent yo-yo?	112
	5.4.5.5.3	Dealer practices inconsistent with a condition precedent transaction	113
	5.4.5.5.5	Condition subsequent sales often violate federal and state titling requirements	113
	5.4.5.5.7	Condition subsequent sales must comply with UCC Article 9	113
	5.4.5.5.8	Truth in Lending violations in a condition subsequent sales	113
	5.4.5.6	Trade-Ins and Deposits	113
	5.4.5.7	Misrepresentations After Yo-Yo Cancellation	114
	5.4.5.7.1	Re-negotiation misrepresentations	114
	5.4.5.7.2	Backdating documentation of a subsequent sale	114

replacement heading

replacement heading

new subsection

5.4.5.7.3 Malicious prosecution where consumer does not return the vehicle 114

5.4.5.8	Must the Consumer Arbitrate Yo-Yo Sale Claims?	114
5.4.6	Used Car Sales	114
5.4.6.2	FTC Used Car Rule	114
5.4.6.2.2	Rule requirements.	114
5.4.6.2.4	Remedies for rule violations.	115
5.4.6.4	Nature of Prior Use	115
5.4.6.5	Odometer Rollbacks and Mileage Misrepresentations.	115
5.4.6.5.1	UDAP precedent	115
5.4.6.6	Sale of Salvage and Flood-Damaged Cars and Undisclosed Body Damage	115
5.4.6.6.3	Undisclosed salvage or wreck history as a UDAP violation	115
5.4.6.7	“Lemon Laundering” (Undisclosed Sale of Car Previously Returned as a Lemon)	116
	5.4.6.7.4A Deceptive practices relating to goodwill buybacks	116
5.4.6.8	Non-disclosure or Misrepresentation of Vehicle Defects	116
5.4.6.8.1	General.	116
5.4.6.9	Misrepresentations Concerning Clear Title	116
5.4.6.12	Excessive Price	116
5.4.6.13	Buy Here—Pay Here Dealerships	116
5.4.6.13.3	Revolving repossession practices.	116
5.4.6.14	Private Sellers and Curbstoners	116
5.4.7	New Car Sales	117
5.4.7.1	Introduction	117
5.4.7.2	Pricing Misrepresentations.	117
5.4.7.5	Misrepresentation of Vehicle Identity, Characteristics.	117
5.4.8	Automobile Leases	117
5.4.8.2	Deceptive Inducements and Misrepresentations About the Nature of the Lease	117
5.4.8.3	Early Termination and Default	117
5.4.8.4	UDAP Violations at Scheduled Termination, Including Charges for Excess Mileage and Wear.	118
5.4.9	Daily Rental Car Practices	118
5.4.9.4	Excess Charges to Repair Damage	118
	5.4.9.5 Abuses Relating to Use of GPS Devices	118
5.4.10	Automobile Sub-Lease Scams, Brokers, and Car Finders.	118
5.4.10.1	Automobile Sub-Leases.	118
5.4.10.1.2	Consumer remedies.	118
5.4.12	Mobile Home Sales.	118
5.4.12.1	Introduction.	118
5.4.13	Travel	119
	5.4.13.5 Marketing of International Driver’s Permits	119
5.5	Apartment Rentals, Mobile Home Parks, Migrant Camps, Real Estate Sales, and Storage	119
5.5.1	Mobile Home Parks	119
5.5.1.2	Park Rental Agreements, Rules, and Fees; Performance of Park Obligations; Sale of Utilities	119
5.5.1.3	Unfair Restriction on Tenant’s Sale of the Home.	119
5.5.1.5	Other Approaches to Protecting Mobile Home Park Tenants.	120
5.5.1.5.1	Tenant ownership of the park	120
5.5.1.5.2	Comprehensive mobile home park legislation	120
5.5.2	Landlord-Tenant Practices	120
5.5.2.1	Introduction	120

new subsection

new subsection

new subsection

5.5.2.2	Security Deposits and Calculation of Rents	120
5.5.2.3	Rental Agreements	120
5.5.2.4	Substandard Housing	120
5.5.5	Real Estate Sales	120
5.5.5.1	Inapplicability of Seller Defenses	120
5.5.5.2	Deception Concerning the Nature of the Home	121
5.5.5.3	UDAP Violations Concerning Title, Financing, and the Homeowner's Legal Rights	122
5.5.5.4	Property Flipping	122
5.5.5.6	Special Issues Concerning Appraisers	123
5.5.5.7	Special Issues Concerning Home Builders	124
5.5.5.7.1	Misrepresentations concerning the home or work to be performed	124
5.5.5.7.2	Performance problems, warranties	124
5.5.5.10	Condominiums and Timeshares	124
5.5.6	Storage of Goods	124
5.6	Home Improvements and Related Services, Utilities and Telecommunications . .	125
5.6.1	Home Improvement Sales	125
5.6.1.1	Introduction	125
5.6.1.2	Marketing Misrepresentations	125
5.6.1.3	The Home Improvement Contract and Warranties	125
5.6.1.6	Failure to Perform Work Properly and As Scheduled	125
5.6.5	Water Quality Improvement Systems	125
5.6.7	Energy Savings Claims	126
5.6.8	Unregulated Heating Fuel and Gasoline	126
5.6.8.1	Problems Facing Users of Oil, Propane, Kerosene, and Wood	126
5.6.8.4	UDAP Regulations	126
5.6.8.5	Price Gouging on Petroleum Products	127
5.6.9	Gas and Electric Service	127
5.6.9.1	Abuses Relating to Utility De-Regulation	127
5.6.9.1.2	Retail energy market abuses	127
5.6.9.1.3	Wholesale energy market abuses	128
5.6.9.2	Illegal Shut-Offs	128
5.6.10	Telephone, Telecommunications, and Internet Services	128
5.6.10.1	The Filed Rate Doctrine	128
5.6.10.1.1	Described	128
5.6.10.1.2	Telephone services not covered by the doctrine	129
5.6.10.2	Marketing and Billing for Telecommunications Services	132
5.6.10.3	Slamming (Changing Long-Distance Carriers without the Consumer's Authorization)	133
5.6.10.4	Prepaid Phone Cards	133
5.6.10.5	Unauthorized Charges	134
5.6.10.6	Inside Wiring Maintenance Contracts and Phone Rental	134
5.6.10.7	Internet Service Providers	135
5.6.11	Water and Sewer Service	136
5.6.11.2	Water and Sewer Service by a Regulated Utility or Municipality . .	136
5.6.11.3	Water Quality and Service Provided by Non-regulated Entities . .	136
5.7	Household Products	136
5.7.4	Rent-To-Own Sales	136
5.7.4.1	Importance of UDAP Approach	136
5.7.6	Computers and Other Electronic Equipment	137
5.7.10	Miscellaneous Household Products	137
5.8	Door-to-Door, Mail Order, Referral, Unsolicited, Negative Option Sales	137
5.8.1	Mail-Order Sales	137
5.8.1.1	FTC Rule	137

5.8.2	Door-to-Door and Off-Premises Sales	137
5.8.2.1	The FTC Cooling-Off Period Rule	137
5.8.2.3	Interrelation of FTC Rule and State Law with Truth in Lending Rescission	138
5.8.2.4	Scope of the FTC Rule.	138
5.8.2.4.2	Effect of prior negotiations, seller being invited to the home	138
5.8.2.4.3	Emergency exception	138
5.8.2.5	Scope of State Laws.	138
5.8.2.5.2	Coverage that is broader than the FTC rule	138
5.8.2.5.3	Narrower coverage than the FTC rule	138
5.8.2.5.5	Particular interpretations of state law scope provisions	139
5.8.2.6	Consumers' Rights Under FTC Rule, State Statutes	139
5.8.2.6.2	No recovery for services performed prior to cancellation	139
5.8.2.6.3	Continuing right to cancel if notice is defective	139
5.8.4	Unsolicited Goods	139
5.8.5	Negative Option Plans.	139
5.9	Telemarketing, 900 Numbers, On-Line Fraud, and Spam.	140
5.9.1	Introduction	140
5.9.3	Telephone Consumer Protection Act	140
5.9.3.1	Scope.	140
5.9.3.2	Challenges to Statute and Regulation	140
5.9.3.3	Junk Faxes	141
5.9.3.4	Restriction on Auto Dialers and Abandoned Calls.	144
5.9.3.5	Prerecorded Calls.	144
5.9.3.6	General and Company-Specific Do-Not-Call Lists.	144
5.9.3.9	Consumer Remedies.	145
5.9.3.9.1	Creation of private cause of action	145
5.9.3.9.2	Jurisdiction in state and federal court.	145
5.9.3.9.3	Relief.	146
5.9.3.9.4	Who is liable.	147
5.9.4	FTC Telemarketing Sales Rule and Statute	148
5.9.4.2	Scope of Statute and Rule.	148
5.9.4.3	Disclosures Required	148
5.9.4.3.1	General disclosure requirements	148
5.9.4.4	Prohibition Against Deception	148
5.9.4.4.1	General prohibition.	148
5.9.4.5	Harassment and Abuse	149
5.9.4.5.2	Abandoned calls.	149
5.9.4.6	Privacy Issues: Calling Hours, Do-Not-Call Lists, and Caller ID Blocking.	149
5.9.4.6.1	Calling hours.	149
5.9.4.6.2	Company-specific do-not-call lists.	149
5.9.4.6.3	Nationwide do-not-call list.	149
5.9.4.6.4	Prohibition against Caller ID blocking.	150
5.9.4.7	Special Rules for Particular Types of Telemarketing Solicitations	150
5.9.4.7.3	Negative-option sales	150
5.9.4.7.4	Special restrictions for credit repair services, advance-fee credit offers, and recovery rooms.	150
5.9.4.7.5	Preacquired account telemarketing	150
5.9.4.9	Public and Private Enforcement of the Rule.	150
5.9.4.9.2	Private enforcement	150
5.9.5	Other State and Federal Law Applicable to Telemarketing	150
5.9.5.2	State and Federal RICO Statutes	150
5.9.5.3	State Telemarketing Fraud Statutes	151

5.9.5.4	UDAP, Fraud, and Other State Statutes	151
5.9.6	Identifying All the Entities Liable for a Telemarketer’s Fraud	151
5.9.8	900-Number Fraud	152
5.9.8.1	Nature of 900-Number Fraud.	152
5.9.8.2	Federal 900-Number Regulation.	152
5.9.8.3	State Laws Regulating 900 Numbers	152
5.9.8.4	Other Entities Liable for a Provider’s 900-Number Fraud.	153
5.9.9	On-Line Fraud	153
5.9.10	Unsolicited Bulk Commercial E-mail	153
5.9.10.1	Why Unsolicited Bulk Commercial E-mail Is a Problem for Consumers	153
5.9.10.2	Legal Theories for Suing Spam Senders	154
5.9.10.2.1	Federal CAN-SPAM Act provides no private cause of action	154
5.9.10.2.2	Telephone Consumer Protection Act	154
5.9.10.2.4	State anti-spam laws	155
5.9.10.2.5	Other state law claims.	155
5.9.10.3	Practical Problems in Suing Spammers	156
5.10	Future-Service Contracts: Health Spas, Dance Studios, Membership Campgrounds, Buying Clubs, and Trade Schools	156
5.10.3	Health Spas	156
5.10.3.1	FTC Rulemaking Proceeding, State Statutes	156
5.10.5	Campground Resort Memberships	157
5.10.5.1A	Post-Sale Abusive Collection	157
5.10.5.3	Special Membership Campground Statutes	157
5.10.7	Trade School Abuses	157
5.10.7.1	Nature and History of Trade School Abuses	157
5.10.7.3	UDAP Precedent	157
5.10.7.4	Other Claims	158
5.11	Health, Nutrition, and Funerals	158
5.11.2	Other Medical Cures, Food Advertising	158
5.11.4	Assisted Living Facilities	159
5.11.5	Funerals.	160
5.11.5.1	The FTC Rule	160
5.11.6	Hospital Treatment and Payment Issues	160
5.11.7	Managed Care	161
5.11.8	Tobacco.	161
5.12	Attorneys, Living Trusts, Other Fiduciaries	162
5.12.2	Nonattorney Legal Service Providers and the Unauthorized Practice of Law	162
5.12.2.2	Immigration Consultants or Assistants	162
5.12.2.3	Bankruptcy Petition Preparers	162
5.12.2.4	Unauthorized Practice of Law	164
5.12.3	Living Trusts	164
5.13	Opportunity Schemes and Other “Nonsale” Transactions.	165
5.13.1	Franchises and Business Opportunities	165
5.13.1.1	FTC Franchising Rule.	165
5.13.1.2	Other FTC, State UDAP Precedent	165
5.13.1.3	Investments.	165
5.13.2	Employment Opportunities	165
5.13.3	Pyramid Sales	166
5.13.5	Charitable Solicitations	166
5.13.6	Scholarship Location Services and Diploma Mills	166

new subsection

Chapter 6

Liability of Various Parties

6.2	Liability of Agents and Employees	167
6.3	Liability of Principals, Co-Venturers.	167
6.3.1	Principals Liable for the Acts of Their Agents	167
6.3.2	Principal's Liability for Actions of Independent Contractor	167
6.4	Liability of Officers, Directors, Owners, Parent Companies, Franchisors, Successor Corporations, and an Individual's Estate	167
6.4.2	Liability for Own Actions	167
6.4.3	Piercing the Corporate Veil and Related Theories	168
6.5	Those Aiding or Furnishing Means for Deception; Civil Conspiracy and Joint Enterprise	168
6.5.1	Types of Parties Who May Be Liable	168
6.5.2	Conduct Sufficient to Trigger Liability	169
6.5.2.1	General	169
6.5.2.2	Aiding and Abetting.	169
6.5.2.3	Civil Conspiracy	169
6.5.2.4	Ratification, Acceptance of Benefits, and Concealment of Fraud	169
6.6	Liability of Assignees and Related Creditors for Seller's Misconduct Under the FTC Holder Rule	170
6.6.1	Overview	170
6.6.1.1	Rationale for FTC Holder Rule	170
6.6.1.3	Loans to Purchase Goods or Services	170
6.6.1.5	Relationship to Lender's Direct Liability for Participation in Deception	170
6.6.1.6	Organization of This Section	170
6.6.2	Scope of the FTC Holder Rule	170
6.6.2.1	Operational Scope of the Holder Notice	170
6.6.2.2	Scope of the Rule	170
6.6.2.2.2	Coverage of leases	170
6.6.3	Operation of the FTC Holder Rule	171
6.6.3.1	Seller-Related Claims Covered by the Rule	171
6.6.3.2	Consumer's Claims Can Offset Remainder Due on the Note.	171
6.6.3.3	Effect on Security Interest.	171
6.6.3.4	Recovery of Amounts Already Paid	171
6.6.3.4.1	General.	171
6.6.3.4.3	Is recovery of amount paid only available where consumer could rescind sale or goods or services have no value?	172
6.6.3.5	Are Attorney Fees Included Within the Cap?	172
6.6.3.6	Multiple or Punitive Damages	172
6.6.3.7	No Limit on Creditor's Liability for Own Conduct	172
6.6.3.8	Relationship of FTC Rule and Federal Statutes Limiting Liability.	172
6.6.3.8.1	Relation to TIL and ECOA limits on assignee liability.	172
6.6.3.8.2	Relation to the Magnuson-Moss Warranty Act	173
6.6.3.11	Relation of FTC Rule to State Law.	173
6.6.3.11.1	FTC Rule overrides only less protective state laws.	173
6.6.4	Theories of Recovery Where FTC Holder Notice Is Improperly Omitted.	173
6.6.4.2	Absent Holder Notice As an Implied Contract Term	173
6.6.4.2.2	Revised Article 3 will require the Holder Notice to be implied in negotiable instruments	173
6.6.4.2.3	Court decisions prior to Revised Article 9 implying notice into contract.	173
6.6.5	Other Theories for Holding Assignees and Lenders Liable for Seller-Related Claims and Defenses.	174

6.6.5.2	Assignee of Credit Contract Is Generally Subject to Seller-Related Defenses.	174
6.6.5.3	State Statute May Create Derivative Liability Independent of FTC Holder Rule.	174
6.6.5.4	The Close-Connectedness Doctrine.	174
6.6.5.6	Liability of Credit Cards Issuers and Those Issuing Similar Devices	175
6.6.5.6.1	Introduction.	175
6.7	Raising Lender-Related Defenses Against the Lender's Assignee	175
6.7.2	Does Holder-In-Due-Course Status Exist and What Defenses Does It Bar?	175
6.7.2.2	Is There a Negotiable Instrument?	175
6.7.2.2.1	Overview of requirements for negotiable instruments.	175
6.7.2.2.3	Payable on demand or at a definite time	175
6.7.2.2.4	Payable to bearer or to order	175
6.7.2.2.5	Unconditional promise to pay and no other undertaking.	175
6.7.2.3	Is the Holder of the Instrument a Holder in Due Course?	176
6.7.2.3.1	General.	176
6.7.2.3.2	The holder requirement; indorsements and allonges	176
6.7.2.3.3	Value	176
6.7.2.3.4	Good faith.	177
6.7.2.3.5	Without notice.	177
6.7.2.4	Rights of Transferees from Holders in Due Course	177
6.7.2.5	Defenses the Consumer Can Raise Even Against a Holder in Due Course	177
6.7.3	Liability of Assignees of High-Rate Mortgages	178
6.7.3.1	General	178
6.7.4	Special Issues Arising in Securitization Transactions	178
6.7.4.2	The Different Players in a Securitization Transaction.	178
6.7.4.4	Raising Defenses on a Securitized Loan	178
6.7.4.4.2	Who is the proper party in interest in the enforcing the note?	178
6.7.5	Raising Lender-Related Defenses Against the FDIC, RTC, and Subsequent Note Holders.	178
6.7.5.1	Introduction	178
6.9	UDAP Claims Against Bankrupt Sellers	178
6.10	Merchant Bonding, Insurance, and Consumer Recovery Funds	178
6.10.1	Recovering on a Bond	178
6.10.2	Recovering from the Merchant's Insurance Policy	179

Chapter 7

Litigating UDAP Cases

7.1	Introduction	181
7.2	Is There a Private UDAP Right of Action?	181
7.2.1	Private Right Unambiguously Exists in Every State Except Iowa	181
7.2.2	Implying a Private UDAP Right of Action in Iowa	181
7.2.3	Can Consumers Bring Actions Under UDTPA-Type Statutes?	181
7.3	Statutes of Limitations	182
7.3.1	Applicable Limitation Period	182
7.3.2	When Does the Period Start to Run?	182
7.3.2.1	Discovery Rule	182
7.3.2.2	Date of Injury	183
7.3.2.3	Series of Events.	183
7.3.3	Tolling	183
7.3.3.2	Fraudulent Concealment and Estoppel.	183

7.3.4	Limitations Period Where Complaint Amended to Add New Claims or Parties	183
7.4	Retroactive Application of Statutory Provisions	183
7.5	Preconditions to Private Actions	184
7.5.2	Damage Precondition	184
7.5.2.1	Types of Damage Preconditions	184
7.5.2.2	Implications of Damage Precondition	185
7.5.2.3	UDAP Statutes That Explicitly Dispense with Damage Preconditions	185
7.5.2.4	Must the Amount of Damage Be Proved?	185
7.5.2.5	Consumer Injuries That Satisfy the Damage Requirement	186
7.5.2.5.1	Non-pecuniary losses	186
7.5.2.5.2	Clauses that have not been enforced	186
7.5.2.5.3	Temporary losses	187
7.5.2.5.4	Delivering product different than consumer bargained for	187
7.5.2.5.5	Bait-and-switch cases	188
7.5.2.5.6	Debts and litigation expenses	188
7.5.2.5.7	Other losses.	188
7.5.2.6	The Damage May Be Minimal.	189
7.5.2.7	Causation	190
7.5.3	Public Interest Precondition	190
7.5.3.1	Almost All States Reject a Public Interest Requirement	190
7.5.3.2	The Washington State Standard	190
7.5.3.3	Colorado Requires a Significant Impact on the Public As Consumers	191
7.5.3.4	Minnesota Requires Private UDAP Actions to Meet a Public Interest Test	191
7.5.3.5	Nebraska Applies UDAP Statute Only to Transactions That Affect the Public Interest	192
7.5.3.6	Georgia Intermediate Appellate Courts Require Impact on Consumer Marketplace or Potential Harm to Consumer Public . . .	192
7.5.3.7	South Carolina Requires That Practice Have Impact on Public Interest.	193
7.5.3.8	New York Requires That Practices Impact Consumers at Large. . .	193
7.5.4	Notice Letters As Precondition	195
7.5.4.1	Is a Notice Letter a Precondition to a UDAP Action?	195
7.5.4.3	Form of the Notice Letter; Delivery	195
7.5.4.4	To Whom Must the Notice Letter Be Sent?	195
7.5.4.5	Content of the Notice Letter	195
7.5.4.7	Pleading Notice and Proving Notice Was Sent	196
7.5.4.8	If Notice Was Not Sent.	196
7.5.4.9	Seller's Responsibilities on Receiving Notice Letter	196
7.6	Jurisdiction and Choice of Law Issues	196
7.6.2	Jurisdiction over Out-Of-State Sellers	196
7.6.3	Choice of Law Issues	197
7.6.4	The Proper State Court	198
7.6.5	Federal Court Jurisdiction	198
7.6.6	Bankruptcy Court Jurisdiction.	200
7.6.7	The Enforceability of Binding Arbitration Agreements	200
7.7	Pleading and Framing UDAP Claims	200
7.7.3	Choosing the Defendants	200
7.7.5	Elements to Plead.	200
7.7.6	Allegations Should Be Specific.	201
7.7.7	Adding Non-UDAP Counts	202

7.7.8 Filing a UDAP Suit After a Collection Action and Other Res Judicata Issues	202
7.8 Discovery and Factual Investigation	202
7.8.1 Starting Discovery Early	202
7.8.2 Evidence to Look For	202
7.8.3 Other Approaches to Obtaining Evidence	203
7.9 Trial	203
7.9.1 Evidence and Proof Issues	203
7.9.1.1 Standard of Proof	203
7.9.1.2 Other Bad Acts	203
7.9.1.3 Expert Testimony	203
7.9.2 Trial Before a Judge or Jury	203
7.9.2.2 Is a Jury Trial Available for UDAP Claims?	203
7.9.2.3 Questions of Law vs. Questions of Fact	204
7.10 Constitutional Issues	204
7.10.2 The First Amendment	204
7.10.2.1 Deceptive Commercial Speech	204
7.10.2.2 Unfair Commercial Speech	204
7.10.2.5 First Amendment Issues in Defamation Claims by Dealers	204
7.10.3 Vagueness	205
7.10.4 Other Constitutional Challenges	205

Chapter 8

Private UDAP Remedies

8.1 Nature and Liberal Interpretation of UDAP Remedies	207
8.2 Is There a Private UDAP Remedy?	207
8.3 Calculating Actual Damages	208
8.3.2 Direct Actual Damages	208
8.3.2.1 How Are Direct Damages Calculated: Out of Pocket, Loss of Bargain, or Cost to Repair?	208
8.3.2.2 Loss-of-Bargain Damages	208
8.3.2.3 Cost-to-Repair Damages	208
8.3.2.4 Out-of-Pocket Damages or Restitution	209
8.3.2.4.1 General	209
8.3.3 Consequential Damages	209
8.3.3.6 Injury to Credit Rating	209
8.3.3.8 Physical Injuries	209
8.3.3.9 Pain and Suffering; Mental Anguish	209
8.3.3.9.1 General	209
8.3.3.9.2 States where UDAP pain and suffering damages are never recoverable	209
8.3.3.9.3 Pain and suffering damages generally recoverable where there is physical injury	209
8.3.3.9.4 Pain and suffering damages recoverable where deception intentional or grossly negligent	210
8.3.3.9.5 Modern standards may be even more liberal	210
8.3.3.9.6 Is mere aggravation enough?	210
8.3.5 Proving Actual Damages and Causation	210
8.3.5.1 General Standards	210
8.3.9 Interrelation of UDAP Actual Damages and Damages on Other Claims	211
8.4 Statutory, Multiple, and Punitive Damages	211
8.4.1 Statutory Minimum Damages	211
8.4.1.1 General	211
8.4.1.2 Statutory Damages for Multiple Claims	211
8.4.2 Multiple Damages	212

8.4.2.1	General	212
8.4.2.2	Are Multiple Damages Mandatory?	212
8.4.2.3	Limits on Treble Damages Award	212
8.4.2.3.1	Intent or knowledge preconditions.	212
8.4.2.3.2	Bad faith refusal to settle as precondition.	212
8.4.2.3.3	Other preconditions to multiple damage awards	212
8.4.2.3.4	Standards where multiple damages are discretionary	212
8.4.2.5	Arbitration and Multiple Damages	213
8.4.2.5.2	Does an arbitrator have authority to award multiple damages?	213
8.4.2.6	Interrelation of Treble Damages with Other Awards	213
8.4.2.7	How to Calculate Multiple Damages.	213
8.4.2.7.1	Relationship to seller’s recovery in the same case	213
8.4.2.7.3	What awards should be trebled?	213
8.4.2.8	Should the Jury Be Told That Actual Damages Will Be Trebled?	214
8.4.3	Punitive Damages.	214
8.4.3.1	Are Punitive Damages Available Under a UDAP Statute?	214
8.4.3.3	Standards for Determining Whether UDAP Punitive Damages Should Be Awarded	214
8.4.3.4	Need Consumer Prove Actual Damages?	214
8.4.3.5	Arbitration and Punitive Damages	214
8.4.3.6	Limits on the Amount of Punitive Damages.	214
8.4.3.6.1	Constitutional limitations enunciated by the United States Supreme Court	214
8.4.3.6.2	State statutory caps on punitive damages awards.	215
8.4.3.8	Interrelation of Punitive Damages with Other Remedies.	216
8.5	Class Actions	216
8.5.1	General.	216
8.5.2	UDAP Class Action Procedures	216
8.5.4	Proving a UDAP Violation Is Common to the Class	216
8.5.4.2	Showing a Common Deceptive Practice	216
8.5.4.2.1	General.	216
8.5.4.2.2	Mass advertising	217
8.5.4.2.3	Standardized sales presentations	217
8.5.4.2.5	Common excess charges	217
8.5.4.2.6	Standard form contract provisions.	217
8.5.4.2.7	Standardized billing and collection practices.	217
8.5.4.2.9	Do class issues predominate?	217
8.5.4.2.10	Is the class action superior?	217
8.5.5	Multi-State Class Actions.	218
8.5.6	“Picking Off” Named Plaintiffs	218
8.5.7	Statutory Damages for Each Class Member	218
8.5.8	Settlements	218
8.5.9	Arbitration and Class Actions	218
8.6	Injunctions and Other Equitable Relief	219
8.6.2	Does a UDAP Statute Authorize Private Injunctive Relief?	219
8.6.2.2	Implying an Injunctive Remedy in Other States	219
8.6.3	Preconditions for Private Injunctive Relief	219
8.6.3.1	Must the Plaintiff Be Injured?	219
8.6.3.2	Must the Plaintiff Benefit from the Injunction?	219
	8.6.3.3 Adequate Remedy at Law and Other Impediments to Injunctive Relief.	219
8.6.5	Other Equitable Relief.	220
8.7	Voiding and Rescinding Contracts	220
8.7.2	Statutory Language Authorizing Remedy	220

replacement title

8.7.3	Where Statute Is Silent As to Availability of Remedy	220
8.7.4	Procedures to Rescind Contract.	220
8.7.5	Relationship of Remedy with Other UDAP Remedies	220
8.8	Attorney Fees	221
8.8.1	Purpose of UDAP Attorney Fee Provisions.	221
8.8.2	When Are UDAP Attorney Fees Available?	221
8.8.2.1	Statutory Preconditions to Attorney Fee Award.	221
8.8.2.2	Where No Explicit Statutory Authority for Fees	221
8.8.3	Are Attorney Fees Mandatory?	221
8.8.4	When Does a Consumer Prevail, Triggering UDAP Attorney Fees?	222
8.8.4.1	Must the Consumer Prove UDAP Damages?	222
8.8.4.3	Multiple Claims or Multiple Parties	222
8.8.4.4	Attorney Fees for Work on Default Judgments and Protecting a Judgment	222
8.8.4.5	Settlements	222
8.8.4.5.2	Can a seller ask the consumer to waive fees in a settlement?	222
8.8.4.5.3	The catalyst theory and how to preserve a fee claim when settling a case	222
8.8.4.6	Collateral Proceedings, Including Proceedings Relating to the Fee Award	223
8.8.5	Attorney Fees in Arbitration Proceedings	223
8.8.5.1	Where Arbitration Restricts Prevailing Consumer’s Right to Fees	223
8.8.5.2	Where Arbitrator with Authority to Do So Fails to Award Fees to Prevailing Consumer.	223
8.8.6	Attorney Fees for Appellate Work	223
8.8.6.1	When Are Such Fees Awarded?	223
8.8.6.2	Who Determines Appellate Attorney Fees?	223
8.8.7	Types of Representation Entitled to Fees	223
8.8.7.2	Paralegals and Law Clerks	223
8.8.7.3	Expert Witnesses	224
8.8.9	Who Is Liable for Attorney Fees?	224
8.8.10	Attorney Fees for Prevailing Sellers.	224
8.8.10.2	Has the Seller Prevailed?	224
8.8.10.3	Tougher Standard for Sellers’ Fees Where Award Is Discretionary for Either Party.	224
8.8.10.4	Where a UDAP Statute Explicitly Limits Fees to Frivolous or Bad Faith Actions	224
8.8.10.4.3	Meaning of “bad faith”	224
8.8.10.4.4	Meaning of “groundless”	225
8.8.10.4.5	Meaning of “frivolous”	225
8.8.10.4.6	Procedural issues	225
8.8.10.5	Authority for Seller’s Attorney Fees Where No Explicit Authorization in UDAP Statute	225
8.8.11	How Attorney Fees Are Calculated	225
8.8.11.1	Why UDAP Attorney Fee Awards Must Be Adequate	225
8.8.11.3	Factors Used to Calculate Fees.	226
8.8.11.3.1	Standards vary by state	226
8.8.11.3.2	The lodestar formula	227
8.8.11.3.3	Fees calculated based on contingency fee agreement	228
8.8.11.4	Awards for Work on Non-UDAP Counts and on Unsuccessful UDAP Counts	228
8.8.11.7	Out-of-Pocket Expenses	229
8.8.11.8	Effect of Federal Rule of Civil Procedure 68 and Similar State Rules	229

replacement heading

new subsection

8.8.12 Judicial Procedure for Seeking Attorney Fees	229
8.8.13 Tips on Handling Attorney Fee Hearings.	229

Chapter 9

Other Private Remedies

9.1 No Private Remedy Under the FTC Act	231
9.2 The Racketeer Influenced & Corrupt Organizations Act (RICO).	231
9.2.1 Overview of RICO and Its Application to Consumer Fraud.	231
9.2.1.1 Advantages and Disadvantages of RICO Claims.	231
9.2.1.3 Scope, Preemption, and Immunity	231
9.2.3 Elements of the Civil RICO Action.	231
9.2.3.1 Introduction	231
9.2.3.2 The Defendant “Person” and the “Enterprise”.	232
9.2.3.2.2 Alleging an appropriate enterprise.	232
9.2.3.2.3 Alleging an enterprise distinct from the defendant for section 1962(c) claims	232
9.2.3.2.5 Strategies to find the corporation liable	232
9.2.3.4 “Pattern” of Racketeering Activity.	232
9.2.3.4.3 Closed-ended continuity	232
9.2.3.4.4 Open-ended continuity	232
9.2.3.4.5 Relationship aspect of pattern.	233
9.2.3.5 Collection of an Unlawful Debt	233
9.2.3.5.2 Potential RICO claims based on the collection of an unlawful debt; payday lenders	233
9.2.3.6 The “Injury” Element	233
9.2.3.6.2 Standing	233
9.2.3.6.4 Provision-specific standing—injuries from subsection 1962(a), (b), and (d) violations.	234
9.2.3.7 The Prohibited Conduct	234
9.2.3.7.2 Subsection 1962(b)—prohibited acquisitions.	234
9.2.3.7.3 Subsection 1962(c)—prohibited association; conduct or participation and the <i>Reves</i> test.	234
9.2.3.7.4 Subsection 1962(d).	235
9.2.4 Predicate Offenses: Mail Fraud and Wire Fraud.	235
9.2.4.1 Elements of Mail Fraud	235
9.2.4.4 Wire Fraud	235
9.2.5 RICO Pleading.	235
9.2.5.1 Avoiding Rule 11 Claims	235
9.2.5.2 Pleading Fraud—Rule 9(b)’s Particularity Requirement	235
9.2.5.3 Pleading the Relief Sought	236
9.2.5.3.4 Injunctive and other equitable relief	236
9.2.5.4 Local Requirements for Case Statements	236
9.2.6 Procedural Issues	236
9.2.6.4 RICO Statute of Limitations	236
9.2.7 RICO Consumer Cases in the Courts	236
9.2.7.2 Examples of Successful Consumer RICO Cases	236
9.3 State RICO Statutes.	236
9.3.1 Overview of State RICO Statutes	236
9.3.2 Predicate Acts	237
9.3.3 Pattern Requirements	237
9.3.4 Enterprise Requirements	237
9.3.5 Timing of Offenses and Statute of Limitations.	238
9.3.6 Jurisdictional and Procedural Issues.	238
9.3.7 Private Remedies Under State RICO Statutes	238
9.3.8 Application of State RICO Statutes to Consumer Fraud	238

	9.3.10 Strategic Advantages of State RICO Statutes As Compared to Federal RICO	238
	9.3.11 State Civil Theft Laws	238
	9.4 Other Federal Causes of Action	238
	9.4.2 United States Bankruptcy Code	238
	9.4.3 Federal Anti-Discrimination Laws	239
	9.4.4 Federal Magnuson-Moss Warranty Act	239
	9.4.7 Truth in Lending, Consumer Leasing, HOEPA, and RESPA	239
	9.4.12 Banking Holding Company Anti-Tying Act	239
	9.4.13 Federal False Claims Act	239
<i>new subsection</i>	9.4.13.1A Advantages of a False Claims Act Claim	239
	9.4.13.2 Features of the False Claims Act	240
	9.4.13.4 Procedure Under the False Claims Act	240
	9.4.13.5 Examples of False Claims Act Cases	240
	9.5 Cancellation and Rescission	241
	9.5.5 Right to Reject or Revoke Acceptance of Purchased Goods; Automobile Lemon Laws	241
	9.5.6 Unconscionable Contracts	241
	9.5.8 Illegality in the Transaction	241
	9.5.9 Misrepresentation or Fraud	241
	9.5.9.1 General	241
	9.5.9.2 Actionable Misrepresentations	241
	9.5.9.3 Reliance	241
	9.5.10 Mistake	242
	9.5.10.1 When Is a Mistake Sufficient to Cancel the Contract?	242
	9.5.11 Restitution	242
	9.5.15 Failure of Condition	242
	9.6 Contract, Warranty, and Tort Damage Actions	242
	9.6.2 Breach of Warranty	242
	9.6.3 Common Law Deceit and Other Tort Actions	242
	9.7 Unjust Enrichment, Restitution, and Similar Equitable Theories	242
	9.7.1 Introduction	242
	9.7.2 Unjust Enrichment	242
	9.7.4 Constructive Trust	243
	9.7.5 Obstacles to Equitable Remedies	243
	9.7.5.3 Existence of an Express Contract	243
	9.7.5.4 The Voluntary Payment Defense	243
	9.8 Referral to a Government Agency	243

Chapter 10

State Agency Enforcement

	10.1 Introduction	245
	10.2 Civil Investigative Demands, Subpoenas, and Other Investigative Issues	245
	10.2.2 Standards of Review for Compulsory Process	245
	10.2.3 Constitutional Issues	245
<i>replacement heading</i>	10.2.3.3 Unreasonable Search and Seizure and Other Constitutional Issues	245
	10.2.6 Trade Secrets, Confidential Information	245
	10.2.9 Test Purchases	245
	10.2.10 When Can the State Initiate an Investigation?	246
	10.3 Special Preconditions to a State Enforcement Action	246
	10.3.2 Reason to Believe the Act Has Been Violated	246
	10.3.3 Preconditions to Private Actions Do Not Apply	246
	10.3.4 Standing Issues	246

	10.5 Special Standards for State Enforcement Actions to Determine Whether There Is a UDAP Violation	246
	10.5.2 Deception	246
	10.7 Enforcement Remedies	246
	10.7.1 Cease and Desist Orders, Injunctions	246
	10.7.1.2 Mootness	246
	10.7.1.3 Breadth of the Order.	247
	10.7.1.3.1 General considerations.	247
	10.7.1.4 Innovative Orders.	247
	10.7.1.7 Preconditions to an Injunctive Order	247
	10.7.2 Violations of Cease and Desist Orders, Injunctions, Assurances of Voluntary Compliance	247
	10.7.2.1 Standard of Proof; Right to Jury Trial	247
	10.7.3 Civil Penalties for Initial Violations	247
	10.7.3.2 Multiple Civil Penalties.	247
	10.7.3.3 Factors for Determining Amount of Civil Penalties	248
	10.7.3.5 Constitutional Challenges to Civil Penalties	248
	10.7.3.6 Civil Penalties in Bankruptcy.	248
	10.7.4 Restitution	248
	10.7.4.1 State Authority to Seek Restitution	248
	10.7.4.2 Restitution Where Seller Files for Bankruptcy	249
	10.7.4.4 Establishing Evidence Sufficient to Require Restitution	249
	10.7.4.5 Types of Restitution Awards	249
	10.7.6 Attorney Fees and Other Litigation Costs for the State and for the Respondent	249
<i>new subsection</i>	10.7.7 State Enforcement Agency Procedures	250
	10.7.8 Relation to Private Suits.	250
	10.8 Challenges and Defenses to State Enforcement Actions	250
Appendix A	Statute-By-Statute Analysis of State UDAP Statutes.	253
Appendix B	Selected Federal Trade Commission Rules	
	B.2 FTC Rule Concerning Preservation of Consumers' Claims and Defenses.	257
	B.2.1 The Rule	257
Appendix C	Federal and State RICO Statutes	
	C.1 Federal RICO Statutes.	259
	C.1.1 Full Text of Federal RICO Statute	259
	C.2 Statute-By-Statute Analysis of State RICO Statutes	259
Appendix D	Federal Telemarketing Statutes and Regulations	
	D.1 Federal Telemarketing Statutes	261
	D.1.3 Restrictions on Use of Telephone Equipment—47 U.S.C. § 227	261
	D.2 Federal Telemarketing Rules and Regulations	264
	D.2.1 Telemarketing Sales Rule—16 C.F.R. § 310.	264
	D.2.3 Restrictions on Telephone Solicitation—47 C.F.R. § 64.1200	265
Appendix E	State Telemarketing and State “900-Number” Statutes Summarized. . .	269

Appendix H

Useful Websites 271

Index 273

Quick Reference to Consumer Credit and Sales Legal Practice Series . . . 337

About the Companion CD-Rom 355