1.5 What Is “UDAP”?

The term “UDAP” appears frequently in this treatise (and even more frequently in the companion title, Unfair and Deceptive Acts and Practices [1]). All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace.1 Many of these statutes are patterned after the language found in section 5(a)(1) of the Federal Trade Commission (FTC) Act,2 which prohibits “unfair or deceptive acts or practices.” The term “UDAP” is an acronym for this prohibition. UDAP is distinguishable from UDAAP, which describes the Consumer Financial Protection Bureau’s new authority to challenge unfair, deceptive, and abusive practices, examined in Chapter 3 [2], infra.

“UDAP” will be used in this treatise somewhat imprecisely to refer to all state consumer statutes of general applicability, whether the legislation proscribes unfair, unconscionable, deceptive, misleading, or even simply fraudulent practices. This terminological convenience is necessitated by the lack of any other common name for such statutes. These statutes are referred to in different states as consumer protection acts, consumer sales acts, unfair trade practices acts, deceptive and unfair trade practices acts, deceptive consumer sales acts, deceptive trade practices acts, and consumer fraud acts. In addition, commentators often call these statutes “Little FTC Acts,” although this name is only precise for those statutes that parallel the FTC Act and prohibit “unfair methods of competition and unfair or deceptive acts or practices.”

Most UDAP statutes were enacted in the ten-year span between the mid-1960s and the mid-1970s, but significant amendments and even some new statutes have been enacted since that period. There continues to be legislative activity in this area.

UDAP statutes apply to most consumer transactions and provide a flexible and practical consumer remedy for many abuses. These statutes are particularly important because, while the Federal Trade Commission Act is often viewed as sharply limiting the doctrine of caveat emptor,3 the Act provides only FTC enforcement and not state or private enforcement.4 State UDAP statutes, by incorporating the FTC Act concepts of deception and unfairness and by providing significant state and private remedies, allow for widespread redress of marketplace misconduct and abuse of consumers.

Legislatures and courts have been careful to guarantee that UDAP statutes are broad and flexible and can apply to creative, new forms of abusive business schemes in almost all types of consumer transactions. Even when UDAP statutes enumerate specifically prohibited practices, most statutes also prohibit other unfair, unconscionable, and/or deceptive practices in more general terms. UDAP statutes typically do not require proof of the seller’s fraudulent intent or knowledge. In some cases, consumer reliance, damage, or even actual deception is not a prerequisite to a UDAP action. Thus a UDAP claim is a far easier cause of action to prove than common law fraud.

All UDAP statutes authorize private damage actions. In order to encourage private litigation and deter merchant misconduct, many provide such special private remedies as attorney fees for prevailing consumers and punitive, treble, or minimum damage awards. UDAP statutes often provide a practical remedial approach for consumer complaints as well as counterclaims and defenses to collection actions.

The breadth of UDAP statutes and their avoidance of overly precise definitions of prohibited practices are their unique strengths. NCLC’s Unfair and Deceptive Acts and Practices [1] describes a large body of Federal Trade Commission interpretations and cases, state regulations, and tens of thousands of state UDAP case decisions that can provide clear guidance in initiating most UDAP claims.

But it is when a specific abusive practice has not been previously prohibited by statute or common law that a UDAP statute should be most relied upon. When a practice does not fall precisely under a debt collection act, state or federal credit legislation, warranty law, or other statutes, UDAP statutes can provide an all-purpose remedy. Almost any abusive business practice aimed at consumers is at least arguably a UDAP violation, unless the trade practice clearly falls outside the scope of the statute. For far more detail on all aspects of UDAP law, see NCLC’s Unfair and Deceptive Acts and Practices [1].

Footnotes


5 [4] Legal historians point out that caveat emptor, or “let the buyer beware,” is not an ancient doctrine. Medieval economic concepts included a “just price” and “a sound price warranting a sound commodity.” The prices of many goods and services were fixed, allowing courts to examine contracts for their fairness independently of the terms agreed upon. However, emerging nineteenth-century commercial notions of markets, speculation, and business bargains gradually ended notions of contractual fairness apart from the original intent of the bargaining parties. Notions of the sanctity of contracts and caveat emptor thus only reached full development in the nineteenth century. At about the same time, the common law action of “Trespass on the Case in the Nature of Deceit” that applied even to negligent misrepresentations was replaced by common law actions for deceit or fraud that required the defendant’s knowledge of the falsity and intent to deceive. See, e.g., Horwitz, The Historical Foundation of Modern Contract Law, 87 Harv. L. Rev. 917 (1974).

6 [5] See § 2.2.4.1 [4], infra.