Summary Contents

Using the Digital Library ................................................................. iii
The Leading Resource for All Consumer Law ................................... iv
Contents ......................................................................................... ix

Chapter 1  First Considerations ..................................................... 1
Chapter 2  UDAP Scope ................................................................. 11
Chapter 3  Demonstrating That a Practice Is a UDAP Violation .......... 209
Chapter 4  Deception, Unfairness, Unconscionability, and Abusiveness. 241
Chapter 5  General Sales and Performance Practices ......................... 353
Chapter 6  Credit and Collections ................................................. 411
Chapter 7  Motor Vehicle Sales, Rentals, and Repair ......................... 479
Chapter 8  Home and Home-Related Transactions ............................ 527
Chapter 9  Services, Insurance, Opportunity Schemes, Other Transactions 587
Chapter 10 Liability of Various Parties ............................................ 651
Chapter 11 Litigating UDAP Cases ............................................... 693
Chapter 12 Private UDAP Remedies ............................................. 815
Chapter 13 State Agency Enforcement ......................................... 931
Appendix A Statute-by-Statute Analysis of State UDAP Statutes .......... 983

Online with updates at www.nclc.org/library
<table>
<thead>
<tr>
<th>Appendix B</th>
<th>Useful Websites</th>
<th>1003</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Index</td>
<td>1005</td>
</tr>
</tbody>
</table>

Online with updates at www.nclc.org/library
## Contents

Using the Digital Library ........................................ iii

The Leading Resource for All Consumer Law ........................ iv

### Chapter 1  First Considerations .................................... 1

1.1 All Subscribers Have Access to the Digital Version ................ 1
1.2 What Is “UDAP”? ............................................... 1
1.3 Nature and Strengths of UDAP Statutes ............................ 1
1.4 About This Treatise ........................................... 2
   1.4.1 Scope and Organization of This Treatise .................... 2
   1.4.2 Pleadings and Primary Sources ............................ 3
   1.4.3 Unreported Decisions and Clearinghouse Citations .......... 3
1.5 Other NCLC Resources ........................................ 3
   1.5.1 Federal Deception Law As a Companion Volume ............ 3
   1.5.2 Other Related NCLC Treatises and Resources .............. 4
1.6 Attorney Advance Preparation for UDAP Clients .................. 5
1.7 Determining Whether There Is a UDAP Approach to the Client’s Problem ........................................ 7
   1.7.1 Transactions Amenable to a UDAP Approach ................ 7
   1.7.2 Look at All Aspects of a Transaction ....................... 7
   1.7.3 Apply UDAP Standards Expansively ......................... 8
1.8 Determining Whether a UDAP Claim Should Be Pursued .......... 8
1.9 Alternatives to a UDAP Action ................................ 9

### Chapter 2  UDAP Scope ............................................. 11

2.1 General Principles ............................................. 11
   2.1.1 Determining a UDAP Statute’s Scope ......................... 11
   2.1.2 Burden of Proof; Waiver ................................... 12
   2.1.3 Liberal Construction of UDAP Scope Sections .............. 12
   2.1.4 Interpretations of “Trade or Commerce” ................... 13
      2.1.4.1 General Standards .................................... 13
      2.1.4.2 Practices Found Not to Be in Trade or Commerce .... 14
   2.1.5 Interpretations of “Goods” .................................. 15
   2.1.6 Interpretations of “Merchandise” ........................... 16
   2.1.7 Interpretations of “Services” ................................ 17
   2.1.8 Interpretations of “Personal, Family, or Household Use”  19
      2.1.8.1 General ................................................ 19
      2.1.8.2 Is the Test Objective or Subjective? ................. 19
      2.1.8.3 Mixed Transactions .................................... 20
      2.1.8.4 Interpretations Unique to Particular States .......... 20
      2.1.8.5 Listing of Consumer Transactions ..................... 21
      2.1.8.6 Transactions Not Found to Be for Consumer Purposes .. 22
      2.1.8.7 Texas Case Law Defining “Consumer Transaction”: “Consumer” Not Limited to “Personal, Family, or Household Purposes” .. 23
2.1.9 Treatment of Litigation Activities ............................................. 24
2.1.10 UDAP Liability Where Party Outside UDAP Statute’s Scope ........ 26

2.2 Exempted Transactions .............................................................. 26
  2.2.1 Credit ..................................................................................... 26
    2.2.1.1 General; Credit Is in “Trade or Commerce” ...................... 26
    2.2.1.2 Does a Credit Transaction Involve “Goods or Services”? ...... 26
    2.2.1.3 Services in Connection with a Loan Are “Goods or Services” . 29
    2.2.1.4 Specific Statutory Exemptions for Certain Creditors or Transactions .............................................................................. 29
    2.2.1.5 Does Other Legislation Occupy the Field of Credit Regulation? 31
      2.2.1.5.1 FTC Act ....................................................................... 31
      2.2.1.5.2 Federal and state banking laws .................................... 31
      2.2.1.5.3 State law exemptions for matters regulated by or in compliance with Truth in Lending Act or other federal statutes .................. 32
    2.2.1.6 Derivative Liability Under FTC Holder Rule Regardless of UDAP Statute’s Coverage .............................................................. 33
    2.2.1.7 State-by-State Survey of Coverage of Credit Transactions and Creditors ................................................................. 33

2.2.2 Debt Collection ........................................................................ 45
  2.2.2.1 Factors Determining Coverage ............................................ 45
    2.2.2.1.1 Statutes that apply to trade or commerce ....................... 45
    2.2.2.1.2 Statutes that apply to goods, services, or merchandise; “in connection with” ................................................................. 46
    2.2.2.1.3 Statutes that apply to “suppliers” ..................................... 47
    2.2.2.1.4 Privity-type issues .......................................................... 47
    2.2.2.1.5 Preemption, displacement by other law, and other exemptions ......................................................................................... 48
  2.2.2.2 State-by-State Survey of UDAP Statute’s Coverage of Debt Collection ..................................................................................... 48

2.2.3 Other Post-Sale Activities ......................................................... 56
  2.2.3.1 General .............................................................................. 56
  2.2.3.2 Repossession ....................................................................... 58
  2.2.3.3 Mortgage Servicing and Foreclosure .................................... 59

2.2.4 Where There Is No “Purchase” ................................................ 62
  2.2.4.1 Solicitations and Unconsummated Offers ............................ 62
  2.2.4.2 Refusal to Contract ............................................................. 63
  2.2.4.3 Where Purchase Is Not from UDAP Defendant ................ 63
  2.2.4.4 Barter and Lease Transactions ........................................... 65
  2.2.4.5 Transactions That Are Void on Other Grounds.................. 66
  2.2.4.6 Where Goods or Services Are Provided Without Charge ...... 66
  2.2.4.7 Goods or Services Not Requested by the Consumer .......... 67
  2.2.4.8 Where Someone Other Than Consumer Pays ................... 67
  2.2.4.9 Collection of Subrogated Claims ....................................... 68
  2.2.4.10 Mistaken Identity and Identity Theft ................................. 68
  2.2.4.11 Misappropriation and Theft .............................................. 69
  2.2.4.12 Charitable Solicitations and Sweepstakes ....................... 69
  2.2.4.13 Tort-Like Claims ............................................................. 70
  2.2.4.14 Other Non-Sale Transactions ........................................... 70
  2.2.4.15 Where Plaintiff Is the Seller Rather Than the Buyer ......... 72

2.2.5 Real Property and Manufactured Homes ................................... 73
  2.2.5.1 Are Real Estate Sales Covered? ........................................ 73
2.2.5.1.1 Real estate sales involve “trade or commerce,” “property,” and “merchandise”; exemptions for brokers ........................................ 73
2.2.5.1.2 Does real estate sale involve “goods or services”? .......................... 74
2.2.5.1.3 State-by-State Survey of UDAP Statute’s Coverage of Real Estate .................. 76
2.2.5.1.4 Isolated sale of real estate by owner ............................................ 80
2.2.5.1.5 Special consideration for manufactured home sales .......................... 81
2.2.5.2 Services, Construction Work, Personalty Related to Real Estate Are Covered .................. 82
2.2.6 Residential Leases; Manufactured Home Communities; Migrant Farmworker Camps ......................................................... 83
2.2.6.1 General Coverage ........................................................................ 83
2.2.6.2 Does Other State Regulation of Landlord-Tenant Relations Displace UDAP Coverage? ........................................................................ 85
2.2.6.3 UDAP Coverage Where Building Is Owner Occupied .................... 85
2.2.6.4 Migrant Farmworker Camps .......................................................... 85
2.2.7 Membership Campgrounds and Timeshares ........................................ 86
2.2.8 Pyramid Sales, Franchises, Securities, Business Opportunities ................ 86
2.2.8.1 Pyramid Sales ............................................................................. 86
2.2.8.2 Franchises ................................................................................ 86
2.2.8.3 Securities Transactions ................................................................. 87
2.2.8.4 Work-at-Home Schemes and Other Personal Business Opportunities ................................................................. 90
2.2.9 Employer-Employee and Internal Business Disputes ................................ 92
2.2.10 Personal Injury Claims ..................................................................... 94
2.2.11 Out-of-State Residents; Out-of-State Transactions ............................... 95
2.2.11.1 Introduction ............................................................................ 95
2.2.11.2 Out-of-State Residents .............................................................. 95
2.2.11.3 Transactions That Occur in Whole or in Part in Another State .......... 97
2.2.11.3.1 Statutory sources for limits on territorial reach ........................ 97
2.2.11.3.2 What level of in-state activity is sufficient .............................. 99
2.2.12 The Texas Exemption for Large Transactions ...................................... 101
2.3 Exempted Sellers .................................................................................. 102
2.3.1 Insurance Companies ........................................................................ 102
2.3.1.1 Do the UDAP Statute’s General Scope Provisions Extend to Insurance Practices? ........................................................................ 102
2.3.1.2 Statutory Exemptions for Insurance Companies .............................. 103
2.3.1.2.1 Specific exemptions for insurers or insurance practices ............. 103
2.3.1.2.2 Effect of an exemption for regulated or permitted practices .......... 104
2.3.1.3 State Insurance Code Displacement of UDAP Applicability .......... 104
2.3.1.4 The Filed Rate Doctrine and Primary Jurisdiction .......................... 106
2.3.1.5 State-by-State Survey of Coverage of Insurance Transactions ........ 107
2.3.2 Utilities ............................................................................................ 114
2.3.2.1 Issues in UDAP Coverage of Utilities ........................................... 114
2.3.2.2 State-by-State Survey of Coverage of Utilities ............................. 115
2.3.3 Regulated Industries ......................................................................... 121
2.3.3.1 Determining Whether Other State Regulation Bars a UDAP Action ................................................................. 121
### Contents

2.4.4 Merchants; Corporations; Government Entities ............................. 165
   2.4.4.1 Seller’s Attempt to Treat Consumer As a Commercial Entity  ... 165
   2.4.4.2 Can Businesses Bring UDAP Actions? ................................. 165
      2.4.4.2.1 Analytical framework ........................................... 165
      2.4.4.2.2 State-specific decisions ....................................... 168
      2.4.4.2.3 UDAP statutes’ other restrictions on suits by businesses .... 172
   2.4.4.2.4 Implied and alternate remedies for businesses .................. 173
   2.4.4.3 Can Government Entities Bring UDAP Claims? ....................... 173

2.4.5 Investigators ................................................................. 174

2.5 Conflict with the FTC Act and Other Federal Law .............................. 174
   2.5.1 General Principles of Federal Preemption ................................ 174
   2.5.2 The FTC Act ................................................................. 176
   2.5.3 Federal Banking and Credit Disclosure Laws ............................... 177
      2.5.3.1 Types of Federal Banking Laws That Affect State Laws; Effect of Dodd-Frank Act ........................................ 177
      2.5.3.2 National Bank Act ..................................................... 177
         2.5.3.2.1 Rate exportation and complete preemption of usury claims against national banks ...................................... 177
         2.5.3.2.2 Preemption of state non-usury laws that prevent or significantly interfere with a national bank’s exercise of its powers .................................................. 177
         2.5.3.2.3 The extent to which state UDAP statutes are preempted ................................................................. 178
      2.5.3.3 Regulation of Federal Savings Associations .......................... 181
         2.5.3.3.1 Overview ............................................................ 181
         2.5.3.3.2 Structure of OTS’s pre-2011 preemption regulation ...... 181
         2.5.3.3.3 No general preemption of UDAP claims under former OTS regulations ............................................. 182
         2.5.3.3.4 UDAP claims based on contract .................................. 182
         2.5.3.3.5 UDAP claims based on misrepresentation or deception ................................................................. 183
         2.5.3.3.6 UDAP claims that impose substantive standards .......... 183
         2.5.3.3.7 UDAP claims based on violation of federal law .......... 184
      2.5.3.4 Preemption Issues for State-Chartered FDIC-Insured Banks and Other State Lenders ................................................. 184
      2.5.3.5 Federal Credit Unions ................................................... 185
      2.5.3.6 Alternative Mortgage Transactions Parity Act ....................... 185
      2.5.3.7 Real Estate Settlement Procedures Act ............................... 185
      2.5.3.8 Truth in Lending Act ................................................... 186
      2.5.3.9 Other Federal Banking and Lending Laws ......................... 187

2.5.4 Federal Vehicle, Boat, and Manufactured Home Standards ............... 187

2.5.5 Federal Transportation and Shipping Laws ..................................... 188
   2.5.5.1 Carmack Amendment .................................................... 188
   2.5.5.2 Interstate Commerce Act .............................................. 189
   2.5.5.3 Federal Air Transportation Laws ...................................... 189
   2.5.5.4 Other Federal Transportation and Shipping Laws .................. 190

2.5.6 Federal Communications Laws ............................................... 191

2.5.7 Federal Securities and Commerce Laws ...................................... 191

2.5.8 Federal Health Laws ........................................................ 193
   2.5.8.1 The Affordable Care Act of 2010 and Other Federal Healthcare Laws ................................................................. 193

---

Online with updates at www.nclc.org/library
Unfair and Deceptive Acts and Practices

2.5.8.2 Medicare .................................................. 194
2.5.8.3 Government Employee Health Insurance Laws ............. 194
2.5.8.4 Medical Devices ........................................ 194
2.5.8.5 Medications, Cosmetics, and Nutritional Supplements ....... 195
   2.5.8.5.1 Non-prescription medications .......................... 195
   2.5.8.5.2 Prescription medications .............................. 195
   2.5.8.5.3 Cosmetics ............................................. 195
   2.5.8.5.4 Nutritional supplements .............................. 196
2.5.9 Food Labeling .................................................. 196
   2.5.9.1 Food, Drug, and Cosmetic Act ............................ 196
      2.5.9.1.1 Express preemption ................................... 196
      2.5.9.1.2 Implied preemption ................................... 198
      2.5.9.1.3 UDAP claims based on violation of FDA requirements; the FDA’s exclusive enforcement authority and POM Wonderful ............................................. 199
      2.5.9.1.4 Referral to FDA’s primary jurisdiction .................. 200
   2.5.9.2 Meat and Poultry Labels .................................. 201
   2.5.9.3 Use of Term “Organic” .................................... 201
2.5.10 ERISA .......................................................... 202
   2.5.10.1 General .................................................. 202
   2.5.10.2 Does State Insurance Regulation Trump ERISA Preemption?.. 203
   2.5.10.3 Claims Outside of the Scope of ERISA .................... 204
2.5.11 Federal Tobacco Regulation .................................... 205
2.5.12 Bankruptcy Code ................................................. 205
2.5.13 Other Federal Statutes ........................................ 207

Chapter 3

Demonstrating That a Practice Is a UDAP Violation ....................... 209
3.1 Getting Started .................................................... 209
   3.1.1 How to Use This Treatise to Prove a Violation .................. 209
   3.1.2 Expansive, Liberal Application of UDAP Statutes ............... 209
3.2 Per Se Violations .................................................... 212
   3.2.1 Pleading Per Se Violations ..................................... 212
   3.2.2 Per Se Violations Enumerated in the UDAP Statute or UDAP Regulation .................................................. 212
      3.2.2.1 Most UDAP Statutes Prohibit Specific Enumerated Practices ............................................. 212
      3.2.2.2 Per Se Violations of State UDAP Regulations ............... 213
   3.2.3 Practices Outside Specific UDAP Prohibitions Can Still Be UDAP Violations .................................................. 213
   3.2.4 Finding of Common Law Fraud Necessitates Finding a UDAP Violation .................................................. 214
   3.2.5 UDTPA Violations As Per Se UDAP Violations .................. 214
   3.2.6 Violation of FTC Act, Other Statute Where that Statute Provides that a Violation Is Unfair or Deceptive .................. 215
   3.2.7 Violations of Other State, Federal Laws as Per Se UDAP Violations .................................................. 216
      3.2.7.1 Importance of Finding Violations of Other Laws Per Se UDAP Violations .................................................. 216
      3.2.7.2 UDAP Scope Issues May Limit Applicability of Per Se Approach .................................................. 216
      3.2.7.3 UDAP Statutes and Regulations Explicitly Ruling on Per Se Approach .................................................. 216
      3.2.7.3.1 One of two California UDAP statutes explicitly adopts per se approach .................................................. 216
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2.7.3.2</td>
<td>Connecticut UDAP regulation adopts per se approach for motor vehicle statutes</td>
</tr>
<tr>
<td>3.2.7.3.3</td>
<td>The District of Columbia UDAP statute explicitly adopts per se approach</td>
</tr>
<tr>
<td>3.2.7.3.4</td>
<td>Florida’s UDAP statutes explicitly sets forth a per se approach</td>
</tr>
<tr>
<td>3.2.7.3.5</td>
<td>Idaho UDAP regulation identifies rules, orders, and statutes leading to per se violations</td>
</tr>
<tr>
<td>3.2.7.3.6</td>
<td>Illinois UDAP statute has unique treatment for violation of credit statutes</td>
</tr>
<tr>
<td>3.2.7.3.7</td>
<td>Massachusetts UDAP regulation finds statutory violations to be per se UDAP violations</td>
</tr>
<tr>
<td>3.2.7.3.8</td>
<td>Missouri UDAP regulation finding statutory violations to be per se UDAP violations</td>
</tr>
<tr>
<td>3.2.7.3.9</td>
<td>Nevada’s UDAP statute explicitly adopts per se approach</td>
</tr>
<tr>
<td>3.2.7.3.10</td>
<td>Texas UDAP statute explicitly rejects per se approach</td>
</tr>
<tr>
<td>3.2.7.4</td>
<td>Case Law Determining Whether Violations Are Per Se UDAP Violations</td>
</tr>
<tr>
<td>3.2.7.4.1</td>
<td>Courts that adopt the approach broadly</td>
</tr>
<tr>
<td>3.2.7.4.2</td>
<td>Examples of statutory and rule violations found to be per se UDAP violations</td>
</tr>
<tr>
<td>3.2.7.4.3</td>
<td>Case law restricting the per se approach</td>
</tr>
<tr>
<td>3.2.7.5</td>
<td>Arguing That a Statutory Violation Is a Per Se UDAP Violation</td>
</tr>
<tr>
<td>3.2.7.5.1</td>
<td>Violation of another statute as an unfair practice</td>
</tr>
<tr>
<td>3.2.7.5.2</td>
<td>Violation of another statute as deceptive practice</td>
</tr>
<tr>
<td>3.2.7.6</td>
<td>Alleging That Practice Is Both a Per Se Violation and Unfair or Deceptive in Its Own Right</td>
</tr>
<tr>
<td>3.3</td>
<td>Proving UDAP Claims Without Per Se Violations</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Introduction</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Develop the Facts</td>
</tr>
<tr>
<td>3.3.3</td>
<td>Practice-Specific Precedent</td>
</tr>
<tr>
<td>3.3.4</td>
<td>Point Out Breadth and Flexibility of General UDAP Standards</td>
</tr>
<tr>
<td>3.4</td>
<td>Sources of UDAP Precedent and Guidelines</td>
</tr>
<tr>
<td>3.4.1</td>
<td>The Statute</td>
</tr>
<tr>
<td>3.4.2</td>
<td>Legislative History; Model Statutes</td>
</tr>
<tr>
<td>3.4.2.1</td>
<td>General</td>
</tr>
<tr>
<td>3.4.2.2</td>
<td>Unfair Trade Practices and Consumer Protection Law</td>
</tr>
<tr>
<td>3.4.2.3</td>
<td>Uniform Consumer Sales Practices Act</td>
</tr>
<tr>
<td>3.4.2.4</td>
<td>Uniform Deceptive Trade Practices Act</td>
</tr>
<tr>
<td>3.4.2.5</td>
<td>Consumer Fraud Acts and Other Models</td>
</tr>
<tr>
<td>3.4.3</td>
<td>State UDAP Case Law</td>
</tr>
<tr>
<td>3.4.3.1</td>
<td>Keeping Up with In-State UDAP Cases</td>
</tr>
<tr>
<td>3.4.3.2</td>
<td>Other States’ UDAP Case Law</td>
</tr>
<tr>
<td>3.4.4</td>
<td>State UDAP Regulations</td>
</tr>
<tr>
<td>3.4.4.1</td>
<td>Finding UDAP Regulations and Related Authority</td>
</tr>
<tr>
<td>3.4.4.2</td>
<td>Authority and Procedure to Adopt Regulations</td>
</tr>
<tr>
<td>3.4.4.3</td>
<td>Precedential Effect of UDAP Regulations</td>
</tr>
<tr>
<td>3.4.5</td>
<td>FTC Cases, Other Guidelines</td>
</tr>
</tbody>
</table>
3.4.5.1 FTC Cases, Other Guidelines Are Important Sources of UDAP Precedent ........................................... 233
3.4.5.2 Types of FTC Cases .................................................. 234
3.4.5.3 Precedential Value of FTC Consent Agreements .................. 235
3.4.5.4 Comparing the FTC Act and the State UDAP Statutes ............. 235
3.4.5.5 Researching FTC Case Law ......................................... 236
3.4.5.6 FTC Trade Regulation Rules, Guides, and Other Statements .......... 237
3.4.6 CFPB UDAAP Authority, Standards, and Precedent ................... 238

Chapter 4  Deception, Unfairness, Unconscionability, and Abusiveness ................................................................. 241

4.1 Introduction ................................................................. 241
4.2 Deception, Statutory Fraud ............................................... 241
  4.2.1 Per Se Deception ....................................................... 241
  4.2.2 Relationship of Deception to Unfairness, Unconscionability .......... 242
  4.2.3 Comparison of Deception with Fraud, Misleading Practices ........... 242
    4.2.3.1 Comparison with Common Law Fraud ............................ 242
    4.2.3.2 Statutory Fraud; Misleading Practices ............................ 244
  4.2.4 Intent Unnecessary .................................................... 244
    4.2.4.1 Intent Generally Not Required .................................... 244
    4.2.4.2 Where Statute Explicitly Requires Proof of Intent ................. 247
  4.2.5 Knowledge Unnecessary .............................................. 248
    4.2.5.1 Knowledge Generally Not Required ............................... 248
    4.2.5.2 Where Proof of Seller’s Knowledge Is Required ................. 250
  4.2.6 Despite Good Faith Efforts .......................................... 251
  4.2.7 Despite Cessation of Practice ........................................ 252
  4.2.8 Despite Industrywide Practice ....................................... 252
  4.2.9 Actual Deception Unnecessary; Likelihood or Capacity for Deception Sufficient ........................................ 253
  4.2.10 Puffing As a Defense ................................................. 255
  4.2.11 Vulnerable Consumers Specially Considered; the Reasonable Consumer Standard ........................................ 258
    4.2.11.1 The FTC Standard ................................................. 258
    4.2.11.2 State UDAP Case Law ............................................. 259
  4.2.12 Materiality May Be Presumed and Reliance Is Unnecessary ............ 260
    4.2.12.1 Introduction ....................................................... 260
    4.2.12.2 The FTC Standard ................................................. 261
    4.2.12.3 State UDAP Case Law ............................................. 262
      4.2.12.3.1 Proof of reliance generally not required ..................... 262
      4.2.12.3.2 Small minority requires reliance ............................ 265
      4.2.12.3.3 No reliance required in nondisclosure or mis-disclosure cases . 267
      4.2.12.3.4 No reliance required for claims not based on deception or in cases seeking injunctive relief .......... 268
      4.2.12.3.5 Where reliance required, it need not be reasonable reliance .... 268
      4.2.12.3.6 A third party’s reliance may be sufficient .................. 269
      4.2.12.3.7 Presumption of reliance where misrepresentations are material .... 269
      4.2.12.3.8 Unrealistically specific allegations of reliance unnecessary .......... 270
4.2.12.4 Requirement That Representation Be Material .......................... 270
4.2.12.5 Relationship of Reliance to Causation .................................. 271
4.2.13 Literally True Statements, Partial Truths; Overall Net Impression .. 272
4.2.14 Conduct, Pictures, and Brand Names ......................................... 276
4.2.15 Failure to Disclose ........................................................................ 276
  4.2.15.1 Overview ................................................................. 276
  4.2.15.2 The FTC Standard ...................................................... 277
  4.2.15.3 State UDAP Precedent ............................................... 278
    4.2.15.3.1 General standards ............................................. 278
    4.2.15.3.2 State regulations .............................................. 280
    4.2.15.3.3 Special duty to disclose for fiduciaries ................. 280
    4.2.15.3.4 Must the nondisclosure be knowing? ................. 281
    4.2.15.3.5 Must the seller intend that others rely on the omission? 282
    4.2.15.3.6 Must the seller have an independent duty of disclosure? 282
    4.2.15.3.7 Must the consumer investigate? .......................... 283
    4.2.15.3.8 Specific nondisclosure holdings ......................... 283
    4.2.15.3.9 Disclosures in online transactions ....................... 288
    4.2.15.3.10 Electronic disclosures ..................................... 289
4.2.16 Subsequent Clarification Does Not Prevent Deception ................ 290
  4.2.16.1 Subsequent Disclosures Cannot Correct Earlier Deceptive Claims 290
  4.2.16.2 Subsequent Consumer Conduct or Other Occurrence Cannot Cure Deception 292
  4.2.16.3 The Georgia Exception ............................................. 292
4.2.17 Immediate Customer’s Deception Unnecessary ............................ 293
4.2.18 Deceptive Statements Need Not Be Advertised to the Public ........ 294
4.2.19 Money-Back Guarantee Does Not Sanitize Fraud .......................... 295
4.2.20 Contract Defenses Do Not Apply to UDAP Cases ....................... 295
  4.2.20.1 Deception Is Not Based on Breach of Contract ............... 295
  4.2.20.2 Parol Evidence Rule ................................................ 296
  4.2.20.3 Privity of Contract ................................................... 297
  4.2.20.4 Disclaimers, Merger Clauses, Limitations on Liability or Remedies, and Other Contract Clauses ........ 301
  4.2.20.5 Voluntary Payment Doctrine ...................................... 305
  4.2.20.6 Post-Transaction Waivers ......................................... 307
  4.2.20.7 Other Contract Defenses .......................................... 307
4.2.21 Tort Defenses Do Not Apply to Deception Claim .......................... 308
  4.2.21.1 Contributory Negligence or Lack of Care by the Consumer .... 308
  4.2.21.2 Economic Loss Rule Generally Does Not Apply to UDAP Claims 309
  4.2.21.3 Unclean Hands ....................................................... 311
  4.2.21.4 Other Tort Defenses ................................................ 312
4.3 Unfairness ...................................................................................... 312
  4.3.1 General .............................................................. 312
  4.3.2 The Current FTC Unfairness Standard ................................... 313
    4.3.2.1 Standard Enacted by Congress in 1994 .................... 313
    4.3.2.2 Substantial Consumer Injury ................................... 314
    4.3.2.3 Injury That Consumer Cannot Reasonably Avoid ........ 315
      4.3.2.3.1 Introduction .................................................. 315

Online with updates at www.nclc.org/library
4.3.2.3.2 Analysis based on the reasonable consumer, not the perfect consumer. 316
4.3.2.3.3 The relevance of the doctrine of unconscionability 317
4.3.2.3.4 Consumers have limited ability to avoid harm caused by standardized contract terms 317
4.3.2.3.5 Market forces can leave consumers with no meaningful choice. 318
4.3.2.3.6 Deception or ambiguity at the time of contract formation; high-pressure sales tactics 319
4.3.2.3.7 Consumers cannot reasonably avoid injury that results from unpredictable or involuntary events 321
4.3.2.3.8 Consumers cannot reasonably avoid harm that they have no reason to anticipate 321
4.3.2.3.9 Consumers cannot reasonably avoid acts undertaken without their consent 322
4.3.2.3.10 Disclosures often do not enable consumers to avoid harm 323
4.3.2.3.11 Steps that mitigate harm that has already occurred do not make the injury reasonably avoidable 325
4.3.2.3.12 Consumers cannot reasonably avoid abuses once the seller has obtained control of the transaction 326
4.3.2.3.13 Consumers cannot avoid abuses that occur after they have entered into the contract 326
4.3.2.3.14 When a market does not correct itself, consumers cannot readily avoid injury 327
4.3.2.3.15 Consumers cannot avoid acts taken by others that affect the market 327
4.3.2.3.16 Harm is not reasonably avoidable if it would be expensive or impractical to avoid it 327

4.3.2.4 Injury Not Outweighed by the Benefits to Consumers or Competition 328

4.3.2.5 Relation to Public Policy 328

4.3.3 Unfairness Standards Under State UDAP Statutes 329

4.3.3.1 Unfairness Broader Than Deception 329

4.3.3.2 Precedential Effect of Congress’ 1994 Definition of Unfairness in Interpreting State UDAP Statutes 330

4.3.3.3 The “S&H” Standard 330

4.3.3.3.1 Description of the “S&H” standard 330

4.3.3.3.2 Differences between the “S&H” and the current FTC standard 331

4.3.3.4 State UDAP Use of “S&H” Unfairness Definition in Lieu of the Current FTC Definition 331

4.3.3.5 Alternative State Definitions 333

4.3.4 Application of Unfairness to Adhesion Contracts 335

4.3.4.1 FTC Credit Practices Rule 335

4.3.4.2 Other Creditor Practices 336

4.3.5 Systematic Breach of Contract As Unfair 336

4.3.6 Coercive High-Pressure Sales and Collection Tactics 337

4.3.7 Taking Advantage of Disparate Knowledge 338

4.3.8 Taking Advantage of a Vulnerable Group 338

4.3.9 Illegal Conduct 338

4.3.10 Misuse of Special Status 340
### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.3.11 Taking Advantage of an Emergency Situation; Excessive Price</td>
<td>341</td>
</tr>
<tr>
<td>As Unfair Practice</td>
<td></td>
</tr>
<tr>
<td>4.3.11.1 Price Gouging in an Emergency As an Unfair Practice</td>
<td>341</td>
</tr>
<tr>
<td>4.3.11.2 State Price Gouging Statutes</td>
<td>341</td>
</tr>
<tr>
<td>4.3.11.3 Practical Tips for Consumers Facing Price Gouging in an Emergency</td>
<td>342</td>
</tr>
<tr>
<td>4.3.12 Unconscionable Prices or Practices As Unfair Practices</td>
<td>342</td>
</tr>
<tr>
<td>4.4 Unconscionability</td>
<td>343</td>
</tr>
<tr>
<td>4.4.1 Importance of Unconscionability Standard</td>
<td>343</td>
</tr>
<tr>
<td>4.4.2 Definitions of Unconscionability in UDAP Statutes and Regulations</td>
<td>343</td>
</tr>
<tr>
<td>4.4.3 UDAP Case Law Defining Unconscionability</td>
<td>345</td>
</tr>
<tr>
<td>4.4.4 Taking Advantage of Vulnerable Consumers</td>
<td>345</td>
</tr>
<tr>
<td>4.4.5 Price Unconscionability</td>
<td>346</td>
</tr>
<tr>
<td>4.4.6 Unconscionable Performance Practices</td>
<td>347</td>
</tr>
<tr>
<td>4.4.7 Unconscionable Collection and Enforcement Practices</td>
<td>348</td>
</tr>
<tr>
<td>4.4.8 Other UDAP Unconscionability Decisions</td>
<td>348</td>
</tr>
<tr>
<td>4.4.9 Other Sources of Unconscionability Precedent</td>
<td>349</td>
</tr>
<tr>
<td>4.4.9.1 General</td>
<td>349</td>
</tr>
<tr>
<td>4.4.9.2 Specific UCC, UCCC, and Common Law Unconscionability Findings</td>
<td>351</td>
</tr>
<tr>
<td>4.5 Abusive Practices</td>
<td>352</td>
</tr>
</tbody>
</table>

**Chapter 5**

General Sales and Performance Practices .................................................. 353

5.1 Introduction ............................................................................................... 353

5.2 Unsubstantiated Claims ............................................................................. 353

5.2.1 General .................................................................................................... 353

5.2.2 FTC Standards ........................................................................................ 353

5.2.3 State UDAP Precedent ............................................................................ 354

5.3 Deceptive Pricing Inducements .................................................................. 355

5.3.1 Bait and Switch ...................................................................................... 355

5.3.2 Unavailability of Advertised Items ....................................................... 357

5.3.3 Deceptive Bargain Sales ......................................................................... 358

5.3.3.1 Phony Distress, Wholesale, and Defective Merchandise Sales .......... 358

5.3.3.2 Deceptive Pricing in Comparison to a Reference Price .................... 358

5.3.3.3 Deceptive Rebate Offers .................................................................... 361

5.3.4 Price Padding and Hidden Fees; Price Transparency ............................ 361

5.3.5 Other Deceptive Pricing Techniques ..................................................... 362

5.3.6 Use of the Word “Free” .......................................................................... 363

5.3.7 Low Balling; Charging Higher Prices Than Agreed Upon ...................... 364

5.3.8 Consumer Specially Selected or Contest Winner .................................... 364

5.3.9 Conditions or Limitations on Offers ...................................................... 365

5.4 General Misrepresentations Regarding Product and Seller ..................... 366

5.4.1 Product Characteristics, Uses and Benefits .......................................... 366

5.4.2 Product Uniqueness ................................................................................ 367

5.4.3 Product Quality, Composition, Model, and Identity ................................ 367

5.4.4 Product Safety ........................................................................................ 368

5.4.5 Product Quantity and Size; Packaging ................................................... 368

5.4.6 Product’s Method of Manufacture .......................................................... 369

5.4.7 Product’s Geographic Origin ................................................................... 370

5.4.8 Seller’s and Product’s Approval, Affiliation, and Endorsement ............ 370

5.4.8.1 Approval or Affiliation ...................................................................... 370

Online with updates at www.nclc.org/library
5.4.8.2 Unlicensed or Unregistered Sellers; Fictitious Names
5.4.8.3 Endorsements and Testimonials
5.4.9 Manufacturer’s and Seller’s Status
5.4.10 Passing Off; Trademarks
5.4.11 Disparaging Competitors
5.5 High-Pressure, Coercive, or Intrusive Sales Techniques
5.5.1 UDAP Precedent
5.5.2 High-Pressure Sales As Unfair Practices
5.5.3 Referral Sales
5.5.4 Unordered Merchandise
5.5.5 Negative-Option Sales and Automatic Renewal Provisions
5.5.6 Door-to-Door Sales, Junk Faxes, Telemarketing, and Spam
5.6 Contracts, Warranties, and Legal Rights
5.6.1 Contract Language for Non-English Speaking Consumers
5.6.2 Plain English Contract Language
5.6.3 Unfair and Unenforceable Adhesion Contract Terms
  5.6.3.1 FTC Credit Practices Rule Sets Out Theory for Unfair Standard Form Contract Terms
  5.6.3.2 Other FTC Precedent
  5.6.3.3 Illegal or Unenforceable Contract Terms As an Unfair and Deceptive Practice
  5.6.3.4 Other State Precedent on Adhesion Contracts
5.6.4 Contractual Misrepresentations
  5.6.4.1 Deception Concerning the Nature of the Document Being Signed
  5.6.4.2 Oral Representations Inconsistent with the Contract
5.6.5 Breaches of Contract
  5.6.5.1 Mere Breach of Contract May Not Be UDAP Violation
  5.6.5.2 Systematic Breach of Many Consumer Contracts As UDAP Violation
  5.6.5.3 Unfairness, Deception, or Other Aggravating Circumstances Accompanying the Contract Breach
  5.6.5.4 Seller’s Refusal to Rectify Breach of Contract
  5.6.5.5 Unequal Relationship of the Parties
5.6.6 Refunds and Cancellation Rights
5.6.7 Guarantees, Warranties, and Service Contracts
  5.6.7.1 Breach of Warranty As UDAP Violation
    5.6.7.1.1 Advantages of UDAP claims in breach of warranty cases
    5.6.7.1.2 Warranty breach as per se UDAP violation
    5.6.7.1.3 Aggravating circumstances can turn breach of warranty into UDAP violation
    5.6.7.1.4 Magnuson-Moss breach of warranty violation as a per se UDAP violation
  5.6.7.2 Service Contracts
    5.6.7.2.1 Duplication of warranty rights
    5.6.7.2.2 Deceptive marketing techniques
    5.6.7.2.3 Failure to pay consumer claims under the service contract
  5.6.7.3 Misrepresentations Concerning the Status of a Guarantee
    5.6.7.3.1 General
    5.6.7.3.2 Thirty-day, “50-50” warranties
5.6.8 Other Misrepresentations of Legal Rights and Requirements; Misrepresentation of Law vs. Fact ................................................................. 394
5.6.9 Merchant’s Slow Payment on Judgment Owed Consumer ......................... 396
5.6.10 Holder’s Refusal to Accept Liability Under FTC Holder Rule .................. 396
5.7 Deceptive Performance Practices ............................................................ 396
5.7.1 Layaway Plans; Other Deposits ........................................................... 396
5.7.2 Delay and Nondelivery ...................................................................... 397
5.7.3 Damaged and Defective Goods ............................................................ 399
5.7.4 Used As New; Prior Use ..................................................................... 399
5.7.5 Substitution of Displayed Products ....................................................... 400
5.7.6 Repair Practices ................................................................................. 400
5.7.7 Deceptive Billing Practices ................................................................... 401
5.8 Application of UDAP Statutes to Anti-Competitive Conduct .................... 404
5.8.1 Introduction ......................................................................................... 404
5.8.2 Can Indirect Purchasers Recover Under State UDAP Statutes? ............... 404
5.8.3 Does the UDAP Statute Prohibit Anti-Competitive Conduct? ................. 406
5.9 Invasion of Privacy ................................................................................. 407

Chapter 6

Credit and Collections .............................................................................. 411
6.1 Introduction ......................................................................................... 411
6.2 Loan Brokers ....................................................................................... 411
6.2.1 Overview of Regulation of Loan Brokers ............................................. 411
6.2.2 Misrepresentations and Unfair Practices by Loan Brokers ................. 412
6.2.3 Advance-Fee Brokers ........................................................................ 412
6.2.4 Yield Spread Premiums ...................................................................... 413
6.3 Improvident Extension of Credit ............................................................ 414
6.3.1 General .............................................................................................. 414
6.3.2 UDAP and Other Laws Prohibiting Credit That Consumer Cannot Repay 414
6.3.3 Applying General UDAP Prohibitions to Improvident Extension of Credit .............................................................. 415
6.3.4 Falsification of Credit Application by Seller or Broker ......................... 417
6.3.4.1 Nature of the Problem .................................................................. 417
6.3.4.2 The Consumer’s Legal Claims ...................................................... 417
6.3.4.3 Computing the Consumer’s Damages ......................................... 418
6.3.4.4 Consumer’s Clean Hands ............................................................. 419
6.4 Violations of Federal and State Credit Laws as UDAP Violations .............. 419
6.4.1 Truth in Lending Violations ................................................................. 419
6.4.2 RESPA Violations ............................................................................. 420
6.4.3 Discriminatory Extension of Credit .................................................... 421
6.4.4 Violations of State Credit Laws ........................................................ 422
6.4.5 Attempts to Evade Credit Legislation ................................................. 423
6.5 Exorbitant Credit Charges ..................................................................... 423
6.5.1 Credit Costs That Are Grossly in Excess of Those Usually Charged in Market .................................................................................. 423
6.5.2 Other Unfairness or Unconscionability in Credit Charges .................... 424
6.5.2.1 Nature and Requirements of State Prohibitions ......................... 424
6.5.2.2 Exorbitant Credit Charges as UDAP Violation .............................. 425
6.5.3 Uncovering Deception in Excessive Charge Cases ............................... 426
6.6 Deception, Coercion, and Violation of Credit Contract ............................ 427
6.6.1 Misrepresentation of Credit Terms ...................................................... 427
6.6.2 The Truth in Lending Act’s Credit Advertising Requirements ............. 431
6.6.3 Nondisclosure of True Credit Terms ........................................... 431
6.6.3.1 General ................................................................. 431
6.6.3.2 Rules Requiring Disclosure of All Material Restrictions ........ 432
6.6.4 Coercive Tactics ............................................................. 433
6.6.5 Post-Consummation Violations .............................................. 433
6.6.6 Banking Agency Guidelines ............................................... 433

6.7 Home Mortgage Loans: Origination, Servicing, Loan Modification, Foreclosure ................................................................. 434
6.7.1 The FTC’s Mortgage Advertising Rule .................................. 434
6.7.2 Negotiation, Closing, and Loan Terms ..................................... 435
6.7.2.1 Substantive Rules Under Truth in Lending Act ................. 435
6.7.2.2 Federal Banking Agency Guidance on Mortgage Lending .... 435
6.7.2.3 Loans Doomed to Foreclosure Because of a Combination of Risky Features ................................................. 436
6.7.2.4 Other Unfair and Deceptive Practices in Mortgage Lending .... 438
6.7.3 Servicing and Escrow Practices ............................................. 439
6.7.4 Payoff of Mortgage ........................................................... 440
6.7.5 UDAP Claims Regarding Mortgage Loan Modification Attempts .................. 441
6.7.5.1 Introduction ............................................................. 441
6.7.5.2 Role of HAMP Guidelines .......................................... 441
6.7.5.3 Can a UDAP Claim Be Based on Violation of HAMP Guidelines? ................................................................. 442
6.7.5.4 Types of Unfair and Deceptive Practices in Connection with Loan Modifications ............................................. 442
6.7.5.4.1 Misrepresentations in connection with loan modifications ................................................................. 442
6.7.5.4.2 Breach of agreement to modify loan as UDAP violation ................................................. 444
6.7.5.4.3 Unfair loan modification terms ................................ 445
6.7.5.4.4 Other unfair loan modification practices ....................... 445
6.7.5.5 Meeting UDAP Statutes’ Injury Requirements in Loan Modification Cases ......................................................... 445
6.7.6 Foreclosure Practices ........................................................ 447
6.7.7 Foreclosure Rescue Scams .................................................... 449
6.7.7.1 Introduction ............................................................. 449
6.7.7.2 “Phantom Help” Scams .............................................. 450
6.7.7.3 Deed Theft Scams ...................................................... 450

6.8 Credit Cards and Related Services ............................................ 451
6.8.1 Introduction ........................................................................... 451
6.8.1.1 Credit Card Regulation ............................................. 451
6.8.1.2 Cautionary Advice About Litigation Against Credit Card Issuers ................................................................. 452
6.8.1.3 Credit Card Marketing and Advertising ......................... 452
6.8.2 Regulatory Actions Against Credit Card Issuers ...................... 453
6.8.2.1 Consumer Financial Protection Bureau Enforcement Actions ................................................................. 453
6.8.2.2 UDAP Issues Involving Subprime Credit Cards ............... 454
6.8.2.2.1 Introduction ............................................................. 454
6.8.2.2.2 Office of the Comptroller of the Currency Advisory Letters ................................................................. 455
6.8.3 Abuses by Non-Issuers Related to Credit Cards ....................... 455
6.8.3.1 Credit Card Finders ...................................................... 455
6.8.3.2 Unauthorized Credit Card Charges ................................ 456
Chapter 7  Motor Vehicle Sales, Rentals, and Repair  .............................................. 479

7.1 Automobile Litigation Checklist ................................................................. 479
7.1.1 Introduction .......................................................................................... 479
7.1.2 Legal Claims ........................................................................................ 479
7.1.3 Investigation and Litigation ................................................................. 481

7.2 “Back-End” Sales: Financing, Insurance, Service Contracts, Doc Charges, Other Add-Ons .......................................................... 483
7.2.1 Back-End Sales Explained ................................................................. 483
7.2.2 “Packing” of Back-End Charges ....................................................... 483
7.2.3 Financing ............................................................................................. 484
  7.2.3.1 Introduction ................................................................................... 484
  7.2.3.2 UDAP Challenges to Dealer Kickbacks ....................................... 484
  7.2.3.3 UDAP Challenges to Dealer Kickbacks ....................................... 484
  7.2.3.4 Class Action ECOA Challenges to Dealer Kickbacks ................. 485
  7.2.3.5 Dealer’s Altering of Consumer’s Credit Application, Fictitious Down Payments, and Other Frauds on the Financer ................................. 485
7.2.4 Service Contracts, Extended Warranties ............................................. 486
  7.2.4.1 Undisclosed Dealer Profit on Sale of Contract ............................... 486
  7.2.4.2 When Dealer Is Actually the Service Contract Provider ............. 487
  7.2.4.3 Does the Contract Provide Meaningful Benefits? ....................... 487
  7.2.4.4 Undisclosed Inspection Fees .......................................................... 487
  7.2.4.5 Who Must Provide Benefits Under the Service Contract ............. 487
7.2.5 Credit Insurance and Other Insurance Products ............................... 488
7.2.6 Documentary Fees and Other “Paper” Charges ................................. 488
  7.2.6.1 Introduction ................................................................................... 488
  7.2.6.2 UDAP Challenges ....................................................................... 488
  7.2.6.3 Truth in Lending Challenges .......................................................... 489
  7.2.6.4 Antitrust Claims ......................................................................... 489
  7.2.6.5 State Statutory Restrictions .......................................................... 490
  7.2.6.6 Unauthorized Practice of Law ........................................................ 490
7.2.7 Dealer-Installed Add-Ons ................................................................. 490
  7.2.7.1 Introduction ................................................................................... 490
  7.2.7.2 Rustproofing and Related Packages .......................................... 490
  7.2.7.3 Glass Etching .............................................................................. 491

7.3 Unfair Dealer Negotiation Practices ...................................................... 492
  7.3.1 The Turnover System ....................................................................... 492
  7.3.2 Dealer’s Illegal Use of Consumer Credit Reports ......................... 492
  7.3.3 “Unhorsing” and Selling the Consumer’s Trade-In Prematurely .... 493
  7.3.4 Dealers Hiding Trade-Ins’ Negative Equity ...................................... 493
  7.3.5 Dealer Failing to Pay Off the Lien on the Consumer’s Trade-In ...... 494
  7.3.6 Lowering the Trade-In’s Agreed-Upon Price .................................... 495
  7.3.7 Playing Fast and Loose with the Paperwork .................................... 495
  7.3.8 Misrepresentations As to Consumer Cancellation Rights ................ 496
  7.3.9 Cooling-Off Periods in Automotive Sales ...................................... 496
  7.3.10 Yo-Yo (Spot Delivery) Abuses ......................................................... 497
  7.3.11 Hired Guns, Tent Sales, and Other Short-Term Techniques .......... 497
  7.3.12 Private Sellers and Curbstoners ...................................................... 498

7.4 Used Car Sales ......................................................................................... 498
  7.4.1 Introduction ....................................................................................... 498
  7.4.2 FTC Used Car Rule ......................................................................... 498
  7.4.3 Sale of Used Cars As New; Demonstrators and Program Cars ......... 499
Chapter 8

Home and Home-Related Transactions ........................................ 527
8.1 Manufactured Homes ......................................................... 527
  8.1.1 Manufactured Home Sales ............................................ 527
    8.1.1.1 Sales Misrepresentations ................................... 527
    8.1.1.2 Defects in the Home, the Site, or the Installation .......... 527
    8.1.1.3 Improvident Extension of Manufactured Home Credit .... 528
    8.1.1.4 Land-Home Packages .......................................... 528
  8.1.2 Manufactured Home Communities .................................... 528
    8.1.2.1 What Statutes and Regulations Apply ..................... 528
    8.1.2.2 Tying Arrangements in Sale of Manufactured Homes, Utilities, or Other Products; Discriminatory Practices .......... 529
    8.1.2.3 Unfair Restriction on Tenant’s Sale of the Home .......... 529
    8.1.2.4 Licensure, Leases, Restrictions on Fees, Habitability .... 530
    8.1.2.5 Manufactured Home Community Eviction Practices ....... 530
    8.1.2.6 Other Approaches to Protecting Manufactured Home Community Residents ........................................... 531
      8.1.2.6.1 Resident ownership of the manufactured home community .......................................................... 531
      8.1.2.6.2 Manufactured home community legislation ............. 531
      8.1.2.6.3 Referral to manufactured home community residents associations ................................................. 532
  8.2 Landlord-Tenant and Employer-Provided Housing .................... 532
    8.2.1 Introduction ........................................................ 532
    8.2.2 Apartment Finders .................................................. 533
    8.2.3 Security Deposits and Calculation of Rents ................. 533
    8.2.4 Rental Agreements ................................................ 534
    8.2.5 Quality of Housing ............................................... 534
      8.2.5.1 Substandard Housing ....................................... 534
      8.2.5.2 Authority to Rent Out a Unit; Failure to Obtain Occupancy Certificates ............................................. 535
      8.2.5.3 Misrepresentations Related to Crime Prevention ....... 535
    8.2.6 Utilities ............................................................ 535
    8.2.7 The Tenant’s Early Termination .................................. 536
    8.2.8 Evictions ........................................................... 536
      8.2.8.1 Deceptive Notices to Quit .................................. 536
      8.2.8.2 Retaliatory or Improper Eviction ....................... 536
      8.2.8.3 Excessive or Unjustified Fees ............................. 537
      8.2.8.4 Landlord Seizure of Evicted Tenant’s Possessions ........ 537
    8.2.9 Employer-Provided Housing: Migrant Farmworker Camps .... 537
  8.3 Real Estate and Home Sales .............................................. 538
8.3.1 Deception Concerning the Nature of the Home .................................. 538
  8.3.1.1 Deception and Non-Disclosure ........................................ 538
  8.3.1.2 Inapplicability of Seller Defenses .................................. 540
8.3.2 UDAP Violations Concerning Title, Financing, and the Homeowner’s Legal Rights ........................................ 540
8.3.3 Special Issues Concerning Home Inspectors .................................. 541
8.3.4 Special Issues Concerning Real Estate Agents and Brokers ................. 541
8.3.5 Property Flipping .............................................................. 542
  8.3.5.1 Importance of Suing Multiple Participants in the Scam ................. 542
  8.3.5.2 UDAP Precedent ......................................................... 543
  8.3.5.3 Other Causes of Action ............................................... 544
8.3.6 Appraisal Fraud .............................................................. 544
  8.3.6.1 Nature of Appraisal Fraud ........................................... 544
  8.3.6.2 Investigating Appraisal Fraud ....................................... 545
  8.3.6.3 UDAP Claims Regarding Appraisal Fraud .......................... 545
8.3.7 Special Issues Concerning Home Builders .................................. 547
  8.3.7.1 Misrepresentations Concerning the Home or Work to Be Performed ........................................ 547
  8.3.7.2 Performance Problems, Contracts, Warranties ....................... 548
8.3.8 Land Fraud Schemes ......................................................... 549
8.3.9 Timeshares .......................................................................... 549
8.4 Home Improvement Sales ......................................................... 550
  8.4.1 General ............................................................................. 550
  8.4.2 Marketing Misrepresentations ............................................. 551
  8.4.3 The Home Improvement Contract and Warranties ......................... 552
  8.4.4 Building Permits and Construction Standards .............................. 553
  8.4.5 Pricing Issues: Unconscionability, Unauthorized Charges, Misrepresentations ........................................ 553
  8.4.6 Failure to Perform Work Properly and As Scheduled ....................... 553
8.4.7 Credit-Related Practices and Lender Liability ................................ 554
8.5 Heating Fuel, Electricity, Telecommunications, and Other Utilities .......... 555
  8.5.1 Unregulated Fuels: Heating Oil, Propane, Kerosene, and Wood .......... 555
    8.5.1.1 Problems Facing Users of Unregulated Fuels ....................... 555
    8.5.1.2 Applicability of the UDAP Statute .................................. 556
    8.5.1.3 UDAP Case Law ......................................................... 556
    8.5.1.4 UDAP Regulations ..................................................... 557
    8.5.1.5 Price Gouging ........................................................... 558
    8.5.1.6 UDAP Principles Applicable to the Sale of Unregulated Fuels .... 558
  8.5.2 Gas and Electric Service ..................................................... 559
    8.5.2.1 Applicability .............................................................. 559
    8.5.2.2 Retail Energy Market Abuses by Unregulated Suppliers .......... 559
      8.5.2.2.1 Introduction ......................................................... 559
      8.5.2.2.2 Deceptive marketing practices ................................... 559
      8.5.2.2.3 Unauthorized switching or slamming ........................... 560
      8.5.2.2.4 High prices .......................................................... 560
      8.5.2.2.5 Other problematic contract terms ............................... 560
    8.5.2.3 Illegal Shut-Offs and Interrupted Service ............................. 562
  8.5.3 Telecommunications .......................................................... 563
    8.5.3.1 UDAP Applicability ..................................................... 563
    8.5.3.2 Slamming (Changing Service Providers Without the Consumer’s Authorization) ................................. 564
    8.5.3.3 Prepaid Phone Cards ................................................... 564

Online with updates at www.nclc.org/library
8.7.4 Disclosure of RTO Transaction’s Effective Annual Percentage Rate
8.7.3 Deceptive RTO Inducements, Sales and Warranty Practices
8.8.8 Magazines
8.8.7 Firearms
8.8.5 Environmental Claims for Household Products
8.8.4 Energy Savings Claims for Insulation and Household Products
8.8.3 Tobacco
8.8.2 Freezer Meats
8.8.1 Tobacco
8.8.4 Energy Savings Claims for Insulation and Household Products
8.8.5 Environmental Claims for Household Products
8.8.6 Computers and Other Electronic Equipment
8.8.7 Firearms
8.8.8 Magazines
8.8.9 Miscellaneous Household Products

8.7 Rent to Own
8.7.1 Importance of UDAP Approach
8.7.2 Applicability of UDAP Statutes to RTO Transactions
8.7.3 Deceptive RTO Inducements, Sales and Warranty Practices
8.7.4 Disclosure of RTO Transaction’s Effective Annual Percentage Rate
8.7.5 Applicability of Three-Day Cooling-Off Period to RTO Transactions
  8.7.5.1 General
  8.7.5.2 The $25 Minimum Payment Requirement
  8.7.5.3 Does the Transaction Take Place Outside the RTO Store?
8.7.6 Deceptive Repossession and Debt Collection Tactics
8.7.7 UCC Article 2A Unconscionability As Alternative to UDAP Claim
8.8 Food; Tobacco; Other Household Products
  8.8.1 Food Labels and Nutritional Claims
    8.8.1.1 General
    8.8.1.2 The Role of FDA Standards
    8.8.1.3 Use of the Term “Organic”
  8.8.2 Freezer Meats
  8.8.3 Tobacco
  8.8.4 Energy Savings Claims for Insulation and Household Products
  8.8.5 Environmental Claims for Household Products
  8.8.6 Computers and Other Electronic Equipment
  8.8.7 Firearms
  8.8.8 Magazines
  8.8.9 Miscellaneous Household Products

Chapter 9 Services, Insurance, Opportunity Schemes, Other Transactions
9.1 Future-Service Contracts: Health Spas, Dance Studios, Membership Campgrounds, Buying Clubs, and Trade Schools
  9.1.1 Introduction
  9.1.2 Cancellation of Future-Service Contracts
    9.1.2.1 The Seller’s Contract Provision
    9.1.2.2 State Statutes May Override Contractual Cancellation Provision

Online with updates at www.nclc.org/library
9.5.2.3.1 UNIP standards as guides for determining UDAP violations ......................................................... 624
9.5.2.3.2 UDAP scope, displacement, exhaustion of administrative remedies, and primary jurisdiction . . . . . . 624
9.5.2.4 Is a Pattern of Unfair Claims Payments a Precondition to a UNIP or UDAP Insurance Action? .................. 625
9.5.3 Unreasonable Refusal or Delay in Paying Claim As a UDAP Violation ...................................................... 626
9.5.3.1 UDAP Claim Distinguished from Claim Based on Insurer’s Breach of Contract ........................................ 626
9.5.3.2 Refusal to Pay ........................................................................................................................................ 626
9.5.3.3 Excessive Delay and Evasiveness As a UDAP Violation ........................................................................ 628
9.5.3.4 Vexatious Litigation .................................................................................................................................. 629
9.5.3.5 Nondisclosure and Deception in the Claims Settlement Process .................................................................. 629
9.5.3.6 Requiring Consumer to Sign Waiver or Release As UDAP Violation .......................................................... 630
9.5.4 Misrepresentation Concerning Policy and Claims Settlement Practices ....................................................... 630
9.5.4.1 Misrepresentation Concerning Policy Coverage and Features ................................................................ 630
9.5.4.2 Misrepresentations Concerning Insurer Claims Settlement Policies ........................................................ 632
9.5.5 Twisting; Sale of Unnecessary Insurance; Other Unfair or Deceptive Sales Schemes ............................................... 632
9.5.5.1 Introduction ........................................................................................................................................ 632
9.5.5.2 Sales of Unnecessary Insurance .............................................................................................................. 632
9.5.5.3 Twisting ........................................................................................................................................ 633
9.5.5.4 Kickbacks ........................................................................................................................................ 633
9.5.5.5 Other Sales Schemes ............................................................................................................................. 633
9.5.6 Unfair Discrimination ...................................................................................................................................... 634
9.5.7 Excessive Premiums As a UDAP Violation .................................................................................................. 634
9.5.8 Third Party’s Failure to Purchase Insurance for the Consumer .............................................................................. 635
9.5.9 Credit Insurance .............................................................................................................................................. 636
9.5.9.1 Introduction ........................................................................................................................................ 636
9.5.9.2 Failure to Disclose Excessive Cost or Kickbacks ...................................................................................... 636
9.5.9.3 Marketing Deception, Illusory Coverage ................................................................................................. 636
9.5.9.4 Coercion in Selling Credit Insurance ..................................................................................................... 637
9.5.9.5 Sale of Credit Insurance That Is Excessive or Violates State Lending Laws. ................................................ 638
9.5.9.6 Failure to Pay Credit Insurance Claims .................................................................................................. 638
9.5.10 Force-Placed Automobile Insurance ........................................................................................................ 638
9.5.11 “Packing” Non-Credit Insurance in Conjunction with Credit Sale .............................................................. 639
9.5.12 Mortgage Insurance ...................................................................................................................................... 640
9.6 Opportunity Schemes and Other “Non-Sale” Transactions .............................................................................. 641
9.6.1 Franchises and Business Opportunities ..................................................................................................... 641
9.6.2 Investments ........................................................................................................................................ 641
9.6.3 Employment Opportunities ........................................................................................................................ 642
9.6.4 Pyramid Sales ........................................................................................................................................ 643
9.6.5 Contests and Game Promotions .................................................................................................................. 645
9.6.6 Charitable Solicitations .................................................................................................................................. 647
9.6.6.1 State and Federal Restrictions .................................................................................................................. 647
9.6.6.2 Constitutional Issues ................................................................................................................................ 647
9.6.7 Scholarship and Grant Location Services; Study Guides ............................................................................... 648
9.6.8 Diploma Mills ........................................................................................................................................ 649
## Chapter 10  Liability of Various Parties

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1</td>
<td>Introduction</td>
<td>651</td>
</tr>
<tr>
<td>10.1.1</td>
<td>Factors in Selecting Defendants</td>
<td>651</td>
</tr>
<tr>
<td>10.1.2</td>
<td>Overview</td>
<td>651</td>
</tr>
<tr>
<td>10.2</td>
<td>Liability of Agents and Principals</td>
<td>652</td>
</tr>
<tr>
<td>10.2.1</td>
<td>Introduction</td>
<td>652</td>
</tr>
<tr>
<td>10.2.2</td>
<td>Liability of Agents and Employees</td>
<td>652</td>
</tr>
<tr>
<td>10.2.3</td>
<td>Principals Liable for the Acts of Their Agents</td>
<td>653</td>
</tr>
<tr>
<td>10.2.3.1</td>
<td>The General Rule That Principals Are Liable</td>
<td>653</td>
</tr>
<tr>
<td>10.2.3.2</td>
<td>Liability Even Where Agent Acts Without Authority</td>
<td>655</td>
</tr>
<tr>
<td>10.2.3.3</td>
<td>Are Dealers Agents for the Manufacturer?</td>
<td>655</td>
</tr>
<tr>
<td>10.2.3.4</td>
<td>Principal’s Liability for Actions of Independent Contractor</td>
<td>656</td>
</tr>
<tr>
<td>10.2.3.5</td>
<td>Liability of Government Entities for Their Agents</td>
<td>656</td>
</tr>
<tr>
<td>10.2.3.6</td>
<td>Principal’s Liability for Multiple Damages</td>
<td>656</td>
</tr>
<tr>
<td>10.3</td>
<td>Liability of Officers, Owners, and Related Companies</td>
<td>657</td>
</tr>
<tr>
<td>10.3.1</td>
<td>Introduction</td>
<td>657</td>
</tr>
<tr>
<td>10.3.2</td>
<td>Liability for Own Actions</td>
<td>657</td>
</tr>
<tr>
<td>10.3.2.1</td>
<td>General</td>
<td>657</td>
</tr>
<tr>
<td>10.3.2.2</td>
<td>Conduct Sufficient to Create Liability</td>
<td>658</td>
</tr>
<tr>
<td>10.3.2.3</td>
<td>FTC Precedent</td>
<td>660</td>
</tr>
<tr>
<td>10.3.3</td>
<td>Piercing the Corporate Veil and Related Theories</td>
<td>661</td>
</tr>
<tr>
<td>10.3.4</td>
<td>Corporate Disregard, Other Theories to Sue Related Corporations</td>
<td>662</td>
</tr>
<tr>
<td>10.3.5</td>
<td>Liability of Co-Venturers, Partners</td>
<td>662</td>
</tr>
<tr>
<td>10.3.6</td>
<td>Liability of Franchisors</td>
<td>663</td>
</tr>
<tr>
<td>10.4</td>
<td>Aiding or Furnishing Means for Deception; Civil Conspiracy; Joint Enterprise</td>
<td>663</td>
</tr>
<tr>
<td>10.4.1</td>
<td>Types of Parties Who May Be Liable</td>
<td>663</td>
</tr>
<tr>
<td>10.4.2</td>
<td>Conduct Sufficient to Trigger Liability</td>
<td>664</td>
</tr>
<tr>
<td>10.4.2.1</td>
<td>General</td>
<td>664</td>
</tr>
<tr>
<td>10.4.2.2</td>
<td>Aiding and Abetting</td>
<td>666</td>
</tr>
<tr>
<td>10.4.2.2.1</td>
<td>Conduct sufficient to create liability.</td>
<td>666</td>
</tr>
<tr>
<td>10.4.2.2.2</td>
<td>Where liability may not be found</td>
<td>667</td>
</tr>
<tr>
<td>10.4.2.3</td>
<td>Civil Conspiracy</td>
<td>667</td>
</tr>
<tr>
<td>10.4.2.3.1</td>
<td>General</td>
<td>667</td>
</tr>
<tr>
<td>10.4.2.3.2</td>
<td>The required elements</td>
<td>668</td>
</tr>
<tr>
<td>10.4.2.4</td>
<td>Ratification, Acceptance of Benefits, and Concealment of Fraud</td>
<td>669</td>
</tr>
<tr>
<td>10.4.2.5</td>
<td>The Close-Connectedness Doctrine</td>
<td>670</td>
</tr>
<tr>
<td>10.4.2.5.1</td>
<td>Utility of the doctrine</td>
<td>670</td>
</tr>
<tr>
<td>10.4.2.5.2</td>
<td>Affirmative recoveries under the doctrine</td>
<td>670</td>
</tr>
<tr>
<td>10.4.2.5.3</td>
<td>Flags of close-connectedness</td>
<td>671</td>
</tr>
<tr>
<td>10.4.3</td>
<td>Liability of Payment Processors and Related Entities As Aiders and Abettors</td>
<td>671</td>
</tr>
<tr>
<td>10.4.3.1</td>
<td>Introduction</td>
<td>671</td>
</tr>
<tr>
<td>10.4.3.2</td>
<td>Liability of Entities Involved in Credit Card Payments</td>
<td>672</td>
</tr>
<tr>
<td>10.4.3.3</td>
<td>Liability of Entities That Originate Remotely Created Checks</td>
<td>673</td>
</tr>
<tr>
<td>10.4.3.4</td>
<td>Debit Cards and Electronic Fund Transfers</td>
<td>673</td>
</tr>
<tr>
<td>10.4.3.5</td>
<td>Other Types of Payments</td>
<td>674</td>
</tr>
<tr>
<td>10.4.4</td>
<td>Those Assisting Telemarketing Fraud</td>
<td>674</td>
</tr>
<tr>
<td>10.4.5</td>
<td>Endorsers and Accrediting Organizations</td>
<td>675</td>
</tr>
<tr>
<td>10.5</td>
<td>Holders’ Derivative Liability for Seller or Originating Lender-Related Claims</td>
<td>675</td>
</tr>
<tr>
<td>10.5.1</td>
<td>Introduction</td>
<td>675</td>
</tr>
</tbody>
</table>
10.5.2 Raising Seller-Related Claims Against the Seller’s Assignee ............... 676
  10.5.2.1 General ................................................. 676
  10.5.2.2 FTC Holder Rule Coverage .................................... 676
  10.5.2.3 Claims That Can Be Raised Derivatively ......................... 676
  10.5.2.4 Calculating the Maximum Liability under the FTC
          Holder Rule .............................................. 677
  10.5.2.5 Limits to the FTC Holder Rule .................................. 678
10.5.3 Raising Seller-Related Claims Where Seller Refers the Lender ............. 678
  10.5.3.1 General ................................................. 678
  10.5.3.2 Theories of Recovery Where FTC Holder Notice Is
          Improperly Omitted in Purchase-Money Loan ......................... 679
10.5.4 Raising Seller-Related Claims Against Credit Card Issuers ................. 680
10.5.5 Liability of Lessor for Consumer’s Claims Against the Dealer .............. 680
10.5.6 Raising Lender-Related Defenses Against the Lender’s Assignee .......... 682
  10.5.6.1 General ................................................. 682
  10.5.6.2 The Elements of Holder-in-Due-Course and the Shelter
          Rule .......................................................... 682
10.5.6.3 Eleven Ways to Defeat the Holder-in-Due-Course Defense .. 683
    10.5.6.3.1 No holder in due course in home improvement
          contracts or other credit sales .................................. 683
    10.5.6.3.2 No holder in due course in land installment
          sales ............................................................ 683
    10.5.6.3.3 No holder in due course in home equity lines
          of credit .......................................................... 684
    10.5.6.3.4 No holder in due course in reverse mortgages .. 684
    10.5.6.3.5 No holder in due course in HOEPA loans .......... 684
    10.5.6.3.6 Option ARMs ........................................... 684
    10.5.6.3.7 No holder in due course when paperwork is
          sloppy ............................................................ 684
    10.5.6.3.8 No holder in due course when borrower
          delinquent prior to first transfer of
          instrument ...................................................... 685
    10.5.6.3.9 No holder in due course when assignee
          takes in bad faith or is on notice of consumer
          defenses ......................................................... 685
    10.5.6.3.10 No holder in due course when note comes
          with “luggage” or incorporates mortgage or
          other provisions ................................................. 686
    10.5.6.3.11 Defenses that can be raised against a holder
          in due course ................................................. 686
10.6 Merchant Bonding, Insurance, and Consumer Recovery Funds ................. 686
  10.6.1 Recovering on a Bond ........................................... 686
  10.6.2 Recovering from the Merchant’s Insurance Policy ......................... 687
    10.6.2.1 Consumer Claims Within the Merchant’s Insurance
          Coverages ....................................................... 687
    10.6.2.2 Is There Insurance in Place? .................................. 688
  10.6.3 Consumer Recovery Funds ............................................ 688
10.7 UDAP Claims Against Sellers or Creditors Filing for Bankruptcy ............. 689
10.8 Successor Corporations, Failed Banks, and Deceased Defendants ............ 690
  10.8.1 Liability of Successor Corporations .................................. 690
  10.8.2 Suing Failed Banks, the FDIC, or a Successor Bank ...................... 691
  10.8.3 Survival of Action After Defendant’s Death ............................ 691
11.4.2.8.10 Future losses; potential consequences of security breaches ........................................ 730
11.4.2.8.11 Other losses ........................................ 732
11.4.2.9 Causation ........................................ 732
11.4.2.10 Proof of Damage Precondition ................. 735

11.4.3 Public Interest Precondition ........................................ 735
11.4.3.1 Almost All States Reject a Public Interest Requirement .......... 735
11.4.3.2 Colorado Requires a Significant Impact on the Public As Consumers ........................................ 736
11.4.3.3 Georgia Intermediate Appellate Courts Require Impact on Consumer Marketplace or Potential Harm to Consumer Public ........................................ 738
11.4.3.4 Minnesota Requires Private UDAP Actions to Meet a Public Interest Test ........................................ 739
11.4.3.5 Nebraska Applies UDAP Statute Only to Transactions That Affect the Public Interest ........................................ 742
11.4.3.6 New York Requires That Practices Impact Consumers at Large ........................................ 743
11.4.3.6.1 Description of the requirement ........................................ 743
11.4.3.6.2 Examples of consumer-oriented conduct ........................................ 745
11.4.3.6.3 Examples of conduct found not to be consumer-oriented ........................................ 747
11.4.3.6.4 Insurance transactions ........................................ 749
11.4.3.7 South Carolina Requires That Practice Have Impact on Public Interest ........................................ 750
11.4.3.8 The Washington State Standard ........................................ 751
11.4.3.8.1 Description of the standard ........................................ 751
11.4.3.8.2 Consumer transactions vs. private disputes and the applicable factors ........................................ 752
11.4.3.8.3 Examples of transactions that meet the public interest test ........................................ 754
11.4.3.8.4 Examples of transactions that do not meet the public interest test ........................................ 754

11.4.4 Notice Letters As Precondition ........................................ 755
11.4.4.1 Is a Notice Letter a Precondition to a UDAP Action? ........................................ 755
11.4.4.2 Statutory Exceptions to Notice Requirements; Alternate Claims ........................................ 756
11.4.4.3 Are Notice Letters Required for Counterclaims and Amended UDAP Claims? ........................................ 757
11.4.4.4 Can a Complaint Serve As the Notice Letter? ........................................ 758
11.4.4.5 Delivery ........................................ 758
11.4.4.6 To Whom and by Whom Must the Notice Letter Be Sent? ........................................ 758
11.4.4.7 Content of the Notice Letter ........................................ 759
11.4.4.8 Notice Letters and Class Actions ........................................ 761
11.4.4.9 Pleading Notice and Proving Notice Was Sent ........................................ 762
11.4.4.10 If Notice Was Not Sent ........................................ 762
11.4.4.11 Seller’s Responsibilities on Receiving Notice Letter ........................................ 764

11.5 Jurisdiction and Choice of Law Issues ........................................ 765
11.5.1 Introduction ........................................ 765
11.5.2 Jurisdiction over Out-of-State Sellers ........................................ 765
11.5.2.1 Introduction ........................................ 765
11.5.2.2 Statutory and Constitutional Limits on Long-Arm Jurisdiction ........................................ 765
11.5.2.3 Internet Transactions .......................................................... 768
11.5.2.4 Jurisdiction over Out-of-State Individuals ....................................... 768
11.5.2.5 Conspiracy, Joint Venture, Parent Companies ..................................... 769
11.5.2.6 Forum Non Conveniens ......................................................... 769
11.5.3 Choice of Law Issues ................................................................. 770
11.5.4 The Proper State Court ........................................................................ 772
11.5.5 Federal Court Jurisdiction ...................................................................... 773
11.5.6 Removal Jurisdiction ............................................................................. 774
11.5.7 Bankruptcy Court Jurisdiction .............................................................. 776
11.5.8 The Enforceability of Binding Arbitration Agreements ......................... 777
  11.5.8.1 General ......................................................................................... 777
  11.5.8.2 Statutory Limits on Mandatory Arbitration ........................................ 778
    11.5.8.2.1 Federal limits for manufactured home and home mortgage loans .......... 778
    11.5.8.2.2 Congress Overrides CFPB Rule Restricting Arbitration of Class Actions ........ 778
    11.5.8.2.3 Credit transactions involving military personnel ......................... 779
    11.5.8.2.4 Lasting effect of now-repealed federal limit on schools’ arbitration clauses .... 779
    11.5.8.2.5 State insurance law can prohibit arbitration ..................................... 780
    11.5.8.2.6 Arbitration where consumer files for bankruptcy .......................... 780
    11.5.8.2.7 State law where claim involves no interstate commerce .................. 780
  11.5.8.3 Can the Defendant Prove the Arbitration Requirement? ................. 781
  11.5.8.4 A Threshold Issue: Who Determines Arbitrability—the Court or the Arbitrator? .... 781
  11.5.8.5 Contract Law Defenses .................................................................. 781
  11.5.8.6 Class-Wide Arbitration ................................................................. 782
11.6 Pleading and Framing UDAP Claims ........................................................ 783
  11.6.1 Complying with Notice Letter, Public Interest, Damage, and Scope Requirements ................................. 783
  11.6.2 Choosing the Plaintiff and Defendants ............................................... 784
  11.6.3 Framing the Nature of the Suit ......................................................... 785
  11.6.4 Elements to Plead .............................................................................. 786
  11.6.5 Allegations Should Be Specific ........................................................... 789
    11.6.5.1 The Benefits of Specificity .......................................................... 789
    11.6.5.2 Rule 9(b) vs. Rule 8(a) .................................................................... 789
    11.6.5.3 Treatment of Omitted Claims ....................................................... 792
  11.6.6 Adding Non-UDAP Counts .................................................................. 792
  11.6.7 Filing a UDAP Suit After a Collection Action and Other Res Judicata Issues ............................................................................ 793
  11.6.8 Preparing for Settlement ..................................................................... 794
11.7 Discovery and Factual Investigation .......................................................... 794
  11.7.1 Starting Discovery Early ...................................................................... 794
  11.7.2 The Scope of Discovery ..................................................................... 795
  11.7.3 Document Requests and Admissions .................................................... 795
  11.7.4 Depositions ....................................................................................... 795
  11.7.5 Pattern Evidence and Evidence of Defendant’s Wealth ...................... 796
11.7.6 Other Approaches to Obtaining Evidence ................................................. 797

11.8 Trial ................................................................................................. 798
  11.8.1 Evidence and Proof Issues ................................................................. 798
    11.8.1.1 Standard of Proof ................................................................. 798
    11.8.1.2 Other Bad Acts ........................................................................... 799
    11.8.1.3 Expert Testimony ....................................................................... 800
    11.8.1.4 Other Evidence Issues ............................................................. 801
  11.8.2 Trial Before a Judge or Jury .............................................................. 801
    11.8.2.1 Strategic Considerations ............................................................ 801
    11.8.2.2 Is a Jury Trial Available for UDAP Claims? .............................. 801
    11.8.2.3 Questions of Law vs. Questions of Fact ...................................... 803
    11.8.2.4 Voir Dire, Opening and Closing Arguments, Jury Instructions, and Trial Strategy ......................................................... 804

11.9 Constitutional Issues ........................................................................ 804
  11.9.1 Introduction .................................................................................. 804
  11.9.2 The First Amendment ..................................................................... 804
    11.9.2.1 Deceptive Commercial Speech ................................................. 804
    11.9.2.2 Unfair Commercial Speech ....................................................... 806
    11.9.2.3 Determining Whether Speech Is Commercial or Political .......... 808
    11.9.2.4 First Amendment and Other Issues in Defamation Claims by Dealers .......................................................... 809
  11.9.3 Vagueness ..................................................................................... 809
  11.9.4 Constitutionality of UDAP Remedies and Procedures ..................... 811
    11.9.4.1 Constitutionality of Statutory and Multiple Damages ............... 811
    11.9.4.2 Self-Incrimination and the Right to Confront Witnesses ............ 812
    11.9.4.3 Due Process and Other Challenges to UDAP Enforcement Procedures .......................................................... 812
  11.9.5 Other Constitutional Challenges .................................................... 813

Chapter 12 Private UDAP Remedies ............................................................. 815
  12.1 Nature and Liberal Interpretation of UDAP Remedies ......................... 815
  12.2 Private Causes of Action and Remedies Under UDAP Statutes ............. 816
    12.2.1 Private Right of Action Unambiguously Exists in Every State .......... 816
    12.2.2 Private Cause of Action Issues in Delaware .................................. 817
    12.2.3 Private Cause of Action Issues in Hawaii ...................................... 817
    12.2.4 Private Cause of Action Issues in Wisconsin .................................. 818
    12.2.5 California UDAP Remedies .......................................................... 818
    12.2.6 Remedy Issues in Maine and New York ......................................... 818
    12.2.7 Remedy Issues in Iowa ................................................................. 818
      12.2.7.1 2009 Statutory Amendment Creates Explicit Private Cause of Action ........................................................................... 818
      12.2.7.2 Implied Causes of Action in Iowa .............................................. 819
    12.2.8 Causes of Action and Remedies Under UDTPA-Type Statutes ......... 819
      12.2.8.1 Can Consumers Bring Actions Under UDTPA-Type Statutes? ............................................................................. 819
      12.2.8.2 Relief Available Under UDTPA-Type Statutes ......................... 820
  12.3 Calculating Actual Damages .................................................................. 820
    12.3.1 Introduction ................................................................................. 820
    12.3.2 Direct Actual Damages ................................................................. 821
      12.3.2.1 How Are Direct Damages Calculated: Out of Pocket, Loss of Bargain, or Cost to Repair? ......................................................... 821
      12.3.2.2 Loss-of-Bargain Damages ....................................................... 822
### Contents

12.3.2.3 Cost-to-Repair Damages ............................................... 823
12.3.2.4 Out-of-Pocket Damages or Restitution ........................ 823
  12.3.2.4.1 General ......................................................... 823
  12.3.2.4.2 Need the court deduct the value of the product from the restitution amount? 825
  12.3.2.4.3 Restitution under California Law .......................... 826

12.3.3 Consequential Damages .................................................. 828
  12.3.3.1 General .......................................................... 828
  12.3.3.2 Standards to Prove Consequential Damages .................. 828
  12.3.3.3 Financing Costs As Consequential Damages .................. 829
  12.3.3.4 Consequential Damages Based on Consumer’s Lost Time or Earnings .................................................. 829
  12.3.3.5 Lost Use of a Product or Service ................................ 829
  12.3.3.6 Injury to Credit Rating ........................................ 830
  12.3.3.7 Attorney Fees As Consequential Damages .................. 830
  12.3.3.8 Physical Injuries .............................................. 830
  12.3.3.9 Pain and Suffering; Mental Anguish ........................ 831
    12.3.3.9.1 General ..................................................... 831
    12.3.3.9.2 States where UDAP pain and suffering damages are never recoverable .................. 832
    12.3.3.9.3 Pain and suffering damages generally recoverable where there is physical injury ........ 832
    12.3.3.9.4 Pain and suffering damages recoverable where deception intentional or grossly negligent .................................................. 832
    12.3.3.9.5 Pain and suffering damages may be even more broadly available in UDAP cases .......... 833
    12.3.3.9.6 Special statutory standards for mental anguish damages .................. 833
    12.3.3.9.7 Aggravation, inconvenience, and related costs .............. 833

12.3.4 Prejudgment Interest ..................................................... 834

12.3.5 Proving Actual Damages and Causation ............................ 834
  12.3.5.1 General Standards ............................................. 834
  12.3.5.2 Damages and Causation in Bait-and-Switch and Phony Discount Cases .......................... 837

12.3.6 Limitations on the Amount of Damages ............................. 838
  12.3.6.1 Remedy Limitation Clauses .................................. 838
  12.3.6.2 Collateral Source Rule ....................................... 838
  12.3.6.3 Mitigation of Damages ....................................... 838

12.3.7 Interrelation of UDAP Actual Damages and Damages on Other Claims .................................................. 838

12.4 Statutory, Multiple, and Punitive Damages .......................... 839
  12.4.1 Statutory Minimum Damages ....................................... 839
    12.4.1.1 General ....................................................... 839
    12.4.1.2 Statutory Damages for Multiple Claims or Multiple Plaintiffs .................................................. 840
    12.4.1.3 Should Statutory Damages Be Trebled? ....................... 840
    12.4.1.4 Interrelationship Between Statutory Damages and Other Awards .................................................. 841
  12.4.2 Multiple Damages ..................................................... 841
    12.4.2.1 General ....................................................... 841
    12.4.2.2 Are Multiple Damages Mandatory? .......................... 842
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.4.2.3</td>
<td>Limits on Treble Damages Award</td>
<td>843</td>
</tr>
<tr>
<td>12.4.2.3.1</td>
<td>Intent or knowledge preconditions</td>
<td>843</td>
</tr>
<tr>
<td>12.4.2.3.2</td>
<td>Bad faith refusal to settle as precondition</td>
<td>844</td>
</tr>
<tr>
<td>12.4.2.3.3</td>
<td>Other preconditions to multiple damage awards</td>
<td>845</td>
</tr>
<tr>
<td>12.4.2.3.4</td>
<td>Standards where multiple damages are discretionary</td>
<td>846</td>
</tr>
<tr>
<td>12.4.2.3.5</td>
<td>Statutory standards as to the multiplier to be utilized</td>
<td>847</td>
</tr>
<tr>
<td>12.4.2.4</td>
<td>Are Multiple Damages Available in Default Judgments?</td>
<td>847</td>
</tr>
<tr>
<td>12.4.2.5</td>
<td>Arbitration and Multiple Damages</td>
<td>847</td>
</tr>
<tr>
<td>12.4.2.5.1</td>
<td>Can UDAP multiple damages claims be forced into arbitration?</td>
<td>847</td>
</tr>
<tr>
<td>12.4.2.5.2</td>
<td>Does an arbitrator have authority to award multiple damages?</td>
<td>848</td>
</tr>
<tr>
<td>12.4.2.6</td>
<td>Interrelation of Treble Damages with Other Awards</td>
<td>848</td>
</tr>
<tr>
<td>12.4.2.7</td>
<td>How to Calculate Multiple Damages</td>
<td>850</td>
</tr>
<tr>
<td>12.4.2.7.1</td>
<td>Relationship to seller’s recovery in the same case</td>
<td>850</td>
</tr>
<tr>
<td>12.4.2.7.2</td>
<td>Calculation issues where there are multiple parties</td>
<td>851</td>
</tr>
<tr>
<td>12.4.2.7.3</td>
<td>What awards should be trebled?</td>
<td>851</td>
</tr>
<tr>
<td>12.4.2.7.4</td>
<td>Emotional distress damages</td>
<td>852</td>
</tr>
<tr>
<td>12.4.2.7.5</td>
<td>Should the amount of a cancelled or rescinded debt be trebled?</td>
<td>852</td>
</tr>
<tr>
<td>12.4.2.7.6</td>
<td>Prejudgment and postjudgment interest; other financing costs</td>
<td>852</td>
</tr>
<tr>
<td>12.4.2.8</td>
<td>Should the Jury Be Told That Actual Damages Will Be Trebled?</td>
<td>853</td>
</tr>
<tr>
<td>12.4.2.9</td>
<td>Parties Liable for Treble Damages</td>
<td>855</td>
</tr>
<tr>
<td>12.4.3</td>
<td>Punitive Damages</td>
<td>855</td>
</tr>
<tr>
<td>12.4.3.1</td>
<td>Are Punitive Damages Available Under a UDAP Statute?</td>
<td>855</td>
</tr>
<tr>
<td>12.4.3.2</td>
<td>Common Law Fraud Punitive Damages Where UDAP Punitive Damages Not Available</td>
<td>857</td>
</tr>
<tr>
<td>12.4.3.3</td>
<td>Standards for Determining Whether UDAP Punitive Damages Should Be Awarded</td>
<td>857</td>
</tr>
<tr>
<td>12.4.3.4</td>
<td>Need Consumer Prove Actual Damages?</td>
<td>858</td>
</tr>
<tr>
<td>12.4.3.5</td>
<td>Arbitration and Punitive Damages</td>
<td>858</td>
</tr>
<tr>
<td>12.4.3.5.1</td>
<td>Are punitive damages authorized in arbitration?</td>
<td>858</td>
</tr>
<tr>
<td>12.4.3.5.2</td>
<td>Advantages of seeking punitive damages in arbitration</td>
<td>859</td>
</tr>
<tr>
<td>12.4.3.6</td>
<td>Limits on the Amount of Punitive Damages</td>
<td>859</td>
</tr>
<tr>
<td>12.4.3.6.1</td>
<td>Constitutional limitations enunciated by the United States Supreme Court</td>
<td>859</td>
</tr>
<tr>
<td>12.4.3.6.2</td>
<td>State statutory caps on punitive damages awards</td>
<td>860</td>
</tr>
<tr>
<td>12.4.3.6.3</td>
<td>Potential of multiple punitive damages awards against one defendant</td>
<td>862</td>
</tr>
<tr>
<td>12.4.3.7</td>
<td>Who Is Liable for Punitive Damages?</td>
<td>862</td>
</tr>
<tr>
<td>12.4.3.8</td>
<td>Interrelation of Punitive Damages with Other Remedies</td>
<td>863</td>
</tr>
<tr>
<td>12.5</td>
<td>Class Actions</td>
<td>864</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>12.5.1</td>
<td>General</td>
<td>864</td>
</tr>
<tr>
<td>12.5.2</td>
<td>UDAP Class Action Procedures</td>
<td>864</td>
</tr>
<tr>
<td>12.5.2.1</td>
<td>Special State Requirements and Restrictions for UDAP Class Actions</td>
<td>864</td>
</tr>
<tr>
<td>12.5.2.2</td>
<td>Effect of <em>Shady Grove</em> on UDAP Class Actions Filed in Federal Court</td>
<td>866</td>
</tr>
<tr>
<td>12.5.2.2.1</td>
<td>The Supreme Court’s opinion</td>
<td>866</td>
</tr>
<tr>
<td>12.5.2.2.2</td>
<td>Applying <em>Shady Grove</em> to UDAP statutes that preclude class actions.</td>
<td>867</td>
</tr>
<tr>
<td>12.5.2.2.3</td>
<td>Applying <em>Shady Grove</em> where UDAP statute’s class action procedures differ from the federal rules</td>
<td>868</td>
</tr>
<tr>
<td>12.5.3</td>
<td>UDAP Class Actions Where Individual Damage Is Minimal</td>
<td>868</td>
</tr>
<tr>
<td>12.5.4</td>
<td>Proving That a UDAP Violation Is Common to the Class</td>
<td>869</td>
</tr>
<tr>
<td>12.5.4.1</td>
<td>Comparison of UDAP and Fraud Class Actions</td>
<td>869</td>
</tr>
<tr>
<td>12.5.4.2</td>
<td>Showing a Common Deceptive Practice</td>
<td>869</td>
</tr>
<tr>
<td>12.5.4.2.1</td>
<td>General</td>
<td>869</td>
</tr>
<tr>
<td>12.5.4.2.2</td>
<td>Mass advertising and product labels</td>
<td>870</td>
</tr>
<tr>
<td>12.5.4.2.3</td>
<td>Standardized sales presentations</td>
<td>870</td>
</tr>
<tr>
<td>12.5.4.2.4</td>
<td>Common problems with the product itself</td>
<td>871</td>
</tr>
<tr>
<td>12.5.4.2.5</td>
<td>Common excess charges</td>
<td>871</td>
</tr>
<tr>
<td>12.5.4.2.6</td>
<td>Standard form contract provisions</td>
<td>872</td>
</tr>
<tr>
<td>12.5.4.2.7</td>
<td>Standardized collection practices</td>
<td>872</td>
</tr>
<tr>
<td>12.5.4.2.8</td>
<td>Common failure to disclose a material fact</td>
<td>872</td>
</tr>
<tr>
<td>12.5.4.2.9</td>
<td>Do class issues predominate?</td>
<td>872</td>
</tr>
<tr>
<td>12.5.4.10</td>
<td>Is the class action superior?</td>
<td>875</td>
</tr>
<tr>
<td>12.5.5</td>
<td>Multi-State Class Actions</td>
<td>875</td>
</tr>
<tr>
<td>12.5.6</td>
<td>“Picking Off” Named Plaintiffs</td>
<td>877</td>
</tr>
<tr>
<td>12.5.7</td>
<td>Statutory Damages for Each Class Member</td>
<td>877</td>
</tr>
<tr>
<td>12.6</td>
<td>Injunctions and Other Equitable Relief</td>
<td>878</td>
</tr>
<tr>
<td>12.6.1</td>
<td>Advantages of the Injunctive Remedy</td>
<td>878</td>
</tr>
<tr>
<td>12.6.2</td>
<td>Does a UDAP Statute Authorize Private Injunctive Relief?</td>
<td>878</td>
</tr>
<tr>
<td>12.6.2.1</td>
<td>Statutes That Explicitly Authorize Private Injunctive Relief</td>
<td>878</td>
</tr>
<tr>
<td>12.6.2.2</td>
<td>Implying an Injunctive Remedy in Other States</td>
<td>879</td>
</tr>
<tr>
<td>12.6.3</td>
<td>Preconditions for Private Injunctive Relief</td>
<td>879</td>
</tr>
<tr>
<td>12.6.3.1</td>
<td>Must the Plaintiff Be Injured?</td>
<td>879</td>
</tr>
<tr>
<td>12.6.3.2</td>
<td>Injunctions to Benefit the Public; Must the Plaintiff Benefit from the Injunction?</td>
<td>880</td>
</tr>
<tr>
<td>12.6.3.2.1</td>
<td>Article III standing</td>
<td>880</td>
</tr>
<tr>
<td>12.6.3.2.2</td>
<td>The “likely to be damaged” standard</td>
<td>881</td>
</tr>
<tr>
<td>12.6.3.2.3</td>
<td>Other state standards</td>
<td>882</td>
</tr>
<tr>
<td>12.6.3.2.4</td>
<td>Where the statute is silent</td>
<td>883</td>
</tr>
<tr>
<td>12.6.3.3</td>
<td>Adequate Remedy at Law and Other Impediments to Injunctive Relief</td>
<td>883</td>
</tr>
<tr>
<td>12.6.4</td>
<td>Other Equitable Relief</td>
<td>884</td>
</tr>
<tr>
<td>12.6.5</td>
<td>Declaratory Relief</td>
<td>885</td>
</tr>
<tr>
<td>12.7</td>
<td>Voiding and Rescinding Contracts</td>
<td>885</td>
</tr>
<tr>
<td>12.7.1</td>
<td>Introduction</td>
<td>885</td>
</tr>
<tr>
<td>12.7.2</td>
<td>Statutory Language Authorizing Remedy</td>
<td>885</td>
</tr>
<tr>
<td>12.7.3</td>
<td>Where Statute Is Silent As to Availability of Remedy</td>
<td>886</td>
</tr>
<tr>
<td>12.7.4</td>
<td>Procedures to Rescind Contract</td>
<td>887</td>
</tr>
<tr>
<td>12.7.5</td>
<td>Relationship of Rescission to Other UDAP Remedies</td>
<td>887</td>
</tr>
</tbody>
</table>
## 12.8 Attorney Fees

### 12.8.1 Purpose of UDAP Attorney Fee Provisions

### 12.8.2 When Are UDAP Attorney Fees Available?
- 12.8.2.1 Statutory Preconditions to Attorney Fee Award
- 12.8.2.2 Where No Explicit Statutory Authority for Fees
- 12.8.2.3 Availability of Other Remedies Does Not Limit Access to Fees

### 12.8.3 Are Attorney Fees Mandatory?

### 12.8.4 When Does a Consumer Prevail, Triggering UDAP Attorney Fees?
- 12.8.4.1 Must the Consumer Prove UDAP Damages?
- 12.8.4.2 Must the Consumer’s Recovery Exceed the Creditor’s?
- 12.8.4.3 Multiple Claims, Parties, or Trials
- 12.8.4.4 Attorney Fees for Work on Default Judgments and Protecting a Judgment
- 12.8.4.5 Settlements
  - 12.8.4.5.1 Are fees available after settlement?
  - 12.8.4.5.2 Can a seller ask the consumer to waive fees in a settlement?
  - 12.8.4.5.3 Preserving a fee claim when settling a case
- 12.8.4.6 Collateral Proceedings, Including Proceedings Relating to the Fee Award

### 12.8.5 Attorney Fees in Arbitration Proceedings

- 12.8.5.1 Where Arbitration Restricts Prevailing Consumer’s Right to Fees
- 12.8.5.2 Where Arbitrator with Authority to Do So Fails to Award Fees to Prevailing Consumer
- 12.8.5.3 Where Arbitration Agreement Provides Consumer Must Pay Prevailing Defendants’ Fees

### 12.8.6 Attorney Fees for Appellate Work

### 12.8.7 Types of Representation Entitled to Fees

- 12.8.7.1 Attorney Fees for Legal Services and Other Public Interest Attorneys
- 12.8.7.2 Paralegals and Law Clerks
- 12.8.7.3 Expert Witnesses
- 12.8.7.4 Pro Se Representation and In-House Counsel

### 12.8.8 Who Receives the Fees?

### 12.8.9 Who Is Liable for Attorney Fees?

### 12.8.10 Attorney Fees for Prevailing Sellers

- 12.8.10.1 Introduction
- 12.8.10.2 Has the Seller Prevailed?
- 12.8.10.3 Tougher Standard for Sellers’ Fees Where Award Is Discretionary for Either Party
- 12.8.10.4 Where a UDAP Statute Explicitly Limits Fees to Frivolous or Bad Faith Actions
  - 12.8.10.4.1 Importance of the exact statutory language
  - 12.8.10.4.2 Meaning of “for purposes of harassment”
  - 12.8.10.4.3 Meaning of “bad faith”
  - 12.8.10.4.4 Meaning of “groundless”
  - 12.8.10.4.5 Meaning of “frivolous”
  - 12.8.10.4.6 Procedural and calculation issues
12.8.10.5 Authority for Seller’s Attorney Fees Where No Explicit Authorization in UDAP Statute .......................... 908

12.8.11 How Attorney Fees Are Calculated ................................................................. 909
12.8.11.1 Why UDAP Attorney Fee Awards Must Be Adequate .......................... 909
12.8.11.2 Examples of Significant UDAP Attorney Fee Awards ....................... 911
12.8.11.3 Factors Used to Calculate Fees ................................................................. 912
12.8.11.3.1 Standards vary by state ................................................................. 912
12.8.11.3.2 The lodestar formula ................................................................ 920
12.8.11.3.3 Fees calculated based on contingency fee agreement .................. 921
12.8.11.4 Awards for Work on Non-UDAP Counts and on Unsuccessful UDAP Counts ................................................................. 922
12.8.11.5 Calculating Fees for Public Interest Attorneys ........................................ 924
12.8.11.6 Fees for Paralegals, Law Clerks ............................................................... 924
12.8.11.7 Out-of-Pocket Expenses; Costs .............................................................. 925
12.8.12 Effect of Federal Rule of Civil Procedure 68 and Similar State Rules .... 925
12.8.13 Judicial Procedure for Seeking Attorney Fees .............................................. 926
12.8.13.1 Pleading and Documentation Required for a Fee Award .................. 926
12.8.13.2 The Consumer’s Burden of Proof .......................................................... 926
12.8.13.3 Timing of the Fee Petition ...................................................................... 927
12.8.13.4 Who Makes the Fee Determination? ...................................................... 927
12.8.13.5 Procedure for Appellate Fees ............................................................... 928
12.8.14 Tips on Handling Attorney Fee Hearings .................................................... 928

Chapter 13 State Agency Enforcement .......................................................... 931
13.1 Introduction ........................................................................................................ 931
13.2 Practices and Respondents Subject to State Enforcement Actions .................. 931
13.2.1 Introduction .................................................................................................... 931
13.2.2 Special UDAP Scope Issues for State Enforcement Actions .................. 932
13.2.3 Special Deception Standards for State Enforcement ................................. 933
13.2.4 Special Standards for Unfairness, Unconscionability, Unsubstantiated Claims ................................................................................................................. 933
13.2.5 Persons Liable in State Enforcement Actions ............................................ 934
13.2.6 The Dodd-Frank Act’s Expansion of Attorney General Enforcement Authority .......................................................... 934
13.2.6.1 Overview ............................................................................................. 934
13.2.6.2 Substantive Meaning of the Act’s General UDAAP Prohibition ........ 935
13.2.6.3 Scope Issues ......................................................................................... 936
13.3 Civil Investigative Demands, Subpoenas, and Other Investigative Issues .... 936
13.3.1 Introduction; State’s Authority to Use Compulsory Process .................... 936
13.3.2 When Can the State Initiate an Investigation? ........................................... 936
13.3.3 Standards of Review for Compulsory Process ........................................... 937
13.3.4 Constitutional Issues As to Investigative Demands .................................. 939
13.3.4.1 Due Process ........................................................................................ 939
13.3.4.2 Self-Incrimination ............................................................................. 940
13.3.4.3 Unreasonable Search and Seizure ....................................................... 941
13.3.4.4 The First Amendment ....................................................................... 941
13.3.5 Preconditions to Attorney General Investigative Demands ................. 941
13.3.5.1 Reasonable or Probable Cause ......................................................... 941
13.3.5.2 Other Preconditions .......................................................................... 943
13.3.6 Defects on the Face of a Subpoena ............................................................... 943
13.3.7 Trade Secrets, Confidential Information ................................. 943
  13.3.7.1 Is Information Protected? ......................................... 943
  13.3.7.2 Attorney General Approaches to Dealing with Confidentiality Claims .................................................. 944
13.3.8 Obtaining Information from Lawyers ................................. 944
13.3.9 Different Forms of Discovery Distinguished ......................... 944
13.3.10 Test Purchases, Visits .................................................. 945
13.3.11 Access to FTC Investigational Records ............................. 945
13.3.12 Respondent’s Discovery of the State’s Case or Policies .......... 946
13.3.13 Public’s Access to Results of State’s Civil Investigation .... 946
13.4 Preconditions to State Enforcement Action ........................... 947
  13.4.1 Must the State First Offer Voluntary Compliance or Notify the Respondent? ................................................. 947
    13.4.1.1 States That Have Such a Requirement ...................... 947
    13.4.1.2 Where UDAP Statute Requires Offer of Voluntary Compliance or Notice ............................................. 947
  13.4.2 Reason to Believe That the Act Has Been Violated As Statutory Precondition to Enforcement ......................... 948
  13.4.3 Do Preconditions to Private Actions Apply? ................. 948
13.5 State Enforcement Litigation Issues ........................................ 949
  13.5.1 Standing Issues and Scope of State’s Authority ................. 949
  13.5.2 Selective Enforcement and the “Everyone Does It” Defense .......................... 950
  13.5.3 Challenges to State Administrative UDAP Proceedings ........ 950
  13.5.4 Removal to Federal Court .............................................. 951
  13.5.5 The Statute of Limitations .............................................. 952
  13.5.6 Challenges to Enforcement Agency’s Pre-Trial Publicity ........ 953
  13.5.7 The Respondent’s Counter Suit or Calling Attorney General Staff As Witnesses ............................................. 953
  13.5.8 The Respondent’s Claim of a Right to Court-Appointed Counsel ..... 954
  13.5.9 Special Counsel .......................................................... 954
13.6 Enforcement Remedies ....................................................... 955
  13.6.1 Cease and Desist Orders, Injunctions ............................. 955
    13.6.1.1 Introduction ......................................................... 955
    13.6.1.2 Mootness .......................................................... 955
    13.6.1.3 Preliminary Injunctions ......................................... 956
    13.6.1.4 Preconditions to an Injunctive Order ...................... 957
    13.6.1.5 Breadth of the Order ............................................. 957
    13.6.1.5.1 General considerations .................................... 957
    13.6.1.5.2 First Amendment considerations ....................... 958
    13.6.1.5.3 Can an injunction prevent a business from operating? ......................................................... 958
    13.6.1.5.4 Special statutory limitations to injunctive remedy ................................................................. 959
  13.6.1.6 Innovative Orders ...................................................... 959
  13.6.1.7 Who Should Be Named in an Injunctive Order .............. 961
  13.6.1.8 Effect of Bankruptcy Stay on an Injunction ................ 961
  13.6.1.9 Judicial Modification of Consent Decrees .................. 962
  13.6.1.10 Public Disclosure of Consent Agreements ................ 962
  13.6.2 Violations of Cease and Desist Orders, Injunctions, Assurances of Voluntary Compliance ............................. 962
    13.6.2.1 Standard of Proof; Right to Jury Trial and Appointed Counsel ...................................................... 962