



NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY



Public Health
Law Center

AT WILLIAM MITCHELL
COLLEGE OF LAW

Consumer Protection: An Overview of State Laws and Enforcement

State attorneys general (AGs) play a unique and important role in enforcing state consumer protection laws, given their broad authority to act in the public interest combined with their responsibility to enforce most state laws.¹ State AGs frequently use their consumer protection authority to address marketing practices that involve health and safety, such as deceptive practices used to market health products,² practices implicating food safety issues,³ and questionable health benefit or nutrition claims made on food or supplement products. In 2004, for example, the Connecticut AG sued two snack food companies, alleging (among other misconduct) that they falsely claimed their products could help increase energy and fight off illnesses.⁴

This fact sheet provides an overview of state consumer protection laws, and how state AGs enforce these laws.

Many researchers and advocates concerned about childhood obesity have looked to state attorneys general (AGs) with a hopeful eye. This fact sheet is one of a series from NPLAN about state AGs and their potential as effective allies in efforts to curb questionable and unhealthy food and beverage marketing practices aimed at children. All of these resources are available at www.nplan.org.

Unfair and Deceptive Acts and Practices

States' consumer protection laws are commonly referred to as "unfair and deceptive acts and practices" (UDAP) laws.⁵ Most state consumer protection laws are loosely based on a handful of model acts,⁶ but have been tailored or combined in different ways from state to state so that no one model clearly predominates.⁷ That being said, every state has one or more consumer protection laws that prohibit *deceptive* trade practices such as false or misleading advertisements, bait-and-switch tactics, and other fraudulent marketing methods.⁸ A slim majority of states have laws that prohibit *unfair* acts or practices,⁹ and a minority (13 states and the District of Columbia) prohibit *unconscionable* business practices.¹⁰ In addition to these general consumer protection laws, there are laws that target specific industries or practices, such as telemarketing, predatory lending, health or travel club memberships, and in-person solicitations, to name just a few.¹¹

While state AGs are significant enforcers of state consumer protection laws,¹² consumers may also bring lawsuits under these laws, acting as "private AGs."¹³ Typically, however, private lawsuits may be restricted in ways that state AG lawsuits

are not. For example, private lawsuits may not be able to obtain the full range of remedies available to state AGs; or a consumer may be required to give the defendant advance notice before filing a lawsuit (giving the defendant an opportunity to dodge the lawsuit — and long term consequences — by simply refunding money only to those who complain); or the law may impose additional evidentiary burdens on consumers, such as requiring them to prove that they relied on the specific practice they are suing over, or that the defendant’s conduct affects the public at large.¹⁴ State AGs may have the authority to enforce consumer protection laws either civilly, criminally, or both.¹⁵ The fact sheets in this series focus on AG civil enforcement practices because most consumer protection cases are brought as civil actions, and children’s food and beverage marketing issues are more likely to lend themselves to civil enforcement.

Elements of a Consumer Law Violation

Although a number of state UDAP laws prohibit unfair and unconscionable acts or practices, deception claims typically will be the heart of a case. Unfairness or unconscionability claims usually serve as additional hooks, if they’re included at all. Deception and unfairness are often lumped together — arguably, deceptive practices are inherently unfair to consumers, though there are certainly practices that may not be deceptive but are still unfair (e.g., suing consumer credit cardholders in states far away from where they live).

State AGs tend to favor cases based on deception over those based solely on theories of unfairness or unconscionability, because the standards for unfairness and unconscionability are less well developed than the standards that apply for deception.¹⁶ Also, to the extent that multistate action is desirable, cases focused on these theories would be at a disadvantage because not every state UDAP law includes unfairness or unconscionability. Advocates calling for state AG action on food and beverage marketing issues may find it more productive to focus on cases based on deceptive or misleading advertisements or practices.

Establishing Deception

The elements needed to establish that an ad or practice is deceptive depend on state law; many UDAP laws include a list of specific acts or practices that the law deems deceptive or unfair. So to assess whether a certain act or practice is illegal under a state’s consumer protection laws, advocates should first review the law(s) to see what conduct is covered.¹⁷ Absent express language in the law, general principles taken from court cases usually apply:

- 1. Consumer protection laws should be broadly interpreted in favor of protecting consumers.**¹⁸ This principle applies particularly in cases brought by state AGs.¹⁹ This means that when interpreting consumer protection statutes — what kinds of conduct are covered, who is protected (only individuals? small businesses?) — courts should not interpret the law narrowly because the purpose of the law is to root out consumer fraud, in whatever creative form it might be found.

- 2. The net or overall impression of the ad or practice is what matters.**²⁰ If the net effect is misleading, the law is violated — even if an ad makes statements that are literally true, for example, or includes disclosures. Moreover, omissions of material information can be just as deceptive or misleading as affirmative statements or representations.²¹

- 3. The act or practice must have the tendency or capacity to deceive a consumer.** Proof that consumers were *actually* deceived is not required²² — although proof of actual deception is highly preferred, and sometimes necessary in practice for an AG to take a case. Additionally, state AGs usually do not need to prove that a defendant *intended* to deceive consumers.²³

- 4. The ad or practice should be viewed from the perspective of the “reasonable consumer.”** Courts typically assess the potential net effect of the ad or practice from the perspective of the reasonable or average consumer who is being targeted. In some cases, however, courts will apply a more lenient “least sophisticated consumer” standard instead.²⁴

Establishing Unfairness

Standards for unfairness are generally less developed and therefore less predictable than standards for statutory deception.²⁵ Legal assessments of the unfairness of a certain business practice typically focus either on the nature of the conduct or the relative positions of the two parties. A Georgia court, for example, defined unfairness as “reprehensible conduct” that shows a “blatant disregard of the rights of innocent purchasers.”²⁶ A North Carolina court defined unfairness as conduct that amounts to “an inequitable assertion of [a party’s] power or position.”²⁷

Roughly half of the 28 states with unfairness laws have adopted unfairness tests that are based on an approach used by the Federal Trade Commission (FTC)²⁸ until the early 1980s, which defined unfairness as conduct that “offends public policy,” “is immoral, unethical, oppressive, or unscrupulous,” and “causes substantial injury to consumers.”²⁹ In 1980, the FTC issued a policy statement (which was later made into law) that shifted the focus of the federal test primarily to the substantial consumer injury component, making it significantly more difficult for the government to establish a violation.³⁰ This newer FTC unfairness standard, however, has been adopted by only a few states.³¹

Enforcing State Consumer Protection Laws

In general, state AGs have at least two important types of power related to their authority as the state’s chief law enforcer. First, state AGs have broad authority to investigate possible violations of the law, including the power to obtain information and, usually, to take depositions, as part of their investigation.³² This authority is commonly referred to as Civil Investigative Demand (CID) or administrative subpoena authority. This way, state AGs are able to collect and assess potential evidence before ever filing a case. They also can use this information to strengthen their positions when

negotiating with targeted companies to try to resolve their concerns before filing a lawsuit.

This CID authority is a powerful tool; the threshold for issuing one is low — typically, the state AG needs merely to have reason to believe that a law has been or is being violated, or that a violation is about to occur.³³ At the same time, CIDs can require the recipients to disclose information that they would rather not share with outsiders.

Second, state AGs typically have the authority to obtain a range of remedies in court, including:

- “Equitable relief” — i.e., injunctions, which are court orders that either prohibit a company from doing something (such as conducting business in the state, selling a certain type of product, or using a specific type of advertisement or sales technique), or require a company to do something (such as making certain disclosures in specific ways, or including a specific provision in its contracts with consumers)
- Restitution payments to or on behalf of consumers who lost money because of the company’s conduct
- Civil penalties or fines³⁴

These remedies (or their equivalents) usually can also be obtained by state AGs through an agreement with the target of the investigation or action, known as an *Assurance of Voluntary Compliance* or an *Assurance of Discontinuance*.³⁵ Many state AG investigations and cases are resolved through the use of Assurances or similar agreements. Assurances can result in settlements before significant litigation costs are incurred with the same general effect as settlements or court orders resulting from a trial. Also, Assurances and similar settlement agreements can be a face-saving measure for both sides — the company or entity agreeing to the Assurance usually does not admit to any wrongdoing, while the AG gets to declare a victory for consumers.

Enforcing Federal Consumer Protection Laws

State AGs also have authority to enforce certain federal consumer protection laws, such as the Nutrition Labeling and Education Act³⁶ and the Children’s Online Privacy Protection Act,³⁷ among others.³⁸ State AGs often share consumer complaints and other information with each other as well as with the Federal Trade Commission (FTC). The FTC (and only the FTC) has the authority to enforce Section 5 of the FTC Act,³⁹ which prohibits “unfair methods of competition” and “unfair or deceptive acts or practices” “in or affecting commerce.”⁴⁰ However, conduct that violates the FTC Act will often violate state consumer laws as well, so state AGs sometimes bring consumer protection actions in coordination with the FTC against the same defendants.

For more information about state AGs and their consumer protection authority and activities, see the other fact sheets in this series, available at www.nplan.org.

Additional Resources:

- *Identifying and Reporting Misleading Ads: How to Help Enforce Federal Regulations Limiting Deceptive or Unfair Marketing*, by Angela Campbell (2010), available at www.nplan.org.
- *State Attorneys General and Public Health: Capacity and Impact*, a 2010 memo from the National State Attorneys General Program and the Rudd Center on Food Policy and Obesity, available at www.law.columbia.edu/center_program/ag/policy/health/Obesity
- The National State Attorneys General Program has launched a Health Law Initiative to provide resources and convene events on the role of attorneys general in health advocacy and enforcement. For more information, see www.law.columbia.edu/center_program/ag/policy/health



public health
law & policy

phlpnet.org

NPLAN is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

This fact sheet was developed by Julie Ralston Aoki, Staff Attorney at the Public Health Law Center at William Mitchell College of Law, with assistance from law clerks Jayce Lesniewski and Adam Pabarcus. Editorial assistance was provided by Samantha Graff, Seth E. Mermin, and Carrie Spector.

Support for this fact sheet was provided by a grant from the Robert Wood Johnson Foundation.

- ¹ See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 233 (Emily Myers & Lynn Ross eds., 2d ed. 2007) [hereinafter 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES].
- ² See, e.g., Consent Judgment, State v. Central Coast Nutraceuticals, No. CV2008-033069 (Ariz. Super. Ct., Maricopa County June 22, 2009) (on file with author) (involving deceptive marketing of health supplements).
- ³ For example, the California Attorney General has brought consumer protection and food safety lawsuits against candy companies and several fast food chains and snack food companies, relating to harmful substances in their products. See Press Release, Office of the Attorney Gen.: State of Cal., Attorney General Lockyer Announces Settlement With Hershey and Mars Subsidiaries To Reduce Lead In Mexican Candy Popular with Children (June 29, 2006), available at <http://ag.ca.gov/newsalerts/release.php?id=1317>; Office of the Attorney Gen.: State of California, Atty. Gen. Brown Settles Potato Chip Lawsuit with Heinz, Frito-Lay & Kettle Foods, <http://ag.ca.gov/newsalerts/release.php?id=1595&> (last visited Apr. 24, 2010) (describing AG lawsuits over companies' failure to disclose presence of acrylamide, a carcinogen, found in certain of their products, and including links to the resulting settlements); Complaint, People v. Snyders of Hanover, Inc., et al., (Cal. Super. Ct., Alameda County June 1, 2009), available at <http://ag.ca.gov/prop65/pdfs/snyders.pdf>.
- ⁴ Press Release, Conn. Attorney Gen.'s Office, Attorney Gen., DCP Reach Settlement with Snack Food Companies to Stop Unproven Health Claims (May 25, 2004), available at www.ct.gov/AG/cwp/view.asp?A=1779&Q=284312.
- ⁵ For an overview of the state consumer protection laws in the fifty states (with a focus on comparing the strengths and weaknesses of each state's laws), see CAROLYN CARTER, NAT'L CONSUMER LAW CTR. INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), available at www.consumerlaw.org/issues/udap/content/UDAP_Report_Feb09.pdf; Alan S. Brown et al., *Comparison of Consumer Statutes Across the Fifty States*, FDCC Q. (2005), available at http://findarticles.com/p/articles/mi_qa4023/is_200504/ai_n14800199/?tag=content;col1. See also David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR J. 247 (2006).
- ⁶ The three model laws are the Uniform Deceptive Trade Practices Act (1966 revision available online at www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf), the Uniform Consumer Sales Practices Act (uniform version found at 7A U.L.A. 231 (1985)), and the Unfair Trade Practices and Consumer Protection Act, which was a draft model law created by the FTC in collaboration with the Council of State Governments in 1967 and revised in 1971. Albert N. Shelden, *State Consumer Protection Laws and Unfair Competition*, SF74 ALL-ABA 501, 508 n.5 (2001). While the majority of state consumer protection laws can be traced to this last model, at least three variations of it have been adopted across the states. MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 2:10 (2009).
- ⁷ PRIDGEN, *supra* note 6, at § 2:10.
- ⁸ *Id.* at § 3:1; see also CARTER, *supra* note 5, at 11.
- ⁹ See Belt, *supra* note 5, at 303.
- ¹⁰ PRIDGEN, *supra* note 6, at § 3:15 (2009). California's consumer protection laws also prohibit "unlawful" business practices. CAL. BUS. & PROF. CODE § 17200 (West 2010).
- ¹¹ See 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 234; Shelden, *supra* note 6, at 511-14 (listing examples of issue-specific laws).
- ¹² While a number of cities or counties have consumer affairs offices or similar departments, many of these have no formal enforcement powers and focus instead on education. PRIDGEN, *supra* note 6, at § 7:28. In a few states, however, county or city attorneys have authority to enforce state UDAP laws, although they may be limited in what relief they can obtain or in other ways. See, e.g., CAL. BUS. & PROF. CODE § 17535 (Deering 2010); MINN. STAT. §§ 325F.67 & 325F.70 (2009); 73 PA. CONS. STAT. ANN. §§ 201-3.1 & 201-4 (West 2010); TEXAS BUS. & COM. CODE ANN. § 17.48 (Vernon 2009).
- ¹³ CARTER, *supra* note 5, at 21. Iowa recently enacted a law creating a private right of action for consumer fraud violations (see Iowa Code Ann. §714H.5 subdiv. 1 (2009)); thus, all fifty states now allow consumers to enforce consumer fraud laws (albeit to varying degrees).
- ¹⁴ 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 234; CARTER, *supra* note 5, at 18-21.
- ¹⁵ 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 236-27.
- ¹⁶ See PRIDGEN, *supra* note 6, at § 3:15 (referring to a lack of "meaningful" standards for unfairness, and the "boundless" nature of the terms "unfair" and "unconscionable"); see also Belt, *supra* note 5, at 305-09. Thus, practice materials in this area written by state consumer protection attorneys tend to focus on deception claims. See, e.g., Prentiss Cox, *Regulatory Perspectives and Initiatives: State Attorneys General Case Selection and Investigation*, 1591 PLI/CORP 83 (2007); Shelden, *supra* note 6.
- ¹⁷ Shelden, *supra* note 6, at 515.
- ¹⁸ See, e.g., Utah Consumer Sales Practices Act, UTAH CODE ANN. § 13-11-2; Kirk v. Source One Mortgage Servs. Corp., 54 Cal. Rptr. 2d 358, 362 (Dist. Ct. App. 1996); Randels v. Best Real Estate, Inc., 612 N.E.2d 984, 987 (Ill. 1993); State by Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 495-96 (Minn. 1996); Lemelledo v. Beneficial Mgmt. Corp., 696 A.2d 546, 551 (N.J. 1997); and Elder v. Fischer, 717 N.E.2d 730, 737 (Ohio Ct. App. 1998).
- ¹⁹ Cf. Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000) (limiting availability of attorneys' fees for private plaintiffs' under state consumer protection law to those who can demonstrate that their cases serve a public benefit); Michael v. Mosquera-Lacy, 200 P.2d 694 (Wash. 2009) (noting same principle applies in Washington).
- ²⁰ Cox, *supra* note 16, at 85 and cases cited therein; Shelden, *supra* note 6, at 516.
- ²¹ PRIDGEN, *supra* note 6, at § 3:1; Shelden *supra* note 6, at 517.
- ²² PRIDGEN, *supra* note 6, at § 3:1; see also Shelden, *supra* note 6, at 518.
- ²³ See, e.g., CARTER, *supra* note 5, at 17 (noting that only 5 state UDAP laws require the state to prove knowledge or intent to deceive).
- ²⁴ Shelden, *supra* note 6, at 515. Compare Aron v. U-Haul Co. of Cal., 49 Cal. Rptr. 3d 555, 562 (Ct. App. 2006) (applying "reasonable consumer" standard), and Quigley v. Esquire Deposition Servs., LLC, 975 A.2d 1042, 1047 (N.J. Super. Ct. App. Div. 2009) (applying "average consumer" standard), and Fayne v. Vincent, 301 S.W.3d 162, 177 (Tenn. 2009) (applying "reasonable consumer" standard), and Bisson v. Ward, 628 A.2d 1256, 1261 (Vt. 1993) (same), with Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479-80 (Tex. 1995) ("Generally, an act is false, misleading, or deceptive if it has the capacity to deceive an 'ignorant, unthinking, or credulous person.'" (citations omitted)).
- ²⁵ See PRIDGEN, *supra* note 6, at § 3:15.
- ²⁶ Regency Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990) (citations omitted).
- ²⁷ Noble v. Hooters of Greenville (NC), LLC, 681 S.E.2d 448, 452 (N.C. Ct. App. 2009) (quoting Johnson v. Phoenix Mut. Life Ins. Co., 266 S.E.2d 610, 622 (1980), *overruled in part on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 374 S.E.2d 385 (1988)).
- ²⁸ The Federal Trade Commission (FTC) enforces the federal consumer protection law known as Section 5 of the FTC Act, codified at 15 U.S.C. § 45 et. seq. (2009), which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" "in or affecting commerce." 15 U.S.C. § 45(a)(1) (2009).
- ²⁹ Belt, *supra* note 5, at 303-04. See, e.g., Keller v. Beckenstein, 979 A.2d 1055, 1064-65 (Conn. App. Ct. 2009); Tokuhisa v. Cutter Mgmt. Co., 223 P.3d 246, 259 (Haw. Ct. App. 2009); Dubey v. Public Storage, Inc., 918 N.E.2d 265, 277 (Ill. App. Ct. 2009); Bank of America, N.A. v. Prestige Imports, 917 N.E.2d 207, 229 (Mass. App. Ct. 2009). This standard is called the "cigarette rule" because it was set forth by the FTC in 1964 in its regulations, *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964).
- ³⁰ Letter from the Fed. Trade Comm'n to the Honorable Wendell H. Ford, United States Senate and the Honorable John C. Danforth, United States Senate (Dec. 17, 1980), www.ftc.gov/bcp/policystmt/ad-unfair.htm. The FTC unfairness test now requires: 1) substantial injury to consumers; 2) which cannot be reasonably avoided by consumers; and 3) the injury must not be outweighed by countervailing benefits to consumers or competition. 15 U.S.C.A. § 45 (n).
- ³¹ Belt, *supra* note 5, at 306-07 (describing only Iowa, Maine, Maryland, Ohio, and Tennessee as having adopted the newer FTC unfairness standard).
- ³² 2007 STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, *supra* note 1, at 234-35.
- ³³ Cox, *supra* note 16, at 89; see also Shelden, *supra* note 6, at 528.
- ³⁴ See CARTER, *supra* note 5, at 16.
- ³⁵ See, e.g., C.G.S.A. § 42-110j (2010) (Connecticut); M.G.L.A. c. 93A, § 5 (2010) (Massachusetts); Minn. Stat. § 8.31 subdiv. 2b (2009) (Minnesota); 73 P.S. § 201-5 (2010) (Pennsylvania); Tex. Bus. & Com. Code Ann. § 17.58 (2010) (Texas).
- ³⁶ 21 U.S.C. § 337 (2009).
- ³⁷ 15 U.S.C. § 6504 (2009).
- ³⁸ See, e.g., 15 U.S.C. § 1640(e) (2009) (HOEPA); 15 U.S.C. §§ 1679h & 1681s (2009) (credit); 15 U.S.C. § 5712 (2009) (pay per call services); 15 U.S.C. § 6103 (2009) (telemarketing); 47 U.S.C. § 227 (2007) (do not call); 49 U.S.C. § 32709 (2007) (odometers).
- ³⁹ See 15 U.S.C. § 45 et seq. (2009). For more information about FTC consumer protection enforcement authority, see Angela Campbell, *Identifying and Reporting Misleading Ads: How to Help Enforce Federal Regulations Limiting Deceptive or Unfair Marketing* (2010), available at www.nplan.org.
- ⁴⁰ 15 U.S.C. § 45(a)(1) (2009).