

# CONSUMER PROTECTION IN THE STATES

## A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS

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### APPENDIX B RATING CRITERIA

Appendix C (available at <http://www.nclc.org/issues/how-well-do-states-protect-consumers.html>) is a set of state-by-state analyses of the features of state UDAP statutes that this report addresses. For each state, it rates the features that this report addresses as Strong, Mixed, Undecided, or Weak, and it cites the basis for each rating. The rating criteria are set forth below.

The summaries were developed after detailed research into each state's UDAP statute and the decisions interpreting it, and many were reviewed by practitioners in the states. Any errors are the responsibility of the National Consumer Law Center (NCLC) and should be brought to NCLC's attention.

Not all features of the states' statutes fit neatly into our rating system. In borderline cases, we have used our best judgment to rate a particular feature.

**General.** When a state has conflicting or limited case authority on a question, we rate it as Undecided unless there is some specific indication in the statute that it should be interpreted one way or another. When the state supreme court has ruled, but some federal courts or lower courts are deviating from that ruling, we still consider the supreme court's ruling controlling.

When a statute has a certain feature, but only in a limited or partial way, we rate it as Mixed. For example, some UDAP statutes apply to insurance sales but not insurers' handling of claims, or vice versa.

**Section 1, Breadth of substantive prohibitions.** Sections 1(a) and 1(b) of the state-by-state rating sheet deal with the breadth of the statute's substantive prohibitions. If the state has a broad general prohibition of unfair or unconscionable practices or of deceptive practices, but does not allow consumers to bring suit under the broad general prohibition, it is rated Mixed in that category, and that limitation is also reflected in Section 3(a), which addresses whether there are major gaps in consumers' ability to enforce the statute. A broad prohibition of deception is also rated Mixed if the deception must be knowing and intentional.

Section 1(c) rates state UDAP statutes on the question whether they give a state agency—usually the attorney general’s office—the authority to adopt substantive rules. The state is rated Mixed if the statute provides rulemaking authority but the state agency has rarely or never used it.

**Section 2, Scope of the statute.** Section 2 of the ratings addresses the scope of the UDAP statute—whether it excludes certain industries. If the statute applies to an industry, but denies consumers the right to bring suit against those entities, it is rated Mixed, and that limitation is also reflected in Section 3(a), which addresses whether there are major gaps in consumers’ ability to enforce the statute.

Section 2(a) addresses whether the statute applies to credit transactions and creditors. If it excludes most creditors, it is rated Weak. If it has a less sweeping exclusion it is rated Mixed. It is also rated Mixed if it applies broadly to creditors, but denies consumers the right to enforce the statute against them.

Section 2(b) addresses the applicability of the statute to insurance. If the state allows the statute to be applied to unfair and deceptive practices in sales of insurance, but not to unfair or deceptive claims settlement practices, or vice-versa, it is rated as Mixed. It is also rated Mixed if it applies broadly to insurers, but denies consumers the right to enforce the statute against them.

Section 2(c) addresses the applicability of the statute to utilities. UDAP statutes that explicitly exclude all or most regulated utilities are rated as Weak. In states where regulated utilities are not excluded from the UDAP statute, a public utility commission may still have exclusive jurisdiction to address utility rates. Unless there are decisions taking an unusually broad view of the public utility commission’s exclusive jurisdiction, for example by applying it to immunize utilities from liability for unfair or deceptive practices that do not relate to rates, the public utility commission’s exclusive jurisdiction over rates will not interfere with a Strong rating. The statute is rated Mixed if it applies broadly to utility companies, but denies consumers the right to enforce the statute against them.

Section 2(d) addresses whether the statute applies to debt collection and other post-sale acts. The rating is based primarily on three types of post-sale activity: debt collection, repossession, and mortgage servicing. If the statute applies to some but not all of these areas, it is rated Mixed. The ratings on this question are complicated by the fact that in some states a number of mortgage servicers may fall into a separate exemption for banks, which is evaluated in Section 2(a).

Section 2(e) addresses whether the UDAP statute applies to real estate transactions. If it applies to real estate transactions, but immunizes licensed real estate agents and brokers from liability even for knowingly false representations, it is rated as Mixed. On the other hand, although a proviso excluding licensed real estate agents and brokers only for unknowing misrepresentations they pass on from others weakens the statute, it will not interfere with a Strong rating. However, such a state should be considered at the bottom of the “Strong” rating. The statute is also rated Mixed if it applies broadly to real estate transactions, but denies consumers the right to enforce the statute in those transactions.

**Section 3, Consumer access to justice.** Section 3(a) addresses whether there are major gaps in the scope of consumers' ability to enforce the statute. If the statute includes a broad prohibition of unfair or deceptive practices but allows only the state attorney general, not individual consumers, to invoke this prohibition, it is rated Weak. A statute is also rated Weak if it applies to one of the industries listed in Section 2 (credit, insurance, utilities, debt collection, and real estate), but denies consumers the right to bring suit under the statute against members of one of those industries. Gaps such as these are serious weaknesses in UDAP statutes.

Section 3(b) addresses whether the statute or the courts require the consumer to show reliance. There are many variations in how states treat this question. We rate a state Strong if it makes it clear that a showing that a misrepresentation was material—*i.e.* the type of statement that is important to consumers and likely to affect their decisions—is sufficient proof of causation. Issues about the extent to which a showing of reliance is required remain unresolved in many states.

Section 3(c) rates the state on whether it requires consumers to show that a practice impacts the public interest before they can bring suit against a company for unfair or deceptive practices.

Section 3(d) rates the state on whether it requires a consumer to send a pre-suit notice before bringing a claim in court. If a state has two UDAP statutes that are widely used by consumers, and one of them requires pre-suit notice, it is rated Mixed.

Section 3(e) addresses whether the statute allows consumers to recover multiple or punitive damages. If either is allowed, whether due to explicit statutory language or to a state supreme court decision, the state is rated Strong. One state, Kansas, does not allow multiple or punitive damages, but allows consumers to seek a \$10,000 civil penalty, and is also rated Strong.

Section 3(f) addresses whether the statute allows the court to award attorney fees to a consumer who prevails in a UDAP case. The statute is rated Weak if it does not allow for attorney fees to prevailing consumers. It is also rated Weak if it allows the court to order a consumer who loses a UDAP case that was filed in good faith to pay the defendant's attorney fees.

Section 3(g) addresses whether the UDAP statute prohibits class actions. The state is rated Weak if a prohibition of class actions is embedded in the UDAP statute itself. If the UDAP statute does not prohibit class actions, but state courts do not entertain class actions because of restrictions in other law or gaps in court rules, the state is rated Mixed. In those states, while UDAP class actions will not be available in state court, it is likely that federal courts will be able to entertain them. Some UDAP statutes have special rules for class actions that are more restrictive than the rules for other cases. Since these states do not bar class actions, they are still rated Strong, but this is a very marginal rating.

The report also includes an analysis of whether the UDAP statute allows consumers to enforce it only if they have suffered a "loss of money or property" or an equivalent

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restriction. This issue is not addressed in Appendix C's state-by-state analysis, but the citations can be found in a footnote to the report.

**Section 4, Strength of public enforcement authority.** Section 4 addresses the remedies available to the state enforcement authority.

Section 4(a) evaluates whether the state enforcement authority must prove that the defendant acted intentionally or knowingly. This rating focuses primarily on whether proof of intent or knowledge is required for deceptive representations or unfair acts. If the statute prohibits concealment of material facts only if the business acts knowingly or intends that others rely on the concealment, or requires knowledge of certain facts as part of a showing that a business acted unconscionably, but does not otherwise impose an intent or knowledge requirement, it will be rated Strong.

Section 4(b) evaluates whether the state can obtain equitable relief such as an injunction. At present, all state UDAP statutes allow equitable relief.

Section 4(c) rates state UDAP statutes on whether the state enforcement agency can seek restitution for consumers. At present, all states authorize the enforcement agency to seek restitution.

Section 4(d) addresses the civil penalty that can be imposed in a suit brought by the state enforcement authority. The rating is Weak if the penalty is \$2,500 or less, Mixed if it is over \$2,500 but not more than \$5,000, and Strong if it is over \$5,000. (Map 10 breaks the states down in greater detail). Some states provide higher civil penalties if the victim is elderly or disabled, but the rating is based on the generally-applicable civil penalty amount.