

B2B Advertising and Sales

How Consumer Protection Laws Apply

Ellen Berge

Partner | +1 202.344.4704 | etberge@Venable.com

Shahin Rothermel

Partner | +1 202.344.4550 | sorothermel@Venable.com

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VENABLE LLP



Protecting the Business Consumer

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Protecting the Business Consumer

Unfair, Deceptive, [and Abusive] Acts or Practices (UDA[A]P)

Who Is the Typical Business Consumer?

- Sole proprietors and small businesses (historically)
 - Larger, medium-sized businesses (more recent)
- What constitute a “small business” may be larger than we think.
 - There are not clear size requirements for a business to be considered small or otherwise subject to FTC protection.
- *FTC v. FleetCor Technologies, Inc.*, Case No. 19-05727 (N.D. Ga. 2019)
- FleetCor marketed payment cards, including fuel cards, principally to companies that operate vehicle fleets.
 - The FTC alleged that FleetCor bilked tens of thousands of customers of hundreds of millions of dollars in hidden fees.
 - Complaint stated that FleetCor’s advertisements represented that consumers would achieve specific savings despite knowing that many customers, “including small- and medium-sized business customers,” do not achieve these savings.
 - Complaint alleged FleetCor and its CEO falsely told customers they would be protected from unauthorized charges and have no setup, transaction, or membership fees; promised savings did not materialize.

Consumer Protection

Unfair or Deceptive Acts or Practices (UDAP) Prohibited Under FTC Act

- 15 U.S.C. Sec. 45(a)(1): Consumer Protection
 - “**unfair or deceptive acts or practices** in or affecting commerce” are unlawful.
- Unfair Act or Practice
 - An act or practice is unfair if it causes or is likely to cause **substantial injury** to consumers which is **not reasonably avoidable by consumers** themselves **and not outweighed by countervailing benefits to consumers**.
- Deceptive Practices
 - Involve a material representation, omission, or practice that is likely to **mislead a consumer acting reasonably in the circumstances**.
- The FTC is not restrained by whether the transaction is for personal, family, or household purposes.
- Many state “mini-FTC Acts” do have this limitation, but the tide is turning.

State UDAP Example: Tennessee

Tenn. Code § 47-18-104(a)

- Prohibits **unfair or deceptive** acts or practices “affecting the conduct of any trade or commerce”
 - "Trade" or "commerce" means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.
- Declares the following specific unfair or deceptive acts or practices to be unlawful (among others):
 - Falsely passing off goods or services as those of another.
 - Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.
 - Representing that goods or services have sponsorship, approval, characteristics, uses, or benefits that they do not have or that a person has a sponsorship approval, status, affiliation, or connection that such person does not have.
 - Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
 - Advertising goods or services with intent not to sell them as advertised.
 - Causing confusion or misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a consumer transaction.
 - Failing to disclose that a charge for the servicing of any goods in whole or in part is based on a predetermined rate or charge, or guarantee or warranty, instead of the value of the services actually performed.

State UDAP Example: New York

New York General Business Law § 349

- “**Deceptive acts or practices** in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”
 - Enforceable by the New York attorney general and private plaintiffs.
 - Previous courts required that deceptive practices be “consumer oriented.”
- Fostering Affordability and Integrity through Reasonable Business Practices Act (**FAIR Act**)
 - Passed by state legislature in June 2025; still awaiting signature by Gov. Kathy Hochul.
 - Expands the scope of GBL 349 to ban **unfair and abusive** practices.
 - **Unfair:** Causes or likely to cause substantial injury not reasonably avoidable and not outweighed by countervailing benefits to consumers or competition.
 - **Abusive:** Materially interferes with a person’s ability to understand a term or conditions or take unreasonable advantage of a person’s lack of understanding of the material risks, costs, or conditions of products or services.
 - Applies deceptive, unfair, and abusive protections to businesses and nonprofits, not just consumers.
 - Change to New York law similar to trends in other states (*see, e.g.*, California and Washington).

New York Law Enforcement



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Attorney General James Secures Over \$4.6 Million for Small Businesses from Northern Leasing Affiliates

AG James Successfully Sued Northern Leasing for Predatory and Deceptive Practices Under New York Anti-Fraud Law 63(12)

September 30, 2024

Attorney General James has been a state and national leader in helping protect small businesses against fraud. In March 2024, Attorney General James [sued over 30 lenders for targeting small businesses with illegal, fraudulent loans](#). In February 2024, Attorney General James [secured a historic court judgment of more than \\$77 million against Richmond Capital Group, Ram Capital Funding, and Viceroy Capital Funding](#) (the Richmond companies) and their principals who were harming small businesses through high-interest loans and undisclosed fees following [a September 2023 court judgment](#) against three merchant cash advance companies. In April 2023, Attorney General James [shut down two websites that impersonated the New York State Department of State](#) and significantly overcharged aspiring small business owners and users for services provided for free from state government. Also in April 2023, Attorney General James [released a guide to help businesses adopt effective data security measures to better protect New Yorkers' personal information](#).

<https://ag.ny.gov/press-release/2024/attorney-general-james-secures-over-46-million-small-businesses-northern-leasing>

UDAP: Law Enforcement Examples in B2B Sales

- **Misrepresentation Made to Induce Payment:** Misrepresenting that defendants are part of or affiliated with a government agency and that consumer-businesses are legally required to purchase labor law posters from defendants.
- **Deceptive Sales:** Deceptively pitching “exclusive” advertising placements to small businesses and misleading them about when ads would be printed.
- **Misrepresentation – Cancellation:** In selling payment processing services, where an early termination fee existed in the contract, misrepresenting that services can be canceled during an initial trial period without penalty; prior to the end of a written term without penalty; or at any time without penalty.
- **Misrepresentation – Monthly Fees:** Misrepresenting that recurring monthly fees for services will not exceed a specified amount.
- **Misrepresentation – Deceptive Savings Claims:** Misrepresenting that customers will save a significant amount of money by using defendant’s services.
- **Unfair Debiting Practices:** Withdrawing money from customer’s bank account without customer’s express authorization, including after customer revoked authorization.

UDAP: More Law Enforcement Examples

- **Unfair Contracting and Billing Practices:** Hidden automatic renewal clauses (“evergreen” contracts) in business-to-business service agreements
- **Misleading Equipment Leasing Terms:** Payment terminals, point-of-sale systems, printers, telecom services
- **Misrepresentations in Business Financing:** Solicitations for loans by lead generators using misrepresentations about loan availability and affiliation with SBA (Small Business Administration).
- **Telemarketing:** The FTC and state attorneys general conducted a sweep against robocalls and telemarketing activities, challenging lead sellers and telemarketers pitching services to businesses, including business leads and credit/loan offers.
- **False Advertising Claims Made to Induce Businesses into Signing Contracts/Purchasing Products**

Small Business Financing

FTC Staff Report: *Strictly Business* (Feb. 2020)

- The FTC Act's prohibition against misleading claims applies to small business financing.
- Consumer confusion possible in the small business financing marketplace.
- Focus on merchant cash advances and concerns.
 - *FTC v. RCG Advances, LLC (SDNY 2020)*
- Marketing and lead generation.
 - ISOs, brokers, and lead generators that market merchant cash advances (MCAs) and other financing products should avoid potentially false or unsubstantiated advertising claims.
 - Finance providers should be aware their use of marketing intermediaries does not shelter them from FTC Act liability.

FTC v. RCG Advances, LLC (SDNY 2020)

- Two NY-based companies and several owners and officers allegedly violated Section 5 of FTC Act for deceptive business financing activities.
- Targeted small businesses, medical offices, nonprofit organizations, and religious organizations.
- Deceived entities by misrepresenting terms of merchant cash advances and then using unfair collection practices.
- Advertisements falsely claimed defendants' cash advances required no personal guaranty and financing required no upfront costs.
- Allegedly used signed confessions of judgment required by contract to seize business and personal assets.
- Threatened customers when payments weren't made.

Quick Note: Does the CFPB Care?

- Consumer Financial Protection Bureau focuses its enforcement resources on **unfair, deceptive, and abusive** acts or practices that harm **consumers**.

Scope Creep:

- *CFPB v. RAM Payment, LLC and Account Management Systems, LLC (AMS)*: Engaged in deceptive and unfair acts and practices against businesses and consumers.
- March 2023: Issued Small Business Lending Under the Equal Credit Opportunity Act regulation (“Small Business Lending Rule”).
 - Requires commercial lenders to collect data about loan purpose, amounts, business industry, owner demographics.
 - April 2025: CFPB stated it would not enforce the Small Business Lending Rule and instead “keep its enforcement and supervision resources focused on pressing threats to consumers, particularly servicemen and veterans.”

Marketing Practices

Telephones/Texting

- Both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) maintain and enforce telemarketing rules. Among other things, these rules:
 - Prohibit calls to numbers listed on the federal Do Not Call (DNC) list, with certain exceptions;
 - Require a company to maintain a company-specific DNC list of persons who wish not to receive calls from the company;
 - Require that certain disclosures be made at the outset of a call identifying the caller and the purpose of the call;
 - Impose certain other disclosure, scripting, and offer consent requirements;
 - Impose restrictions on the times of day when telemarketing calls can be made;
 - Restrict the use of automated telephone dialing systems and prerecorded voice messages, including by obtaining the called party's prior express consent as specified by FCC rules;
 - Impose caller ID requirements; and
 - Impose recordkeeping requirements.

Are B2B Calls/Texts Exempt?

Telemarketing Sales Rule (FTC)

- Until March 2024, the TSR included a categorical exception for calls made from one business to another (other than calls selling nondurable office supplies or cleaning supplies).
- March 2024 FTC Amendment to TSR:
 - ✓ Prohibits deceptive and abusive practices in all business-to-business calls.
 - ✓ Imposes extensive recordkeeping requirements.

TCPA Rules (FCC)

Does not include a categorical exception for business-to-business (B2B) calls, so some rules apply to such calls and some do not:

- Restrictions on the use of autodialers and prerecorded or artificial voice messages apply to all calls made to wireless numbers without distinction and, thus, do apply to calls to businesses.
- FCC calling hour restrictions do not apply to B2B telemarketing (but company policy may limit calling hours).
- FCC Do-Not-Call suppression requirements do not apply to B2B telemarketing, and thus scrubbing against the National DNC Registry is not required.
- FCC caller identification rules do apply to telemarketing calls to businesses.

TSR Prohibitions on Misrepresentations

Applicable to B2B Calls (Examples)

Cannot misrepresent the following:

- The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;
- Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;
- Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;
- A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;
- Any material aspect of a **negative option feature**, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

TSR “Substantial Assistance” Doctrine

Assisting and facilitating Prohibition. It is a deceptive telemarketing act or practice and a violation of [the TSR] for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates [§§ 310.3\(a\)](#) [Prohibited deceptive telemarketing practices], [\(c\)](#) [Credit Card Laundering prohibition] or [\(d\)](#) [Prohibited deceptive charitable solicitations], or [§ 310.4](#) [Abusive calling practices, including Do Not Call violations. (16 CFR 310.3(b))]

Past Defendants Include:

- Payment processors and ISOs
- Lead generators and list brokers
- Call technology providers (robocall services)
- Telemarketing calls centers
- Fulfillment houses and mailing services
- Infrastructure providers (back-end support to help deceptive marketers)
- “Merchant of Record” service providers

State Telemarketing Laws Applicable to Business-to-Business Calls and Texts

- Many state laws focus on the **purpose** of the call/text, rather than the telephone number called or texted.
- Registration Requirements
 - Many state laws apply only to consumer-facing transactions, but other state laws do not have exemptions.
- Consent required to make prerecorded or autodialed calls and texts
 - The federal TCPA and many states do not exempt B2B calls and texts from consent requirements.
- Internal do-not-call requirements
 - Question of whether “do not call” requests apply to individual telephone recipients versus business-wide.

Telemarketing Lawsuits Involving B2B Calls and Texts

- *Kyle Miholich v. Senior Life Insurance Co.*, 2022 WL 1505865 (S.D. Cal. May 12, 2022)
 - The plaintiff had registered the number as a business number with a state insurance website, but the plaintiff attested he also used it as a personal number. The court found that this was sufficient to create a question of fact.
- *Shelton v. Pro Source* 2025 WL 817485 (E.D. Pa March 14, 2025)
 - Continuation of a previous case, where the judge concluded that because the plaintiff held his phone number out to the world as a business phone number, he lacked standing to file under the TCPA's DNC restrictions.
 - BUT the plaintiff stopped using his phone for business purposes and the court found it was now his residential phone number.
- Junk fax lawsuits remain prevalent in the business-to-business context.

Arrangements with Automatic Renewals

- State laws are expanding to business-to-business transactions:
 - Virginia law now includes “small businesses” that seek or acquire, by purchase or lease, any goods, services, money, or credit for business purposes.
 - “Small business”:
 - *a business that is at least 51 percent independently owned and controlled by one or more individuals, or in the case of a cooperative association organized pursuant to Chapter 3 (Section 13.1-301 et seq.) of Title 13.1 as a nonstock corporation, is at least 51 percent independently controlled by one or more members, who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer employees or annual gross receipts of \$10 million or less averaged over the previous three years. One or more of the individual owners or members shall control both the management and daily business operations of the small business.*
 - New York law (FAIR Act)
 - Most long-standing state autorenewal laws applicable to longer-term contracts and service, maintenance and repair contracts have applied to certain business-to-business transactions, or defined “person” to include firms, companies, partnerships, and corporations.”

ROSCA: Restore Online Shoppers Confidence Act

Added to “Data Pass” Law, but Broadly Applicable

SEC. 4. NEGATIVE OPTION MARKETING ON THE INTERNET.

It shall be unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature (as defined in the Federal Trade Commission’s Telemarketing Sales Rule in part 310 of title 16, Code of Federal Regulations), unless the person—

(1) provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information;

(2) obtains a consumer’s express informed consent before charging the consumer’s credit card, debit card, bank account, or other financial account for products or services through such transaction; and

(3) provides simple mechanisms for a consumer to stop recurring charges from being placed on the consumer’s credit card, debit card, bank account, or other financial account.

FTC Theory: ROSCA Applies to B2B Transactions

- FTC has alleged that a business-to-business contract with an automatic renewal provision executed online or through an app is a “transaction effected on the Internet through a negative option feature” and thus subject to ROSCA disclosure, consent, and cancellation requirements.
 - Example: Payment processing agreements executed online that renew automatically for some term if the merchant doesn’t cancel are “negative options” governed by ROSCA.
- Theory not proved in court: Is this a reasonable reading of ROSCA and the intent of Congress?

Federal Trade Commission v. First American Payment Systems

The FTC alleged that the defendants:

- **Deceived businesses about pricing and savings with hidden terms:** The FTC alleged the company advertised that monthly fees were small or zero, and that businesses would save a lot of money over the course of a year by switching to defendants' services but did not take into account the fact that First American periodically raises its prices for existing customers.
- **Imposing surprise cancellation fees:** The complaint alleges that defendants' salespeople promised businesses they will be able to cancel services anytime or within a trial period without a fee, when the company's standard written agreement requires businesses to sign on to a three-year term with a \$495 cancellation fee.
- **Online enrollment system obscured key contract terms:** The three-year obligation, autorenewal element, and cancellation provisions were not sufficiently disclosed or were disclosed only in densely packed documents that required business owners to click separate links to find.
- **Imposing "zombie charges" after companies withdraw consent accounts:** The complaint alleges that First American continued to make withdrawals from businesses' bank accounts even after the businesses have withdrawn consent.

Arrangements with Automatic Renewals

- **Negative Option:** An agreement or arrangement with a term or condition that allows a seller to interpret a customer's silence, or failure to affirmatively act, as acceptance of an offer.
- Encompasses membership programs, continuity plans, recurring billing arrangements, and **agreements with an automatic renewal feature.**
- Does not include installment contracts, where consumers are obligated for entire contractual period for the entire contract. (Example: vehicle purchase agreement)
- Nonetheless, some installment contracts may have a negative option feature. Example:
 - Software license agreement, purchased for one year, where customer is obligated for the entire year, payable monthly.
 - Renews automatically at the conclusion of the year unless the customer cancels the agreement.
 - Canceling the agreement in the first year does not void the customer's obligation to pay for the whole first year, but it does terminate the customer's responsibility for the next year.

Contract vs. UDAP

Business Industry Considerations

- Business customers are more sophisticated, and B2B contracts are individually negotiated, arm's length, and often assisted by professional legal counsel.
- Should the FTC intervene in transactions based on non-form contracts that are the subject of extensive bargaining between sophisticated companies?
- What about form contracts that business owners should be expected to read?

Federal Trade Commission (Click-to-Cancel Commentary)

- First, there is a difference between individually negotiated agreements and form agreements.
 - A business that consents to a negative option feature through an individually negotiated term of an agreement can also individually negotiate the cancellation mechanism.
 - The FTC has not used its Section 5 enforcement authority in the type of large individually negotiated B2B transactions some commenters were worried about.
- Second, the requirement to provide a simple cancellation mechanism does not apply to *all* aspects of a broader contract; it applies only to cancellation of the negative option feature.
 - Complex commercial agreements will have numerous provisions unrelated to negative option features. Nothing in the rule prohibits separate cancellation and termination terms.

Claims Substantiation

- Federal and state laws apply to advertising claims in the business-to-business context.
- Claims involving:
 - Performance and efficacy of products and services
 - Expected revenue and efficiencies from using a service
 - Improvements in business using artificial intelligence
 - Advertising statements that the purchaser can make to consumers about the supplier's products
 - Comparative and superiority statements
 - False statements of association
 - Grubhub agreed to pay \$7.1 million to settle a class action by restaurants (i.e., business entities) that claimed Grubhub falsely advertised that those restaurants were partners, when in fact no agreement existed.

Sweepstakes and Promotions

- *SCA Promotions, Inc. v. Yahoo!, Inc.* (5th Cir. 2017)
 - Yahoo hired SCA to underwrite a \$1B March Madness perfect-bracket contest, then canceled after deciding to co-sponsor a different promotion. The Fifth Circuit reversed for SCA and rendered judgment for \$4.4M in cancellation fees under the contract's schedule.
- *McDonald's Corp. v. Simon Marketing, Inc.* (N.D. Ill. 2002)
 - Sponsor vs. promotion administrator (Monopoly game). McDonald's sued its promotion agency Simon after Simon's security director diverted winning game pieces; claims included RICO, fraud, breach of contract, fiduciary breach, and indemnity.
- *Theme Promotions, Inc. v. News America Marketing FSI, Inc.* (9th Cir. 2008)
 - Theme Promotions alleged anticompetitive conduct/unfair competition by News America (a dominant coupons/FSI and promotions firm).

Endorsements and Testimonials: Lawsuits

- *Chanel, Inc. v. What Goes Around Comes Around*
 - Chanel sued a reseller, alleging false association/endorsement and false advertising based in part on WGACA's marketing (including hashtags like #WGACACHANEL, use of Chanel ads and references to Coco Chanel) that implied Chanel's sponsorship.
- *Yelp Inc. v. ReviewVio, Inc. (d/b/a Dandy)*
 - Yelp sued a reputation-management company over advertising that promised to suppress or filter negative Yelp reviews and used Yelp's logo.
- *Shackelford v. Morgan & Morgan, P.A.*
 - A competing law firm challenged Morgan & Morgan's ads as deceptive endorsements/testimonials (e.g., dramatizations and "actual client" testimonials).
- *Ariix, LLC v. NutriSearch Corp.*
 - Supplement maker Ariix sued the publisher of a product-ratings guide, alleging the "independent" ratings were a covert, paid endorsement of a competitor. The Ninth Circuit held such allegedly biased "reviews" could be commercial speech and actionable under the Lanham Act.

Business-to-Business Disputes concerning Artificial Intelligence

- Intellectual property
 - *Getty Images v. Stability AI; New York Times v. OpenAI; Alden Global Capital newspapers v. OpenAI; Thomson Reuters v. ROSS Intelligence; Anthropic*
- Discrimination
 - *Mobley v. Workday; EEOC v. iTutorGroup*
- Antitrust
 - *Chegg v. Google*
 - *Yardi*
- Privacy lawsuits and use of personal data
- Data broker issues: Are AI services “data brokers” under state laws?
- Data-scraping issues
 - *Meta v. Bright Data*

Recent Developments in Business-to-Business Contracts

- **Arbitration provisions and filing fees**
 - California Code of Civil Procedure § 1281.98 requires that the party drafting an arbitration agreement must pay arbitration fees and costs within 30 days of receiving the invoice, or risk waiving their right to force the other party into arbitration.
 - California Supreme Court held that the law is not preempted by the Federal Arbitration.
 - Carve-outs for injunctive relief and temporary relief.
- **Early termination fees**
 - Contractual provisions must be carefully drafted to avoid imposing impermissible liquidated damages provisions. Courts will look to:
 - Whether the amount bears a reasonable relationship to damages suffered
 - Difficulty in calculating actual damages
 - Reasonableness of the amount at the time of contract formation

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