

THIS IS THE END. . .MY FRIEND: DISGORGEMENT, DISSOLUTION AND SEQUESTRATION AS REMEDIES UNDER STATE UDAP STATUTES

*Michael Flynn**

INTRODUCTION

What is up? Food prices¹, unemployment², crime³, housing foreclosures⁴, finance charges⁵, health insurance premiums⁶, airplane tickets⁷ and the price of many other goods and services.

* Professor of Law, Nova Southeastern University Shepard Broad Law Center. Former Assistant Attorney General, Washington State Attorney General's Office, Section Chief, Consumer Protection and Antitrust Division. The author wishes to thank Gina Lakatos and Jeremy Tyler for their help with this article.

¹ See Robert Gavin, *Surging Costs of Groceries Hit Home - Bread, Eggs, Milk Prices Up Sharply*, THE BOSTON GLOBE, Mar. 9, 2008, at A1.

² See Bureau of Lab. Stat., THE EMPLOYMENT SITUATION: OCTOBER 2008, available at <http://www.bls.gov/news.release/pdf/empstat.pdf> (last visited Nov. 15, 2008).

³ See, e.g., Fla. Dep't of Law Enforcement, 2007 ANNUAL CRIME IN FLORIDA REPORT, Apr. 2008, available at <http://www.fdle.state.fl.us/fsac/ucr/> (last visited Aug. 3, 2008).

⁴ See Sue Kirchhoff & Adam Shell, *Officials Work Fast to Shore Up System; Fed, Congress Both Get Things Done in a Hurry*, USA TODAY, July 15, 2008, at 1B.

⁵ See *Credit Card Industry Practices: Hearing on H.R. 5244 Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Financial Services Comm.*, 110th Cong. (2008) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).

⁶ See *The Economy: The Problem: Workingman's Blues*, ECONOMIST, July 26, 2008.

⁷ See Dan Reed, *Holiday Travel Will Get Costlier; Fewer Flights, Seats Mean Soaring Fares*, USA TODAY, July 18, 2008, at 1A.

What is down? Consumer confidence⁸, securities markets⁹, the value of a dollar¹⁰, housing construction¹¹ and many other leading economic indicators¹². In what has been described by some as desperate economic times for many citizens¹³, there is almost always one thing you can count on to spike upward – the number of con artists! Those who work to protect the public from con artists report a hike in consumer complaints and consumer scams.¹⁴ Beginning in the late 1960's, an energized consumer protection movement has muscled up to ferret out consumer rip-offs.¹⁵ Yet, if real progress had been made, why is the next big consumer scam still so tempting an option?

Many courts have recognized that the appetite of some to fleece consumers may just be insatiable.¹⁶ Further, the inventiveness of the “next” generation of con artists both recycles tried and true scams¹⁷ and invents new ones¹⁸. For example, vulnerable consumers still believe that a leaky roof can be repaired simply by using a “new sealer.”¹⁹ Moreover, techie wizards can now easily steal your identity²⁰, even if you work

⁸ Irwin M. Stelzer, *A Nation of Worriers; American Economic Discontent is Well-founded*, THE WEEKLY STANDARD, July 15, 2008.

⁹ Jenny Anderson & Vikas Bajaj, *New Trouble in Auction-Rate Securities*, N.Y. TIMES, Feb. 15, 2008, at C6.

¹⁰ Ben Steverman, *The Dollar: A Bottom at Last?*, BUSINESSWEEK, May 5, 2008.

¹¹ Martin Crutsinger, *Construction Down; Jobless Claims Up*, THE DENVER POST, July 17, 2008.

¹² *Workingman's Blues; The Economy: The Problem*, supra Note 7.

¹³ Gary Harki, *Fourth Branch of Bank Robbed*, THE CHARLESTON GAZETTE, Apr. 16, 2008.

¹⁴ Federal Trade Commission, CONSUMER FRAUD AND IDENTITY THEFT COMPLAINT DATA, JANUARY – DECEMBER 2007, Feb. 2008.

¹⁵ DAVID BOLLIER, CITIZEN ACTION AND OTHER BIG IDEAS: A HISTORY OF RALPH NADER AND THE MODERN CONSUMER MOVEMENT 1 (Center for Study of Responsive Law ed., 1991).

¹⁶ See *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972).

¹⁷ Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 546-49 (1995) (classic “pigeon drop” scam recycled as the new “Spanish Lotto” scam).

¹⁸ Eric L. Carlson, *Phishing for Elderly Victims*, 14 ELDER L.J. 423, 433 (2006) (describing new “Phishing” scams targeted at the elderly).

¹⁹ Bill Riales, *Inside the Roofing Scam*, WKRG News 5, May 20, 2008, http://www.wkrg.com/investigates/article/inside_the_roofing_scam/13893/.

²⁰ Fed. Trade Comm'n, TALKING ABOUT IDENTITY THEFT: A HOW-TO GUIDE, at 4, available at <http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/TalkingAboutIDTheft.pdf> (last visited Nov. 13, 2008).

hard to protect against this threat.²¹ Where did enforcement go wrong?

This article does not attempt to answer this question comprehensively. Instead, this article examines public as opposed to private enforcement of the consumer protection laws at the state level through the use of state unfair and deceptive trade practice statutes (“UDAP”). In particular, this article overviews the basic enforcement provisions contained in most state UDAP statutes. Then this article will focus on one particular enforcement option recommended by the Federal Trade Commission and provided for in some state UDAP statutes but rarely used. This option might be simply stated as putting an offending business and the principals of such a business, out of business. This article will conclude that the failure on the part of public enforcers to aggressively seek to terminate the ability of violators of UDAP statutes to conduct business may contribute to the continued flooding of the market place with unlawful trade practices.

II. PUBLIC ENFORCEMENT OF STATE UDAP STATUTES

Almost every state has some sort of UDAP statute, often referred to as a “little FTC act” which prohibits unfair and deceptive trade practices in trade or commerce.²² This prohibition applies not only to individuals who conduct business but also to business entities like corporations and partnerships.²³ UDAP statutes typically provide for a private right of action by individuals, even corporations, and for public enforcement mostly through the state Attorneys General.²⁴ The specific enforcement tools usually available for public enforcers include but are not limited to pre-suit investigation subpoena power²⁵ and may include administrative cease and desist orders²⁶. Key remedies available in UDAP statutes for public enforcement agencies include not only a request for declaratory relief²⁷ but also a court

²¹ *Id.* at 7.

²² NAT’L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES I (Jonathan Sheldon & Carolyn Carter eds., 6th ed. 2004).

²³ *Id.* at 581.

²⁴ *Id.* at 1.

²⁵ *Id.* at 931.

²⁶ *Id.* at 945.

²⁷ *See, e.g.*, FLA. STAT. ANN. § 501.207 (West 2008).

issued injunction prohibiting specific unfair and deceptive trade practices²⁸, the payment of consumer restitution²⁹, the assessment of a civil penalty against the offending business and its principals³⁰ and the awarding of attorney fees and costs payable by the offending business and its principals if the public enforcer is successful in prosecuting a UDAP claim³¹.

What is clear from this summary list of public enforcement tools and remedies available under UDAP statutes is that state legislatures recognize the need to police the marketplace and are willing to empower public enforcers with a special set of legal devices and cures to protect consumers and legitimate business.³²

One of the many remedies available to public enforcers under some versions of the UDAP statute is the ability to put a business out of business.³³ These UDAP statutes provide that as a remedy for a finding that a business or an individual committed an unfair or deceptive trade practice, that the public enforcement agency may request and a court may order:

Dissolution of a corporation;

Sequestration of all of the assets of a business or individual; and

Appointment of a receiver or special magistrate to wind up the business activity culminating in the payment of consumer restitution and the payment of civil penalties and attorney fees to the public enforcer.³⁴

Without question a court issued injunction combined with dissolution of a business entity, sequestration of assets and the payment of money to injured consumers and public enforcers in

²⁸ NAT'L CONSUMER LAW CTR., *supra* note 22, at 948.

²⁹ *Id.* at 958.

³⁰ *Id.* at 954.

³¹ *Id.* at 964; *see* State v. Alpine Air Products, Inc., 490 N.W.2d 888 (Minn. Ct. App. 1992) (more than \$100,000 awarded the state in fees), *aff'd on other grounds*, 500 N.W.2d 788 (Minn. 1993).

³² *See* NAT'L CONSUMER LAW CTR., *supra* note 22, at 931-66.

³³ *See, e.g.*, FLA. STAT. ANN. § 501.207 (West 2008) (dissolution or reorganization of any enterprise).

³⁴ NAT'L CONSUMER LAW CTR., *supra* note 22, at 963.

the form of civil penalties and reimbursement of attorney fees and cost is both a strong remedy and a strong deterrent.³⁵

III. THE HISTORY OF PUBLIC ENFORCEMENT

Although court issued injunctions prohibiting specific kinds of unfair and deceptive trade practices are a routine part of most court judgments³⁶ and consent decrees obtained for violation of UDAP statutes³⁷, almost none of these injunctions prohibit the business entity or its individual principles from conducting business again. In fact, there is no reported case in which the public enforcers have sought and received the dissolution of business entities and the sequestration of assets for distribution to injured consumers and public enforcers as a remedy for a UDAP violation. The powerful remedies of dissolution, disgorgement and sequestration, as recommended and employed by the FTC, remain largely unused and inactive.

In 1966, the Federal Trade Commission proposed that state UDAP statutes should at least authorize the state courts “for violation of an injunction issued under the Act to restrain unfair or deceptive practices, . . . to assess civil penalties in an amount up to \$25,000,³⁸ and the court additionally is authorized, in its discretion, to order dissolution or suspension or forfeiture of franchise of any corporation which violates such an injunction.”³⁹ The Federal Trade Commission went on to comment that the remedy of an injunction and a civil fine or penalty is a prohibitory remedy, while the remedy of dissolution, disgorgement and sequestration is a structural remedy.⁴⁰ Public enforcement agencies have traditionally focused on the prohibitory remedies because such remedies can effectively stop unfair and deceptive trade practices. However, public

³⁵ *Id.* at 737-38; Haddad v. Gonzalez, 576 N.E.2d 658, 666 (Mass. 1991) (deterrent value of multiple damage awards).

³⁶ NAT’L CONSUMER LAW CTR., *supra* note 22, at 945.

³⁷ *Id.* at 951-52.

³⁸ Press Release, Fed. Trade Comm’n, FTC Proposes That States Enact Laws to Prevent Consumer Deception and Unfair Competitive Practices, Also to Regulate Hearing Aid Dealers and Correspondence Schools (July 7, 1966) [hereinafter FTC Proposal] (on file with author).

³⁹ *Id.* at 10.

⁴⁰ *Roundtable on Remedies and Sanctions in Abuse of Dominance Cases*, available at <http://www.ftc.gov/bc/international/docs/AbuseRemediesUnitedStates.pdf> (last visited Nov. 13, 2008).

enforcement agencies are reluctant to invoke a structural remedy because they believe that structural remedies like dissolution, disgorgement and sequestration should only be used when the prohibitory remedies of an injunction and civil fine would be inappropriate.⁴¹ Richard Gold, an attorney for the Federal Trade Commission, takes the position that the structural remedies of dissolution, disgorgement and sequestration contained in the Federal Trade Commission Act should be included in state UDAP statutes as a safety net to ensure that corporations abide by any prohibitory actions issued by the court, such as an injunction or fine.⁴²

Even though recommended, only fifteen states have incorporated structural remedies like dissolution, disgorgement and sequestration into their UDAP statutes. The fifteen states are: Alabama⁴³, Connecticut⁴⁴, Florida⁴⁵, Idaho⁴⁶, Iowa⁴⁷,

⁴¹ *Id.*

⁴² Telephone Interview with Richard Gold, Attorney at Law, Fed. Trade Comm'n, in Washington D.C., Md. (August 16, 2007).

⁴³ ALA. CODE § 8-19-11(c) (2008) ("Furthermore, upon a second or continuing violation of an injunction after imposition of the sanctions in subsection (a) of this section, and upon petition by the Attorney General or a district attorney, the circuit court of general jurisdiction of a county may, in its discretion, order the dissolution or suspension or forfeiture of the franchise of any corporation, partnership, or sole proprietorship which willfully violates the terms of any injunction issued under Section 8-19-8).

⁴⁴ CONN. GEN. STAT. ANN. § 42-110p (West 2007) ("Upon petition by the Attorney General, the superior court for the judicial district of Hartford may, in its discretion, order the dissolution or suspension or forfeiture of the franchise of any corporation which violates the terms of any injunction issues under section 42-110m.").

⁴⁵ FLA. STAT. ANN. § 501.207 (West 2008) ("Upon motion of the enforcing authority or any interested party in any action brought under subsection (1), the court may make appropriate orders, including, but not limited to, . . . order the dissolution or reorganization of any enterprise . . .").

⁴⁶ IDAHO CODE ANN. § 48-616 (2008) ("Upon petition by the attorney general, the district court of the county in which the principal place of business of the corporation is located may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under section 48-606, Idaho Code.").

⁴⁷ IOWA CODE ANN. § 714.16(6) (West 2003) ("If a person fails or refuses to file a statement or report, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to the Polk county district court or the district court for the county in which the person resides or is located and, after hearing, request an order: . . . dissolving a corporation created by or under the laws of the state . . .").

Massachusetts⁴⁸, Montana⁴⁹, Nebraska⁵⁰, New Hampshire⁵¹, Oregon⁵², Pennsylvania⁵³, Rhode Island⁵⁴, South Carolina⁵⁵, Vermont,⁵⁶ and Washington⁵⁷. Thirteen of these states model the

⁴⁸ MASS. GEN. LAWS ANN. ch. 93A, § 8 (West 2006) (“Upon petition by the attorney general, the court may for habitual violation of injunctions issued pursuant to section four order the dissolution, or suspension or forfeiture of franchise of any corporation or the right of any individual or foreign corporation to do business in the commonwealth.”).

⁴⁹ MONT. CODE ANN. § 30-14-141 (2007) (“Upon the petition by the department, the district court, may, in its discretion, order the dissolution, suspension, or forfeiture of franchise of any corporation which violates the terms of any injunction issued under 30-14-111.”).

⁵⁰ NEB. REV. STAT. ANN. § 59-1615 (LexisNexis 2008) (“Upon the petition by the Attorney General, the court may, in its discretion, order the dissolution, or suspension or forfeiture, of any corporation which violates . . . the terms of any injunction issued as provided the in the Consumer Protection Act.”).

⁵¹ N.H. REV. STAT. ANN. § 358-A:9 (2008) (“Upon petition by the attorney general, the court may order, for habitual violation of injunctions issued pursuant to RSA 358-A:4, the dissolution, suspension, or forfeiture of franchise of any corporation, or the right of any foreign corporation to do business in the state.”).

⁵² OR. REV. STAT. ANN. § 646.646 (West 2003) (“Upon petition by the prosecuting attorney, the court may, in its discretion, order the dissolution or suspension or forfeiture of the license or franchise of any person who violates the terms of any injunction issued under ORS 646.632.”).

⁵³ 73 PA. STAT. ANN. § 201-9 (West 2008) (“Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to business of any person, firm or corporation which violates the terms of an injunction under section 4 of this act.”).

⁵⁴ R.I. GEN. LAWS § 6-13.1-9 (2008) (“Upon petition by the attorney general, the superior court may, in its discretion, order the dissolution, or suspension or forfeiture of franchise of any corporation that violates the terms of an injunction issued under § 6-13.1-5.”).

⁵⁵ S.C. CODE ANN. § 39-5-120 (2007) (“Upon petition by the Attorney General, the court of common pleas may, for good cause shown, order the dissolution or suspension or forfeiture of any franchise or charter of any corporation which violates the terms of any injunction issued under § 39-5-50.”).

⁵⁶ VT. STAT. ANN. tit. 9, § 2458 (2007) (“Whenever the attorney general or a state's attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 2453 of this title to be unlawful, or has reason to believe that any person has violated any assurance of discontinuance entered into pursuant to section 2459 of this title, and that proceedings would be in the public interest, the attorney general, or a state's attorney if authorized to proceed by the attorney general, may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice or to dissolve a

Federal Trade Commission Act permitting dissolution, disgorgement and sequestration when a UDAP violator habitually violates multiple injunctions.⁵⁸ It is remarkable, if not a comment on the ineffectiveness of this structural remedy, that there is no Federal Trade Commission or state UDAP reported cases that specifically apply all of these structural remedies.⁵⁹ Perhaps the non-use of the structural remedies means that repeat UDAP violators do not exist. This is hardly the case.⁶⁰ Rather than abandoning unfair and deceptive trade practices, many clever UDAP violators restructure business entities and resurface with a revised but similar unfair and deceptive trade practice scheme.⁶¹

Perhaps public enforcement agencies have been lax in monitoring UDAP violator's compliance with injunctive orders.⁶² This would not be surprising given the lack of funding.⁶³ It is

domestic corporation or revoke the certificate of authority granted a foreign corporation. The action may be brought in the superior court of the county in which such person resides, has a place of business or is doing business. Said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter, such injunctions to be issued without bonds, and so to dissolve, or revoke the certificate of authority of, a corporation.”).

⁵⁷ WASH. REV. CODE. ANN. § 19.86.150 (LexisNexis 2008) (“Upon petition by the attorney general, the court may, in its discretion, order the dissolution, or suspension or forfeiture of franchise, of any corporation which shall violate RCW 19.86.030 or 19.86.040 or the terms of any injunction issued as in this chapter provided.”).

⁵⁸ NAT'L CONSUMER LAW CTR., *supra* note 22, at 967-89 (The states that have modeled their statutes after the FTC Act to require a violation of multiple injunctions before a dissolution remedy is available includes: Alabama, Connecticut, Idaho, Massachusetts, Montana, Nebraska, New Hampshire, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington).

⁵⁹ *Id.* at 947; *see, e.g.*, Diane C. Lade, *Springs Attorney Faces Suspension*, SUN-SENTINEL, July 23, 2008, at 3D.

⁶⁰ NAT'L CONSUMER LAW CTR., *supra* note 22, at 952-53; *State ex rel. Abrams v. East Coast Auto Consultants Corp.*, 472 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1984) (changing company name and phone number in attempt to avoid compliance with injunction).

⁶¹ *Id.*

⁶² *See Id.*

⁶³ *See* Fed. Trade Comm'n, *FTC Appropriation History*, <http://www.ftc.gov/ftc/oed/fmo/appropriationhistory.shtm>; *see also* Fed Trade Comm'n, *FTC Full-Time Equivalent History*, <http://www.ftc.gov/ftc/oed/fmo/fte2.shtm> [hereinafter FTC History].

also possible that the trigger for invoking the structural remedies of dissolution, disgorgement and sequestration, that is, multiple violations of prior injunctions, renders the remedy useless. Finally perhaps, the threat of these kinds of structural remedies is used by public enforcement agencies to leverage consent decrees and other settlement concessions from UDAP violators.⁶⁴ Yet even from the two states, Florida and Vermont, which place no prerequisites on public enforcement agencies from seeking structural remedies against UDAP violators,⁶⁵ there are no reported cases where dissolution, disgorgement and sequestration have been requested and court ordered.

In short, the structural remedies for use against UDAP violators have never found a footing in consumer protection law. The question becomes when, if ever, should the remedies of dissolution, disgorgement and sequestration be applied?

IV. THE CASE FOR USE OF STRUCTURAL REMEDIES FOR VIOLATIONS OF STATE UDAP STATUTES

First, it must be noted that not all state UDAP statutes authorize dissolution, disgorgement and sequestration as remedies for UDAP violations.⁶⁶ Until these states amend their UDAP statutes, the option of these remedies will remain closed. Other state UDAP statutes provide for dissolution, disgorgement and sequestration only upon a showing of multiple violations of court issued injunctions against unfair and deceptive trade practices.⁶⁷ Certainly, this kind of repeat violator meets the

⁶⁴ Based on my own experience as an Assistant Attorney General in the Washington State Attorney General's Office in the Antitrust and Consumer Protection Division and working with Federal Trade Commission and other state Attorneys General's offices, many settlements of UDAP cases occurred because of the prospect of having to pay civil penalties, attorney fees and costs. Defendants routinely signed off on consent decrees containing strong injunctive provisions in return for a reduced payment of attorney fees and cost and suspension of the payment of civil penalties if the defendant complied with the injunctive provisions. These consent decrees did not routinely contain any provision concerning or prompting dissolution, disgorgement or sequestration as an initial remedy or as a remedy for a violation of the consent decree.

⁶⁵ FLA. STAT. ANN. § 501.207 (West 2008); VT. STAT. ANN. tit. 9, § 2458 (2007).

⁶⁶ See NAT'L CONSUMER LAW CTR., *supra* note 23, at 967-89.

⁶⁷ See *supra* note 58.

criteria for application of these kinds of structural remedies.

What would make a good case for using structural remedies for violations of state UDAP statutes in states that provide for them?

Let's examine a realistic hypothetical.⁶⁸ Suppose a state public enforcement agency charged with enforcing a UDAP statute knows of a nationwide pest control company that operates in that state and specializes in removing and protecting buildings from termite infestation. One of the basic techniques used to prevent and remove termites is to drill holes in the concrete foundation of a building and then inject poison to kill off and prevent termites from nesting. To be effective, these holes must be drilled through the foundation every few inches. This pest control company has made millions of dollars over the years and its employees, stock holders and corporate officers have all been paid handsomely for the success of this company. Upon further investigation, it turns out that the company sanctioned its employees to just drill through on every other foundation hole. Therefore, customers, even if they checked, would see the drill holes properly spaced but not know that only every other hole was actually drilled through so poison could be injected. Needless to say, many buildings remained infested with termites.

Let's consider a second hypothetical case.⁶⁹ Suppose a public enforcement agency is aware of a gas company that claims one of its gasoline products contains a special additive that will provide for a cleaner burning engine, lessen air pollution, and

⁶⁸ This example is based in part on a past investigation conducted by the Florida Attorney General's Office concerning a national pest control company. The investigation blossomed into a multi-state investigation in which the pest control company signed off on either a consent decree or an assurance of voluntary compliance which enjoined the company from committing the referenced unfair and deceptive trade practices.

⁶⁹ This example is based on some evidence received by state Attorneys General in the early 1980's as part of the multi-district antitrust litigation against the major oil companies for price fixing. Although not specifically part of the complaint or the eventual resolution of this litigation, some investigative reports and other testimony revealed that the oil companies may have been engaged in the referenced unfair and deceptive trade practice. Even today if a consumer takes the time to watch oil company trucks fill up gas tanks at service stations, you will notice that the different grades of gasoline may have a different color. The purpose of this example is again to suggest that this kind of unfair and deceptive trade practice scheme may be appropriate for initial structural remedies.

increase gas mileage at a cost of a few cents per gallon. Upon further investigation, it turns out that the only difference between this gas company's fuel grades is color. Consumers who purchase this gas based on these representations do not realize an increase in gas mileage, air pollution is not decreased, and the engine wears out just as quickly as it does with any other grade of gas is used.

Each of these cases is an example of an unfair trade practice, because consumers paid either for work that was not performed or a product that did not perform.⁷⁰ The cases, as well, are examples of deceptive trade practices, because consumers were induced to pay for work or for a product believing the promise that the company would perform a complete job or that the product would provide enhanced performance⁷¹.

Is it not true that these kinds of UDAP cases justify the nationwide pest control company, the gas company and the individual policy makers for both companies forfeit the privilege to conduct business? In fact, such business behavior merits the dissolution of the business entities and the sequestration of the businesses' assets, including the individual policy makers' assets, to insure full payment of consumer restitution, civil penalties and the public enforcer's attorney fees and costs. Such a remedy protects consumers and provides a visible deterrent to others from launching unfair and deceptive trade practice schemes.⁷² Moreover, removing barriers to initially employing this kind of remedy, such as multiple violations of previously issued injunctions, enhances swift and effective public enforcement of state UDAP prohibitions. The failure of state legislatures and for that matter, the Federal Trade Commission, to incorporate the structural remedies of dissolution, disgorgement and sequestration as remedies of first resort in these kinds of cases seems short-sighted. The reluctance of public enforcement agencies to invoke structural remedies as provided by state UDAP statutes is ill-conceived.

One's view of the proposition put forth in this article may very well depend on whether he or she looks at the ability to engage in business as a "right" or a privilege. If one views the

⁷⁰ NAT'L CONSUMER LAW CTR., *supra* note 23, at 204; *Patterson v. Beall*, 19 P.3d 839, 846 (Okla. 2000).

⁷¹ NAT'L CONSUMER LAW CTR., *supra* note 23, at 144-45.

⁷² NAT'L CONSUMER LAW CTR., *supra* note 23.

opportunity to conduct business and make money as a privilege that is not guaranteed but conditionally granted as long as the business treats people fairly and honestly, then aggressively revoking this privilege of doing business and disgorging profits from a business and individuals who commit unfair or deceptive trade practices is not only an appropriate remedy but also a necessary one. No business should get a free pass on unfair or deceptive trade practice.⁷³ If, however, one views the capacity to operate a successful business as a right that cannot be forfeited but only policed and managed, then revoking the right to do business cannot be sanctioned and only in the most radical of circumstances can businesses be dissolved and profits be disgorged for committing unfair or deceptive trade practices. The later view has no basis in constitutional law⁷⁴ or in the legislative intent or purpose of UDAP statutes⁷⁵. The former confirms what UDAP statutes are designed to do.⁷⁶

V. CONCLUSION

Public enforcement of state UDAP statutes has long been viewed as the front lines of consumer protection.⁷⁷ Reluctance or hesitancy on the part of public enforcers to use the full range of remedies available against violators of state UDAP statutes shortchanges the consumer. Is there risk in aggressively seeking remedies that include an injunction against a company and individuals from conducting business and dissolving business entities and sequestering assets of violator business? Of course, there is – the public enforcement agency might not get the requested relief, even though courts are not inclined to overrule proposed remedies for unfair and deceptive trade practices if the remedy is related to the violation.⁷⁸ Could there be political fallout orchestrated by the business community? I dare say there would be – but not from the legitimate businesses that have also

⁷³ *Id.*

⁷⁴ *See* U.S. CONST. (the Constitution does not dictate that one has a fundamental right to operate a business).

⁷⁵ *See* NAT'L CONSUMER LAW CTR., *supra* note 23, at 1.

⁷⁶ FTC Proposal, *supra* note 39.

⁷⁷ *See* 2008 FED. TRADE COMM'N, THE FTC IN 2008: A FORCE FOR CONSUMERS AND COMPETITION (Mar. 2008), *available at* <http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf> (last visited Aug. 11, 2008).

⁷⁸ NAT'L CONSUMER LAW CTR., *supra* note 23, at 948-49.

been injured by the UDAP violations. Would there be criticism that the public enforcer abused its discretion in seeking such a “harsh” remedy from a business entity and individuals? Yes, but not from the consumers who were treated unfairly and deceptively.

It will take courage and funding for public enforcers to set out on a path that vigorously seeks the full range of remedies available under state UDAP statutes. In hard economic times, to not seek those remedies just adds more hardship to those least capable of protecting themselves from business predators. At some point some government enforcer will perhaps have the nerve to say to UDAP violators, in the words of Jim Morrison, “This is the end. . .my friend.”⁷⁹

⁷⁹ THE DOORS, *The End*, on THE DOORS (Elektra Records 1967).