Wyoming Law Review

Volume 13
Number 2 *Special Section: Consumer Protection Law*

Article 2

January 2013

Consumer Protection Laws: Not Just for Consumers

Megan Bittakis

Wyoming Law Review

VOLUME 13 | *2013* | NUMBER 2

CONSUMER PROTECTION LAWS: NOT JUST FOR CONSUMERS

*Megan Bittakis**

I. Introduction

Sometimes college students make bad decisions. And sometimes the consequences of those decisions are both awful and unforeseeable.[1] Take the case of Heather Kertesz, a student at Lynn University in Florida.[2] One night, she made the not-unusual decision to go to a party.[3] Unfortunately for Ms. Kertesz, this party was hosted by people who were in the business of filming pornography.[4] Although Ms. Kertesz did not know this, the hosts took pictures and made videos of the party for a pornographic website.[5] They took Ms. Kertesz's picture without her permission, and when they asked her to sign a waiver and release, she said no.[6] Unsurprisingly, she was then asked to leave the party.[7]

After the hosts asked her to leave, Ms. Kertesz may have thought the consequences of her decision to attend the party were over, but she was mistaken. Instead, according to the complaint she filed in the United States District Court for the Southern District of Florida, the hosts used the picture of her, taken without her permission, in an especially humiliating way. Her picture was

---

* Associate Professor of Law, Barry University School of Law. The author thanks Barry University School of Law for the Summer Grant that made this article possible.

[1] *See generally* Kertesz v. Net Transactions, Ltd., 635 F. Supp. 2d 1339, 1342–43 (S.D. Fla. 2009) (outlining the plight of an unsuspecting individual and a pornographic website that posted her likeness on their website).

[2] *Id.* at 1342.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

> displayed in the photomontage of the advertising banner that appears on every page of the college wild parties website. It is the first image that users see upon gaining access to the website. The image is of Plaintiff's smiling face while viewing a male and female engaged in sodomy. Plaintiff's head and face were, however, cropped or "photoshopped" from a separate image and placed on the banner to appear as if Plaintiff is watching the couple as the sexual act took place.[8]

Due to that decision to go to a party, Ms. Kertesz was placed in a humiliating situation and sought redress.[9] But should her remedy come under the consumer protection laws, which are intended to remedy wrongs suffered by consumers due to fraudulent and deceptive trade practices?[10] It would seem as though there was a deceptive act, as Ms. Kertesz was portrayed doing something she did not do. But does Ms. Kertesz fall under the umbrella of entities that the consumer protection law was designed to protect? She is not a consumer, as Ms. Kertesz certainly did not allege that she bought the pornography produced by the hosts of the party.[11] Does this alone exclude her from recovery under these laws?

Although not all courts agree, someone in Ms. Kertesz's situation might be able to avail herself of the consumer protection laws. In many jurisdictions, one need not be a consumer to take advantage of consumer protection laws.[12] In the district court where Ms. Kertesz filed her lawsuit, for example, there is a split of authority regarding whether one has to be a consumer to bring a claim for damages under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA).[13] Other states run the gamut of approaches to the issue of who can sue under their consumer protection laws,[14] which are usually referred to as "Little FTC

---

[8] *Id.* (citations omitted).

[9] *Id.* at 1342–43.

[10] *See generally* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 16 (2005) (stating that consumer protection laws prohibit unfair or deceptive trade practices).

[11] *Kertesz*, 635 F. Supp. 2d at 1349.

[12] *See infra* Part III (describing state consumer protection laws that do not formally require a person to be a consumer).

[13] Kelly v. Palmer, Reifler, & Assocs., P.A., 681 F. Supp. 2d 1356, 1360 (S.D. Fla. 2010); *Kertesz*, 635 F. Supp. 2d at 1349. *See generally* FLA. STAT. §§ 501.201 through .213 (2012) (containing FDUTPA).

[14] *See* Michael Flynn & Karen Slater, Feature Article, *All We Are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions*, 15 LOY. CONSUMER L. REV. 81, 87–91 (2003) (noting that although all of the states refer to either a "person" or "consumer" having standing, the interpretations, definitions, and limitations of these two words vary from state to state).

Acts," referring to the Federal Trade Commission Act (FTC Act).[15] Some states impose no restrictions on plaintiffs, while other states require plaintiffs to not only be consumers, but to be consumers of household products, thus eliminating businesses and governmental entities from the laws' protections.[16]

In those states that have adopted a more complicated analysis regarding who may bring a consumer protection suit, it appears that more resources are spent litigating standing than the actual merits of the case. Surely it is more important to society to determine whether a fraudulent or deceptive trade practice occurred than it is to determine whether the plaintiff that brought the consumer protection matter to the court's attention, and is trying to hold the defendant accountable, purchased some product. On the other hand, standing is an important consideration, as it relates to jurisdiction[17] and helps stem the tide of litigation flooding our courts.[18]

This article explores how various states address the question of who should be permitted to bring a private claim under the state's consumer protection laws. Next, the article recommends that states adopt very few restrictions on who should be permitted to sue under those laws. Allowing broad standing to potential plaintiffs serves many important goals, not the least of which is that it frees the courts to decide the important issues that arise under these cases—whether a deceptive practice was perpetrated and, if so, how that conduct should be remedied—rather than the courts spending their resources determining whether the plaintiffs can bring the consumer protection action in the first place. When states impose

---

[15] *See* Parker Allred, Note, *From the BCS to the BS: Why "Championship" Must Be Removed from the Bowl Championship Series*, 2010 UTAH L. REV. 183, 188 (2010) ("Because of the state acts' likeness with the FTC Act, commentators often call the statutes 'Little FTC Acts' or 'UDAP statutes.'"). *See generally* 15 U.S.C. §§ 41–58 (2011) (containing the FTC Act).

[16] *See* CAL. CIV. CODE § 1761(d) (West 2013) ("'Consumer' means an individual who seeks or acquires, by purchase or lease, any goods or services *for personal, family, or household purposes*." (emphasis added)). The 2013 version of the California Civil Code contains the same definition of "consumer" analyzed in *Schauer v. Mandarin Gems of California, Inc.*, 23 Cal. Rptr. 3d 233, 241 (Cal. Ct. App. 2005), which is discussed in Part V, *infra.*

[17] *See* Eder Bros., Inc. v. Wine Merchs., Inc., 880 A.2d 138, 143 (Conn. 2005) ("'The issue of standing implicates this court's subject matter jurisdiction.'" (quoting Fish Unlimited v. Ne. Utils. Serv. Co., 755 A.2d 860, 865 (2000), *overruled in part on other grounds*, Waterbury v. Washington, 800 A.2d 1102 (2002)); D. Wes Sullenger, *Only We Can Save You: When and Why Non-Consumer Businesses Have Standing to Sue Business Competitors Under the Tennessee Consumer Protection Act*, 35 U. MEM. L. REV. 485, 489, 492 (2005) (stating that standing and subject matter jurisdiction are intertwined when a statutory cause of action sets forth who may sue under it).

[18] T.M. *ex rel.* Enk v. Brophy, 124 F.3d 893, 896 (7th Cir. 1997) (Posner, C.J., majority opinion) ("Without such a [standing] limitation, not only would the federal courts be flooded by 'cause' suits (*really* flooded), but people who did have concrete stakes in a litigation would often be thrust aside by the ideologues." (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982))).

unnecessarily complicated tests for determining standing under the Little FTC Acts, the courts end up determining those issues, rather than getting to the crux of the lawsuit.

Part II of this article gives a brief rendition of the history of the FTC Act and the Little FTC Acts. Part III focuses on those states with very few restrictions on who can sue under their consumer protection laws. Part IV addresses those states that severely restrict who can sue, and Part V focuses on states where the claimant must be a consumer that purchased the good or service for personal use. Part VI explores the split in authority in Florida regarding who may sue under FDUTPA. Finally, Part VII explains the article's recommendation that most people and entities, not just those who would be considered "consumers," should have standing under the Little FTC Acts.

II. History of the FTC Act and the Little FTC Acts

In 1914, Congress created the Federal Trade Commission (FTC) in response to abuses by merchants that the common law could not remedy.[19] For example, merchants could engage in false advertising, but be immune from a breach of contract claim because the advertising occurred without the formation of a contract.[20] In addition, "[t]he law did not allow for a proactive approach to stop obviously fraudulent practices before an individual was injured."[21] Moreover, the damages that people were suffering due to the deceptive acts were often greatly exceeded by what it would cost to litigate the matters.[22]

When first created, the FTC focused on anti-trust issues, as Congress's main concern at the time was monopolies, and "the Act initially charged the Commission with regulating 'unfair methods of competition.'"[23] But, in response to United States Supreme Court rulings, Congress amended the FTC Act under the Wheeler-Lea Act of 1938 to prohibit deceptive and unfair trade practices.[24] Rather than trying to describe every possible unfair and deceptive trade practice, Congress left the power of determining what constitutes such trade practices to the FTC.[25]

---

[19] Schwartz & Silverman, *supra* note 10, at 7.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 7–8 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2000))).

[24] *Id.* at 8 & n.21 (citing FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 313 (1934); FTC v. Raladam Co., 283 U.S. 643, 654 (1931)).

[25] *Id.*

In the 1960s, people discovered that the FTC Act was not sufficient to protect consumers.[26] The nation's economy "changed from the personal, primarily local market of the nineteenth century, to the impersonal, international marketplace of the 1960s, [and] consumers were forced to look to government regulation to protect their interests."[27] Thus, the FTC encouraged the states to enact their own consumer protection laws.[28] These laws, which prohibit unfair or deceptive trade practices,[29] would eliminate some of the difficulties individuals faced in suing entities for being deceptive in the marketplace, such as omitting the intent element of fraud.[30]

The National Conference of Commissioners on Uniform State Laws developed a model consumer protection law for states to adopt in 1964, but it too was insufficient to protect individual consumers.[31] The proposed law did not permit courts to award attorneys' fees in all cases, and only the plaintiff in the case was entitled to injunctive relief, which was fairly worthless, as that plaintiff "is unlikely to be deceived repeatedly by the same merchant."[32]

To remedy these deficiencies, the Council of State Governments worked with the FTC and developed three variations of consumer protection laws, permitting each state to choose which variation best fit its needs and philosophies.[33] One of the variations drafted was a remedy to the defects in the previous statutes and meant to entice attorneys to take on these cases by providing for multiple damage awards and awards of attorneys' fees.[34] This approach was successful, resulting in more than half of the states adopting the recommended consumer protection law.[35] By the mid-1970s, every state had its own consumer protection law.[36] "The federal and state laws . . . were intended to complement each other: the federal authorities would provide the substantive guidelines while state authorities would provide enforcement and remedies."[37]

---

[26] Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1621 (1983).

[27] J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 356 (1992).

[28] Franke & Ballam, *supra* note 27, at 357; Note, *supra* note 26, at 1622. Another impetus for the states to take action was Ralph Nader's crusade against the automobile industry. Flynn & Slater, *supra* note 14, at 81.

[29] Schwartz & Silverman, *supra* note 10, at 16.

[30] Note, *supra* note 26, at 1622 n.7.

[31] *Id.* at 1623–24.

[32] *Id.* at 1624.

[33] *Id.*; Sullenger, *supra* note 17, at 492.

[34] Note, *supra* note 26, at 1622.

[35] *Id.* at 1624.

[36] *Id.* at 1622.

[37] Franke & Ballam, *supra* note 27, at 357.

Thus, these Little FTC Acts were created to address several policy concerns.[38] First among those concerns was that caveat emptor was no longer a fair doctrine because there was an imbalance of power between the seller and the buyer.[39] Second, defrauded consumers were not able to achieve vindication because the amount of money that would remedy the deceit was too small for it to be worthwhile for an attorney to litigate the case.[40] Third, those seeking to defraud consumers could conceivably believe that their chances of being punished were small, because they "know that federal and state government agencies can monitor and detect only a small fraction of the deceptive or fraudulent practices occurring in the marketplace."[41] If every one of their customers has the ability to sue them, however, then those sellers will not know when, where, or how many lawsuits they will have to defend, which in turn encourages them to refrain from engaging in deceptive practices to begin with.[42] Now, every state has its own consumer protection law, and every state allows private individuals to bring claims under those laws.[43] These private rights of action "were viewed as a way of avoiding direct government regulation, and instead allowing for private regulation by way of individual consumer actions."[44]

From their beginnings, both the FTC Act and some of the Little FTC Acts were intended to protect not just consumers, but also businesses.[45] As noted above, the FTC first concentrated on monopolies, and one of the purposes of the Little FTC Acts was to prevent "legitimate business from losing customers to unlawful business practices."[46] "This . . . statutory purpose is grounded in the . . . [FTC's] original charge to prohibit unfair competition."[47] Thus, even from their geneses, the consumer protection laws were intended to protect more people and entities than just those falling into the "consumer" category.

III. Very Few Restrictions on Standing

Some states do not limit who can sue under their consumer protection laws to consumers or even consumers and businesses. Instead, they do not place any restrictions on who may be a plaintiff under their Little FTC Acts. One such state

---

[38] Note, *supra* note 26, at 1625.

[39] *Id.*

[40] *Id.* at 1626.

[41] *Id.*; Flynn & Slater, *supra* note 14, at 82.

[42] Note, *supra* note 26, at 1626.

[43] Schwartz & Silverman, *supra* note 10, at 16–17. *See also* Rob Sand, Note, *Fraud's Final Frontier: Iowa's Battle Over Becoming the Final State to Allow Private Consumer Fraud Actions*, 35 J. Corp. L. 615, 617 (2010).

[44] Franke & Ballam, *supra* note 27, at 357.

[45] Flynn & Slater, *supra* note 14, at 82–83.

[46] *Id.*; *see also supra* note 23 and accompanying text.

[47] Flynn & Slater, *supra* note 14, at 82–83.

is Connecticut.[48] Under Connecticut's consumer protection law, known as the Connecticut Unfair Trade Practices Act (CUTPA), "any person" that suffers an ascertainable loss can file a lawsuit under CUTPA for damages.[49] This "any person" language was given full effect in *Eder Brothers v. Wine Merchants, Inc.*, where one wholesale wine distributor sued its competitor wholesale wine distributor under CUTPA.[50]

The *Eder Brothers* court began with an explanation of why standing is important.[51] The plaintiff must have an actual interest in the subject matter for the court to have subject matter jurisdiction over the controversy.[52] The actual interest in the subject matter can be as insubstantial as a "colorable claim of injury."[53] There are two ways actual interest, i.e., standing, can be established: by being "statutorily aggrieved" or "classically aggrieved."[54] To be statutorily aggrieved, one must simply allege an injury to an interest that the legislature deemed protected.[55] "A statute need not specifically provide that certain persons come within its protection in order to establish aggrievement as long as that protection may be implied fairly."[56]

In determining that the wholesale wine distributors did have standing under CUTPA, the Supreme Court of Connecticut noted that the statute was to be construed liberally.[57] The Connecticut State Legislature intended CUTPA to protect not just consumers, but also businesses.[58] Evidence of this is the broad interpretation of CUTPA, resulting in its application to conduct that occurs without consumer injury.[59] Thus, CUTPA applies to anything that would fall within the general description of consumer activity.[60] CUTPA's purpose is

---

[48] Eder Bros. v. Wine Merchs., Inc., 880 A.2d 138, 150 (Conn. 2005).

[49] CONN. GEN. STAT. § 42-110g(a) (2012).

[50] 880 A.2d at 141.

[51] *Id.* at 143.

[52] *Id.*

[53] *Id.* (quoting State v. DeCaro, 745 A.2d 800, 815 (Conn. 2000)).

[54] *See id.* (citing Steeneck v. Univ. of Bridgeport, 668 A.2d 688, 692 (Conn. 1995)). Plaintiffs with a "specific, personal and legal interest in the subject matter" and who have "been specially and injuriously affected" are considered classically aggrieved. Zoning Bd. of Appeals v. Planning & Zoning Comm'n, 605 A.2d 885, 888 (Conn. App. Ct. 1992) (citing Cannavo Enters., Inc. v. Burns, 478 A.2d 601, 603–04 (Conn. 1984)).

[55] *Eder Bros.*, 880 A.2d at 144 (quoting Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1194 (Conn. 2003)).

[56] *Id.* (citing Buchholz's Appeal from Probate, 519 A.2d 615, 620 (Conn. 1987)).

[57] *Id.* at 149.

[58] *Id.* (citing McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1190–91 (Conn. 1984)).

[59] *Id.* (quoting Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1019 (Conn. 1995)).

[60] *Id.*

to protect the public, not a particular entity within the public.[61] Thus, even a wholesale wine distributor has standing under CUTPA to sue a competing wholesale wine distributor.[62]

In Arizona, the only standing requirement a private claimant must show under Arizona's Consumer Fraud Act is that the claimant suffered damage.[63] What is interesting about Arizona is that the legislature did not create a private right of action under its Consumer Fraud Act.[64] Instead, the Supreme Court of Arizona, sitting en banc, inferred a private cause of action from the following language in the Act: "'The provisions of this article shall not bar any claim against any person who has acquired any monies or property, real or personal, by means of any practice declared to be unlawful by the provisions of this article.'"[65] According to the Supreme Court of Arizona, this provision "[c]learly . . . contemplates that a person who has been damaged by the practices declared to be unlawful may exert a claim by reason of such acts."[66] The court relied on a line of United States Supreme Court cases finding private civil actions based on violations of criminal statutes.[67] Those cases determined that plaintiffs have a private claim, inferred from the criminal statute, when the following circumstances exist: the criminal sanctions are not sufficient to fully effectuate the statutes' intent, the plaintiffs' interests are "'within the class that the statute was intended to protect,'" and the injury "'that had occurred was of the type that the statute was intended to forestall.'"[68]

In further support of creating a private cause of action when the legislature did not expressly do so, the Supreme Court of Arizona stated there is "a trend away from the doctrine of caveat emptor toward caveat venditor."[69] Sounding more like legislators enacting a law than judges interpreting one, the court stated, "Without effective private remedies the widespread economic losses that result

---

[61] *Id.*

[62] *Id.* at 150.

[63] Sellinger v. Freeway Mobile Homes Sales, Inc., 521 P.2d 1119, 1122 (Ariz. 1974).

[64] *Id.*

[65] *Id.* (quoting ARIZ. REV. STAT. § 44-1533 (1967)).

[66] *Id.*

[67] *Id.*

[68] *Id.* (quoting Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201–02 (1967)).

[69] *Id.* (citing William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 272 (1971) ("Whereas *caveat emptor* had long been the dominant public policy in the U.S. toward consumers, substantial new requirements and risks have been imposed upon sellers; some even assert that *caveat vendor*—let the seller beware—should become the dominant theme of commercial law, at least insofar as consumer interests are concerned.")).

from deceptive trade practices remain uncompensable and a private remedy is highly desirable in order to control fraud in the marketplace."[70]

After *Sellinger*, which created the private cause of action under Arizona's Consumer Fraud Act,[71] the Arizona courts were left to determine exactly who could bring a claim under this private cause of action. The Ninth Circuit Court of Appeals confronted this issue in *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, when an Arizona wine distributor made a counterclaim under the Act against a California wine supplier.[72] The Ninth Circuit stated that a plaintiff under Arizona's consumer protection law must be a buyer or a target of deceptive advertising.[73] Because the claimant was neither, it could not maintain a claim under the Consumer Fraud Act.[74] Interestingly, the Ninth Circuit did not cite anything—statutes, cases, or legislative history—to support its conclusion that one must be a buyer or a target of deceptive advertising to be able to avail oneself of the Consumer Fraud Act.[75] Instead, the Ninth Circuit quoted the provision of the Arizona Act that states it is "illegal to commit fraud or deception 'in connection with the sale or advertisement of any merchandise.'"[76] The court then stated, "The clear intent of this provision is to protect unwary buyers from unscrupulous sellers."[77] This, then, led the court to its conclusion that only a buyer or "target of deceptive advertising" can maintain the judicially created private cause of action under the Consumer Fraud Act.[78]

Surprisingly, in a case decided after *Sutter Home Winery*, the federal district court for Arizona phrased the standing requirement differently than as "a buyer [or a] . . . target of deceptive advertising."[79] In *Gerber v. Wells Fargo Bank, N.A.*, the plaintiff alleged that the bank sold the junior lien on the property without disclosing that it was a junior lien, even though the bank also held the senior lien.[80] The plaintiff attempted to allege a claim under Arizona's Consumer Fraud Act, and the district court stated, "*Sellinger* did not establish the limits of this private right, except that the claimant must be 'a person who has been damaged.'"[81]

---

[70] *Id.*

[71] *Id.*

[72] 971 F.2d 401, 404–05 (9th Cir. 1992).

[73] *Id.* at 407.

[74] *Id.*

[75] *Id.*

[76] *Id.* (quoting ARIZ. REV. STAT. § 44-1522 (1967)).

[77] *Id.*

[78] *Id.*

[79] *Id.*; *see* Gerber v. Wells Fargo Bank, N.A., No. CV 11–01083–PHX–NVW, 2011 WL 5007921, at *3 (D. Ariz. Oct. 20, 2011) (discussing standing under Arizona Consumer Fraud Act).

[80] *Gerber*, 2011 WL 5007921, at *1–2.

[81] *Id.* at *3.

"[A] *person* who has been damaged"[82] includes a broader category of plaintiffs than "a *buyer* [or a] . . . target of deceptive advertising."[83] "Person" indicates a broader category of plaintiffs than "buyer." The claimants in the Connecticut wine distributor case were not buyers, yet they could maintain a private claim under their state's Little FTC Act, which states that any person that suffers a loss may maintain an action.[84]

IV. Substantial Restrictions on Standing

Although some states' Little FTC Acts say that "any person" may bring a claim under the act, like CUTPA,[85] other courts within those states limit that broad language. One example is Colorado.[86] In *Hall v. Walter*, the Supreme Court of Colorado, sitting en banc, developed those restrictions.[87] The plaintiffs sued the developers, who advertised lots as having access via a road on the plaintiffs' property, for violating the Colorado Consumer Protection Act (CCPA), because their road did not provide access to the developers' lots.[88] The developers argued that the plaintiffs did not have standing under the CCPA because the plaintiffs were third-party non-consumers.[89] The developers made this argument even though the CCPA specifically states that "any person" may recover damages under it against any other person that violated the Act.[90] Although the statute says "any person," the court held that "any person" could not be permitted to bring a suit under the statute because that would result in the statute suffering constitutional infirmities.[91] In *Wimberly v. Ettenberg*, the Supreme Court of Colorado articulated a test to determine whether a plaintiff has such constitutional standing to pursue an action.[92] As part of that test, "the plaintiff [must have] suffered injury in fact to a legally protected interest as contemplated by the statutory or constitutional provisions."[93]

The Supreme Court of Colorado did note that the statute also uses the word "consumer," and held that "any person" is broader than the term "any

---

[82] *Id.* (emphasis added).

[83] *Sutter Home Winery, Inc.*, 971 F.2d at 407 (emphasis added).

[84] Hall v. Walter, 969 P.2d 224, 235–38 (Colo. 1998) (en banc); Eder Bros. v. Wine Merchs., Inc., 880 A.2d 138, 149 (Conn. 2005); *see* CONN. GEN. STAT. § 42-110g(a) (2004).

[85] § 42-110g(a).

[86] *See, e.g.*, *Hall*, 969 P.2d 224.

[87] *Id.* at 234.

[88] *Id.*

[89] *Id.* at 230.

[90] *Id.* at 229 (quoting COLO. REV. STAT. § 6-1-113(1) (1998)).

[91] *Id.* at 230.

[92] 570 P.2d 535, 539 (Colo. 1977).

[93] *Id.* at 539; *accord Hall*, 969 P.2d at 230.

consumer."[94] "Consumer" includes a person that did not purchase anything, such as a potential consumer, and the statute's purposes of deterring and punishing deceptive practices and promoting private enforcement are advanced by allowing some non-consumers to sue.[95]

Although the Supreme Court of Colorado declared that "any person" can bring a claim under the CCPA, the court then decided that "any person" actually means any person that can meet a five-element test.[96] The five elements of Colorado's test are the following: (1) the defendant committed a deceptive trade practice; (2) the deceptive act must be related to the defendant's business; (3) the practice must significantly impact the public as consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the deceptive practice caused the plaintiff's injury.[97]

In *Hall*, the Supreme Court of Colorado found the plaintiffs met the test.[98] Regarding the first element—that the defendant committed a deceptive trade practice—the court found that the defendants telling prospective purchasers that there was legal access over the plaintiffs' property, when there was not, was a deceptive practice.[99] The second element of the test was easily met, because there was no question that the deception occurred within the conduct of the defendants' business, as the defendants were making the misrepresentation in the course of trying to sell the lots.[100] "Third, there is no dispute that [the defendants'] deceptive practices implicated the public as consumers because the misrepresentations were directed to the market generally, taking the form of widespread advertisement and deception of actual and prospective purchasers."[101]

The last two elements of the standing test distinguish a private cause of action from an attorney general's cause of action.[102] The fourth element, that

---

[94] *Hall*, 969 P.2d at 231.

[95] *Id.*

[96] *Id.* at 234. In articulating the five-element test, Colorado followed Washington's lead. *Id.* at 233–34. Washington's statute contains the "any person" language, and its highest court articulated a five-part test to determine whether a non-consumer could bring a claim under its Little FTC Act. *Id.* (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 535 (Wash. 1986)).

[97] *Id.* at 234–35. At least one critic recommends that his state adopt this test, with some modifications, to permit businesses to sue their competitors under that state's consumer protection law. Sullenger, *supra* note 17, at 507–10.

[98] *Hall*, 969 P.2d at 235–38.

[99] *Id.* at 235.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 236.

there was an injury to a legally protected interest, is satisfied by injuries to the plaintiffs' property, which included physical damage to the locks, fences placed on the property, and lost leasing opportunities.[103] Finally, the fifth element—that the deceptive practice caused the plaintiffs' injury—was met when the plaintiffs' fences and locks were damaged and their gates left open on their property, which was due to the defendants' misrepresentation that there was legal access over the plaintiffs' property.[104] Thus, the plaintiffs in this case, even though not consumers of the lots the defendants were selling, could recover under Colorado's Little FTC Act.[105]

Although the CCPA was drafted so that "any person" could seek recovery for damages, the Supreme Court of Colorado grafted a five-element test onto the Act to establish standing.[106] This seems to contradict the intent of the Colorado legislature. Surely if the legislature wanted a five-element test to determine who could sue for damages under the CCPA, then the legislature would have articulated such a requirement. The Supreme Court of Colorado does not explain why its traditional standing inquiry from the *Wimberly* case is insufficient in cases regarding private claims under the CCPA, or why a five-element test must be used instead.[107]

Defendants to CCPA actions have grabbed ahold of the five-element test and used it to prevent claims under the CCPA, and their most potent ally is the third element—that the deceptive practice must significantly impact the public.[108] It was this element that prevented the plaintiffs in *Hildebrand v. New Vista Homes II, LLC*, from being able to state a claim under the CCPA.[109]

In *Hildebrand*, the plaintiffs purchased a home that was built with an insufficient basement floor.[110] The court found that plaintiffs did not establish the public impact requirement, despite the fact that thirty-eight homes were built with insufficient flooring.[111] This third element of the five-element test itself has three factors the court must consider in determining whether there was a public impact.[112] Those three factors are the number of consumers directly affected by

---

[103] *Id.*

[104] *Id.* at 237.

[105] *Id.* at 238.

[106] COLO. REV. STAT. § 6-1-113(1) (1998); *Hall*, 969 P.2d at 233–34.

[107] *Hall*, 969 P.2d at 233–34.

[108] *Id.* at 234–35 (articulating the five elements).

[109] 252 P.3d 1159, 1169 (Colo. App. 2010).

[110] *Id.* at 1162.

[111] *Id.* at 1169.

[112] *Id.*

the deceptive practice; the sophistication and bargaining power of the consumers affected by the practice, as compared to the alleged deceivers' sophistication and bargaining power; and whether the practice previously impacted consumers or has the significant potential to do so in the future.[113]

The *Hildebrand* court found that the plaintiffs did not present any evidence establishing the three factors of the public impact requirement.[114] The court stated that even though thirty-eight homes had the same insufficient construction as the plaintiff's home, "this fact does not alone show public impact arising from defendants' alleged misrepresentations concerning soils and flooring. Nor does it show how any misrepresentations had previously impacted other customers or would have a significant potential to do so in the future."[115] The court found it determinative that the plaintiffs did not present evidence regarding whether those thirty-eight homes failed, what was said to those purchasers, or how many people received the defendants' brochure regarding a ten-year structural warranty.[116] The plaintiffs only provided evidence that the brochure was given to those that wished to purchase homes in that subdivision, which was not enough to meet the three factors for the public impact element, as the misrepresentations were not directed to the general market.[117] In addition, the "[p]laintiffs also presented no evidence concerning the relative bargaining power and sophistication of other purchasers."[118]

Hildebrand demonstrates that, although the Colorado legislature determined that "any person" could bring an action for damages under the CCPA, the Colorado courts have severely curtailed the effect of this language by imposing a five-element test, with one of those elements encompassing a three-factor analysis.[119] Even with evidence of the bargaining inequalities between the parties to the lawsuit, and evidence that other misrepresentations were made to prospective purchasers, the plaintiffs in *Hildebrand* were unable to recover under the CCPA for the misrepresentations made to them.[120]

In addition, alleging a deceptive practice emanating from a public program is insufficient in Colorado to meet the public impact element.[121] In *Brodeur v.*

---

[113] *Id.* (quoting Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 149 (Colo. 2003)).

[114] *Id.*

[115] *Id.* (citation omitted).

[116] *Id.*

[117] *Id.* at 1170.

[118] *Id.*

[119] Hall v. Walter, 969 P.2d 224, 234–35 (Colo. 1998) (en banc); *Hildebrand*, 252 P.3d at 1169.

[120] *Hildebrand*, 252 P.3d at 1169–70.

[121] Brodeur v. Am. Home Assurance Co., 169 P.3d 139, 156 (Colo. 2007) (en banc).

American Home Assurance Co., the plaintiff alleged a violation of the CCPA relative to the administration of the workers' compensation program.[122] The public nature of the workers' compensation program was not enough per se to satisfy the public impact element.[123] The Supreme Court of Colorado, once again sitting en banc, stated that if the public impact element were satisfied solely by the public nature of the defendant's business, then the element would be meaningless.[124] Instead, it is the challenged practice that must significantly impact the public; the public nature of the business could be a factor, but it is not sufficient, standing alone, to meet the public impact requirement.[125] A private dispute over a claim does not necessarily indicate that others have the same issue with the program.[126] Thus, even though the plaintiffs alleged a deceptive practice in the administration of such a vast and public program as the workers' compensation program, this was not enough, per se, to establish the public impact element that the Supreme Court of Colorado grafted onto the CCPA.

The public impact requirement, which is the minority view,[127] is an unnecessary burden on the residents of Colorado. Colorado's consumer protection act has a provision allowing its attorney general or a district attorney to bring a claim against anyone that engages in a deceptive trade practice.[128] Why have a public impact requirement in a private suit when such a provision for remedying a public harm exists?[129] The "Big" FTC Act is intended to reach those actions that impact the public, not the Little FCT Acts.[130] In addition, this directly contradicts the directive to give the CCPA a liberal construction, which the *Hall v. Walter* court recognized should be done.[131] Construing the CCPA to limit the phrase "any person" to "any person that can demonstrate these five elements, including three factors under the third element" is not construing the phrase "any person"

---

[122] *Id.* at 143.

[123] *Id.* at 155.

[124] *Id.* at 155–56.

[125] *Id.* at 156.

[126] *Id.* The Supreme Court of Colorado did not dismiss the CCPA claim outright, however; instead, it affirmed the appellate court's decision to remand the claim back to the trial court for more discovery regarding the public impact requirement. *Id.*

[127] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 537 (Wash. 1986); Jonathan A. Mark, Comment, *Dispensing with the Public Interest Requirement in Private Causes of Action Under the Washington Consumer Protection Act*, 29 SEATTLE U. L. REV. 205, 206 (2005).

[128] COLO. REV. STAT. § 6-1-112(1) (2012).

[129] *See* Schwartz & Silverman, *supra* note 10, at 67 ("[P]rivate causes of action . . . should provide recovery only for real, individual harms.").

[130] *See* Franke & Ballam, *supra* note 27, at 362 ("By contrast, the state laws tend not to limit their reach to conduct affecting a public injury, and in several cases the statutes specifically declare that no showing of such public injury is necessary to obtain private relief.").

[131] Hall v. Walter, 969 P.2d 224, 230 (Colo. 1998) (en banc).

liberally. Finally, requiring a five-element test generates useless litigation, as parties argue over whether all of those elements are met, rather than litigating the heart of the matter—and what the Colorado legislature hoped to prevent by enacting the CCPA—which is whether a deceptive practice was employed.

V. LIMITING STANDING TO CONSUMERS OF PERSONAL GOODS OR SERVICES

Unlike Colorado, in some states it is the legislature, and not the courts, that limits who may obtain relief under their Little FTC Acts. One example of such a state is Alabama, whose statute specifically says the plaintiff must be a consumer who suffers monetary damage.[132] In addition, "consumer" is defined under the statute as "[a]ny natural person who buys goods or services for personal, family or household use."[133]

The scope of standing under Alabama's consumer protection law is discussed, albeit briefly, in *Deerman v. Federal Home Loan Mortgage Corp.*[134] In this case, the plaintiffs were home mortgagors that alleged, inter alia, deception regarding cancellation and notice of private mortgage insurance.[135] The court first looked at the Alabama Deceptive Trade Practices Act (DTPA), and, noting that it only permitted consumers to have standing, stated that the definition of a consumer under the DTPA is one who buys goods or services for personal, family, or household use.[136] Thus, "[f]or the [plaintiffs] to have a cause of action under this statute, a mortgage loan must fit within the statute's definition of a good or service."[137] Under the DTPA, a service is "[w]ork, labor, and other services, including but not limited to services furnished in connection with the sale or repair of goods."[138]

Before determining whether a mortgage is a good or service, the court pointed out that most banks are exempt from the DTPA, due to the fact that other agencies regulate banks, and most mortgages are made by such banks.[139] Thus, the DTPA does not apply to most mortgages.[140] Using this to infer that the Alabama Legislature had no intention of mortgages falling under the DTPA's definition of goods or services, the court stated, "No court has held that a loan

---

[132] ALA. CODE § 8-19-10(a) (2012).

[133] *Id.* § 8-19-3(2).

[134] 955 F. Supp. 1393 (N.D. Ala. 1997), *aff'd without opinion*, 140 F.3d 1043 (11th Cir. 1998).

[135] *Id.* at 1397.

[136] *Id.* at 1399.

[137] *Id.*

[138] ALA. CODE § 8-19-3(7) (1993), *quoted in Deerman*, 955 F. Supp. at 1399.

[139] *Deerman*, 955 F. Supp. at 1399.

[140] *Id.*

is a good or service under this statute, and this court will not be the first to do so."[141] Because the court decided that a mortgage is not a good or service, the plaintiffs "do not fall within the definition of consumer under the statute with respect to their mortgage, and they do not have a private right of action under [the DTPA]."[142]

California's Little FTC Act is similar to Alabama's regarding standing. Under the language in California's Consumers Legal Remedies Act, relief is restricted to consumers that have suffered "any damage,"[143] and the word "consumer" is limited by its definition under the Act, which is "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."[144]

California courts seem to interpret this definition restrictively, as Sarah Jane Schauer discovered when she tried to sue the jeweler that sold her ex-husband her engagement ring.[145] The appellate court affirmed the trial court's decision that Schauer could not state a claim against the jeweler under the Consumers Legal Remedies Act because Schauer was not the consumer.[146] Schauer alleged that the jeweler appraised the ring her ex-husband bought for her from them at $45,500, but that it was only worth approximately $22,000.[147] The appellate court decided that Schauer did not have a claim under the Act because she was not the consumer—it was her ex-husband that bought the ring, and therefore he was the consumer.[148] Schauer's "ownership of the ring was not acquired as a result of her own consumer transaction with defendant, and without an assignment of [her ex-husband's] rights, she does not fall within the parameters of consumer remedies under the Act."[149]

When faced with the identical facts as in *Schauer*, the State of Florida sided with those fiancées that have been deceived. In *Warren v. Monahan Beaches Jewelry Center, Inc.*, the plaintiff's fiancé bought her an engagement ring with a purchase price of $3,974.25,[150] but the plaintiff discovered, after it was given to her, that the

---

[141] *Id.*

[142] *Id.*

[143] CAL. CIV. CODE § 1780(a) (West 2013).

[144] *Id.* § 1761(d).

[145] Schauer v. Mandarin Gems of Cal., Inc., 23 Cal. Rptr. 3d 233 (Cal. Ct. App. 2005).

[146] *Id.* at 241.

[147] *Id.* at 235–36.

[148] *Id.* at 241.

[149] *Id.*

[150] The cubic zirconia engagement ring cost slightly less than the $45,500 at issue in *Schauer*. *Id.* at 235–36.

ring was made with cubic zirconia rather than a real diamond.[151] In determining whether the plaintiff could avail herself of Florida's Little FTC Act, the "Florida Deceptive and Unfair Trade Practices Act" (FDUTPA), the court noted that protecting consumers from suppliers that commit deceptive trade practices is one purpose of FDUTPA, and the plaintiff sufficiently alleged that the defendant-supplier committed a deceptive trade practice in a consumer transaction.[152] FDUTPA defined "'consumer'" as "'an individual; child, by and through its parent or legal guardian; firm; association; joint adventure; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; or any other group or combination.'"[153] Neither FDUTPA nor the cases interpreting it limited who can sue under its provisions to the immediate purchaser, and the court found that the plaintiff was in the category of consumers that the Act was designed to protect.[154] The court rephrased plaintiff's relationship to the transaction as "the beneficiary of the consumer transaction" and found that she was entitled to the remedies available under FDUTPA.[155]

Can the California and Florida decisions be reconciled? Both use the same words and phrases: "consumer" and "consumer transaction."[156] But the difference appears to be in how the states define "consumer." California's Little FTC Act states that a consumer is one that seeks to or acquires a good,[157] while Florida's Little FTC Act does not include any action on the part of the person; instead, it gives a list of nouns that can constitute a "consumer."[158] The fiancée in the California case did not acquire the diamond ring from the jeweler,[159] but the fiancée in the Florida case did not need to acquire the ring from the jeweler to be a consumer.[160] Instead, Florida's statutory definition of "consumer" was written so broadly that the Florida District Court of Appeal found that the plaintiff qualified as a consumer simply by being the person who was to benefit from the consumer transaction, even though she was not the one that acquired the ring from the jeweler.[161]

---

151 548 So. 2d 870, 871–72 (Fla. Dist. Ct. App. 1989).

152 *Id.* at 872–73 (citing FLA. STAT. § 501.202(2) (1985); Marshall v. W & L Enters. Corp., 360 So. 2d 1147 (Fla. Dist. Ct. App. 1978)).

153 *Id.* at 873 (quoting FLA. STAT. § 501.203(9) (1985)).

154 *Id.*

155 *Id.*

156 CAL. CIV. CODE §§ 1761(d), 1780(a) (West 2013); FLA. STAT. § 501.202(2) (1985); Schauer v. Mandarin Gems of Cal., Inc., 23 Cal. Rptr. 3d 233, 241 (Cal. Ct. App. 2005) (interpreting the California Civil Code's definition of "consumer").

157 CAL. CIV. CODE § 1761(d) (West 2013).

158 FLA. STAT. § 501.203(9) (1985).

159 *Schauer*, 23 Cal. Rptr. 3d at 241.

160 *See* FLA. STAT. § 501.203(9) (1985).

161 Warren v. Monahan Beaches Jewelry Ctr., Inc., 548 So. 2d 870, 873 (Fla. Dist. Ct. App. 1989).

Florida's approach does seem to follow the purpose of the statutes more closely than California's approach does: avoiding seller deception in consumer transactions that results in harm to the actual purchaser and the gift recipient. This is one of the evils that the Little FTC Acts were promulgated to address, but in the California case, the alleged harm goes unremedied.[162] Perhaps the California court was worried that allowing a gift recipient to sue would open the floodgates of litigation to meritless actions, but this concern is easily remedied by providing for an award of attorneys' fees to defendants, as well as plaintiffs, for claims asserted under the Little FTC Act.[163]

VI. Conflict Within Florida Regarding Standing

Some states cannot decide, even within their own borders, whether a plaintiff must be a consumer to avail herself of their consumer protection laws. One such state is Florida. In 2001, many years after the engagement ring case, the Florida Legislature amended FDUTPA, changing the word "consumer" to the word "person" in the provision setting forth who could bring a claim under the Act for damages.[164] Thus, the statute now reads, "In any action brought by a *person* who has suffered a loss as a result of a violation of this part, such *person* may recover actual damages, plus attorney's fees and court costs . . . ."[165] Previously, the statute stated, "In any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105 . . . ."[166]

One might think changing the word "consumer" to "person" would unambiguously broaden the category of people that can seek relief under FDUTPA. Contrary to this, several federal district court judges sitting in Florida have determined that the legislature, by eliminating the word "consumer," actually

---

162 *Schauer*, 23 Cal. Rptr. 3d at 241.

163 FDUTPA does provide for an award of attorneys' fees to the prevailing party, regardless of whether the prevailing party is the plaintiff or defendant. Fla. Stat. § 501.2105(1) (2012). California's Little FTC Act permits attorneys' fees to be awarded to the defendant if the court finds that the action was brought in bad faith. Cal. Civ. Code § 1780(e) (West 2013).

164 Kertesz v. Net Transactions, Ltd., 635 F. Supp. 2d 1339, 1349 (S.D. Fla. 2009). Notably, if a declaratory judgment or injunction is being sought, then the plaintiff must only be "anyone aggrieved by a violation of" FDUTPA. Fla. Stat. § 501.211(1) (2012).

165 Fla. Stat. § 501.211(2) (2012) (emphasis added). The engagement ring case occurred when the statute contained the word "consumer" instead of the word "person." *Warren*, 548 So. 2d at 872–73.

166 Fla. Stat. § 501.211(2) (2000) (emphasis added).

meant to retain the restriction on plaintiffs being "consumers."[167] One of those judges is Judge Kenneth A. Marra, who decided the *Kertesz v. Net Transactions, Ltd.*, case, discussed in the introduction to this article.[168]

In the *Kertesz* case, the defendant used the plaintiff's picture on a pornographic website without her knowledge or her consent.[169] One claim, of many, was brought under FDUTPA, and the court considered whether she had standing to sue, as she was not a consumer.[170] The court went directly to the legislative history of the statute, stating that the legislature replaced the word "consumer" with the word "person," not so non-consumers could sue under FDUTPA, but so businesses, in addition to people, could obtain relief under the Act.[171] This idea has support in the Senate Staff Analysis prepared regarding the amendments to FDUPTA.[172] In that analysis, the Senate Staff wrote that the legislature intended the remedies available

> under the FDUTPA . . . to be available to all persons, including businesses, [and] the Legislature has several times amended the definition of 'consumer' in the FDUTPA to clarify the intent to include businesses. Notwithstanding these amendments, courts have been inconsistent in their interpretations of the statute and its protections of businesses.[173]

Judge Marra then noted how section 1.01(3) of the Florida Statutes defines "person" to include "business."[174] "This legislative history suggests to the Court that the change in the word 'consumer' to 'person' served to clarify that businesses, just like individuals, could obtain monetary damages in FDUTPA cases."[175] Thus, as the plaintiff was not a consumer of the pornography, and instead was only a victim of its perpetrators, she could not recover damages under FDUTPA.[176]

---

[167] *Kertesz*, 635 F. Supp. 2d at 1349; Cannova v. Breckenridge Pharm., Inc., No. 08-81145-CIV, 2009 WL 64337, at *3 (S.D. Fla. Jan. 9, 2009) (Marra, J., opinion); Goodbys Creek, LLC v. Arch Ins. Co., No. 3:07-cv-947-J-33HTS, 2008 WL 2950112, at *8 (M.D. Fla. July 31, 2008) (Hernandez Covington, J., opinion); Badillo v. Playboy Entm't Group, Inc., No. 8:04CV591T30TBM, 2006 WL 785707, at *6 (M.D. Fla. Mar. 28, 2006) (Moody, J., opinion).

[168] *Kertesz*, 635 F. Supp. 2d at 1342; *see supra* notes 1–16 and accompanying text.

[169] *Kertesz*, 635 F. Supp. 2d at 1342.

[170] *Id.* at 1349.

[171] *Id.*

[172] *See* Senate Staff Analysis and Economic Impact Statement, CS/SB 208, at 3 (Fla. 2001), *available at* http://archive.flsenate.gov/data/session/2001/Senate/bills/analysis/pdf/2001s0208.cm.pdf, *quoted in Kertesz*, 635 F. Supp. 2d at 1349.

[173] *Id.*

[174] *Kertesz*, 635 F. Supp. 2d at 1349.

[175] *Id.*

[176] *Id.* at 1350.

Other judges have disagreed with the *Kertesz* court's reading of FDUTPA.[177] Judge Federico A. Moreno, Judge Marra's colleague on the bench for the Southern District of Florida, is one of them.[178] Despite serving on the same court, the two did not agree on whether Florida's Little FTC Act should be read to allow any person to recover, or whether it should be read to only permit consumers to recover.[179]

In *Kelly v. Palmer, Reifler, & Associates, P.A.*, the plaintiffs (parents of alleged shoplifters) received letters from the defendant written pursuant to the civil theft recovery act and demanding payment to avoid a lawsuit being filed against the plaintiffs based on their children's alleged thefts.[180] Among other claims, the plaintiffs sued under FDUTPA.[181] The defendant argued that the plaintiffs could not maintain a claim under Florida's consumer protection law because the plaintiffs were not consumers.[182] Contrary to the *Kertesz* court, the *Kelly* court found that the 2001 amendments to the statute changing the word "consumer" to "person" broadened the scope of potential plaintiffs.[183] The court construed the statute liberally, as the legislature directed it to do in section 501.202 of the Florida Statutes, and decided that one need not be a consumer to bring a claim for damages under FDUTPA.[184]

The *Kelly* court also responded to the *Kertesz* court's reasoning, pointing out that not only did the legislature change "consumer" to "person" in the statute, setting forth who could sue under FDUTPA for damages, but it also changed the definition of "consumer" to include businesses and any commercial entity.[185] "So at the same time the Legislature expanded the definition of 'consumer,' it replaced the term 'consumer' with 'person' in the section providing for monetary remedies for a violation of the statute."[186] If the intent were to ensure that businesses are included in those able to seek damages under FDUTPA, then the legislature would

---

[177] *Id.*

[178] Kelly v. Palmer, Reifler, & Assocs., P.A., 681 F. Supp. 2d 1356, 1360 (S.D. Fla. 2010) (Moreno, J., opinion).

[179] *Id.* at 1366; *Kertesz*, 635 F. Supp. 2d at 1350.

[180] *Kelly*, 681 F. Supp. 2d at 1362.

[181] *Id.* at 1363.

[182] *Id.* at 1372.

[183] *Id.* at 1372–73.

[184] *Id.* at 1373 (citing FLA. STAT. § 501.202 (2009) ("The provisions of this part shall be construed liberally to promote the following policies . . . .")). Despite this liberal construction, the plaintiffs still were not able to obtain relief under FDUTPA because their claim did not fall within the scope of "trade or commerce," which FDUTPA requires. *Id.* at 1374–76.

[185] *Id.* at 1373 n.9 (citing Laws of Fla. Ch. 2001-39 § 1).

[186] *Id.*

not have needed to replace "consumer" with "person" in section 501.211(2), as the legislature included businesses in the definition of "consumer."[187] Thus, changing "consumer" to "person" adds nothing to the statute in the way of including businesses that the word "consumer" did not already incorporate.

Furthermore, the *Kertesz* court does not explain why, if the change from "consumer" to "person" was done to include businesses, this necessarily precludes non-consumers from bringing a claim for damages under FDUTPA. "Business" is not the opposite of "non-consumer." Including businesses as potential plaintiffs does not mean that non-consumers cannot be plaintiffs, too.

Finally, the *Kertesz* court failed to confine itself to the plain language of the statute. Instead, it began with the legislative history of the statute, even though it did not first determine that the statute was ambiguous. This violates one of the canons of statutory construction—one should only look to the legislative history of a statute if there is an ambiguity.[188] Perhaps an ambiguity does exist in the use of the word "person" in section 501.211(2), but the *Kertesz* court does not articulate an ambiguity. In fact, it seems that the word "person" would have less ambiguity than the word "consumer," as it is difficult to conceive of an argument that an entity may or may not be considered a "person" under a statute, especially considering the expansive definition in section 1.01(3) of the Florida Statutes.[189]

Despite this split of authority, the Eleventh Circuit and the Florida state courts have not addressed the issue. Thus, Florida remains a state without clear guidance as to whether a non-consumer can bring a claim for damages under Florida's consumer protection laws. Unfortunately for litigants, because the split exists within one court—the Southern District of Florida—[190]there is no Florida district in which non-consumer plaintiffs who wish to file a FDUTPA claim can do so while avoiding the uncertainty regarding whether they have standing to bring the claim.

---

[187] *Id.*

[188] *See* Knowles v. Beverly Enters.–Fla., 898 So. 2d 1, 10 (Fla. 2004). The *Knowles* court noted the intermediate appellate court was correct in not looking to the legislative history because the statute was clear: "[b]ecause we agree that the language used by the Legislature is unambiguous, it is not necessary to examine the legislative history." *Id.*

[189] "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." FLA. STAT. § 1.01(3) (2012).

[190] *Kelly*, 681 F. Supp. 2d at 1356; Kertesz v. Net Transactions, Ltd., 635 F. Supp. 2d 1339, 1356 (S.D. Fla. 2009).

VII. Recommendation and Conclusion

After reviewing the many choices regarding what can constitute standing under the states' consumer protection laws, the best course is to allow as many potential plaintiffs as possible to have standing under the Little FTC Acts. Allowing everyone to sue, and not limiting plaintiffs to consumers, or consumers of personal goods, or imposing a five-element test to determine standing, helps bring to light those deceptive practices that are especially creative or difficult to detect. For example, a competitor to the unscrupulous merchant may be the one to detect the deceptive conduct due to the competitor's knowledge of the particular industry.[191] In addition, broad standing can serve as a deterrent—those who might wish to deceive will be on warning that almost anyone can hold them accountable under the consumer protection laws,[192] and the standing argument will be largely unavailable.

There is an argument that allowing anyone to sue under these acts will result in opening the floodgates of litigation, but this can be addressed by including provisions for attorneys' fees and costs to be awarded to the defendants if the plaintiffs' claims are baseless, either in fact or in law.[193] Finally, the policies supporting Little FTC Acts generally call for liberal construction (usually at the state legislatures' directive) to achieve the goals of protecting consumers and encouraging a fair marketplace.[194] Permitting most types of claimants to sue without placing restrictions on them, especially those restrictions not articulated in the acts themselves, follows this directive.

---

[191] *See* Sullenger, *supra* note 17, at 507 ("[T]he business competitor, because of its knowledge of the truth about its products or services, may be the only party able to take action to protect consumers.").

[192] This comports with one of the policy reasons supporting the enactment of private causes of action under the Little FTC Acts—that the potentially unscrupulous business will reconsider engaging in deceptive practices knowing that any and all could bring claims against it and that it can no longer count on the government's limited resources in combatting such practices to allow it to act deceptively with impunity. Flynn & Slater, *supra* note 14, at 82; Note, *supra* note 26, at 1626.

[193] Some states currently permit defendants to recover attorneys' fees from the plaintiffs if the plaintiffs lose their consumer protection act claim. *See* Fla. Stat. § 501.2105(1) (2012) (providing for an award of attorneys' fees to the "prevailing party," and thus not limiting recovery of such fees to a prevailing plaintiff).

[194] *E.g.*, Cal. Civ. Code § 1760 (West 2013) ("This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."); Fla. Stat. § 501.202 (2012) (FDUTPA "shall be construed liberally" to "promote [its] policies . . . ."); Wash. Rev. Code § 19.86.920 (2012) (requiring that the "act shall be liberally construed" to effect the legislature's intent); Hall v. Walter, 969 P.2d 224, 234 (Colo. 1998) (en banc) (noting that the court gave the consumer protection act a liberal construction in the past); Eder Bros., Inc. v. Wine Merchs., Inc., 880 A.2d 138, 143 (Conn. 2005) (remarking that Connecticut's consumer protection law "'must be liberally construed'" (quoting Fink v. Golenbock, 680 A.2d 1243, 1259 (Conn. 1996))).

As discussed above, the states are inconsistent regarding who may obtain relief under their Little FTC Acts. Allowing a broad range of potential plaintiffs, rather than limiting plaintiffs to "consumers" or imposing other restrictions, will advance the many purposes the Little FTC Acts were enacted to achieve, including deterrence of fraudulent and deceptive conduct, and permitting court resources to be spent on the more substantive issues of the consumer fraud cases before it.