

# Follow-On State Actions Based on the FTC's Enforcement of Section 5

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## Table of Contents

I. Introduction .....	2
II. Background .....	3
III. The Data.....	5
IV. Other Considerations .....	6
V. Conclusion .....	7
Appendix A: State Little FTC Acts and Their Characteristics .....	9

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## I. INTRODUCTION

The Federal Trade Commission (“Commission” or “FTC”) has historically been given a degree of deference by the courts,<sup>1</sup> particularly with regard to the construction of Section 5 of the Federal Trade Commission Act.<sup>2</sup> This deference is supportable so long as the Section 5 actions are solely within the province of a responsible agency charged with the protection of consumers and competition, namely the FTC. But what if those enforcement actions trickled down to state “Little FTC Acts,”<sup>3</sup> which incorporate Section 5 jurisprudence and confer private actions for treble damages on parties that previously had to work within the strict confines of federal antitrust statutes? This concern of ‘follow-on’ actions, recently raised by Chairman (then Commissioner) William Kovacic,<sup>4</sup> threatens to undermine the principle of affording deference to the Commission and to handicap the agency’s ability to be responsive to ever-changing competitive markets.

At present, Section 5 affords no private right of action, so Commission consent orders, administrative actions, and cases brought in federal courts are of no utility as precedent to private parties seeking redress. Instead, private parties that have suffered antitrust injuries must rely on traditional antitrust actions under the Sherman and Clayton Acts.<sup>5</sup> This potential difficulty for individual parties results in an advantage for the Commission and a net gain for competition as a whole. The Commission, as a result, is free to vigorously pursue companies that act anticompetitively—but short of committing a full fledged Sherman Act violation—without worry of opening the floodgates to litigation that might ultimately have a chilling effect on competition. These cases are often brought in the form of administrative actions that result in cease and desist orders or disgorgement of profits, and they do not lead to the mandatory trebling of damages required by the Sherman Act.

Courts, in turn, can give deference to the FTC on matters with which they have little experience, allowing the Commission to aggressively pursue bad actors in new or unfamiliar economic markets. The risk of showing this type deference is minimal: the Commission may call upon the precedent in future actions, when it will exercise its prosecutorial discretion and thoughtfully determine whether the

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<sup>1</sup> Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering The FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 443 & n. 41 (1991) (outlining the history of judicial deference afforded to the Commission).

<sup>2</sup> Federal Trade Commission Act § 5, 15 U.S.C.A. § 45 (West, Westlaw through 2006 Amendments).

<sup>3</sup> A Little FTC Act is a state act that tracks the language of FTC Act §5 (15 U.S.C. §45), and serves as a basis for state level antitrust and/or consumer protection actions. State act features, like treble or punitive damages, class actions, private rights of action, and FTC deference, vary widely. *See also*, Appendix A.

<sup>4</sup> In re Negotiated Data Solutions, 73 Fed. Reg. 5846, 5854 (Kovacic, C., dissenting) *available at* <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

<sup>5</sup> Sherman Act § 1-7, 15 U.S.C.A. § 1-7 (West, Westlaw through P.L. 110-284, July 23, 2008); Clayton Act § 1-15, 15 U.S.C.A. § 12-27 (West, Westlaw through P.L. 110-284, July 23, 2008).

conduct in question falls within the definition of “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”<sup>6</sup> By comparison, actions brought under the Sherman Act by the Commission or by private parties lead to mandatory treble damages and corresponding precedents to support future claims and class actions.

The clarity of this distinction, however, was recently questioned by Chairman Kovacic. In *In re Negotiated Data Solutions*,<sup>7</sup> the Commission voted 3-2 in favor of issuing a complaint and proposed consent order. Chairman Kovacic wrote a brief dissent that questioned the wisdom of issuing a broadly sweeping complaint that pushes the boundaries of Section 5, and pointed to a subtle problem that could undermine the fundamental rationale behind affording deference to the Commission. State Little FTC acts, the dissent noted, some of which have provisions that incorporate the Commission’s administrative law as well as federal decisional law into their construction, offer private rights of action on a state level.<sup>8</sup> The dissent explained that, “[a]s a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own [unfair methods of competition] or [unfair acts or practices] jurisprudence.”<sup>9</sup> Further, the problem is amplified because “[a] number of states that employ this incorporation principle have authorized private parties to enforce their [unfair methods of competition] or [unfair acts or practices] statutes in suits that permit the court to impose treble damages for infringements.”<sup>10</sup>

The *Negotiated Data* dissent, while both thought-provoking and persuasive, did not attempt to quantify the possibility of follow-on state actions. These actions, if they were a possibility, *would* make it dangerous to allow the Commission to extend Section 5 to meet the needs of the changing marketplace.<sup>11</sup> From a quantitative standpoint, because of the limited scope of follow-on actions, the reality of state Little FTC Acts is not the reality with which the *Negotiated Data* dissent was concerned.

## II. BACKGROUND

*Negotiated Data* illustrates the necessity of having a flexible agency that is able to respond to diverse anticompetitive behavior in a changing marketplace, and also underscores the potential problem of follow-on actions. In 1994, Negotiated Data (then National Semiconductor) promised the IEEE, a standard-setting entity, that it would license an ethernet technology at a modest fixed rate if the

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<sup>6</sup> Federal Trade Commission Act § 5.

<sup>7</sup> *In re Negotiated Data Solutions*, 73 Fed. Reg. 5846 (Jan. 31, 2008) *available at* <http://www.ftc.gov/os/caselist/0510094/>.

<sup>8</sup> *See* Appendix A, col. D (“Private Action.”).

<sup>9</sup> *Negotiated Data*, 73 Fed. Reg. at 5854 (Kovacic, C., dissenting).

<sup>10</sup> *Id.*

<sup>11</sup> The Commission has been effective in seeking consent orders in cases where the bad conduct lies on the outer edge of what might be considered a traditional antitrust violation, such that they later have favorable administrative actions and consent orders to refer to when a case falling in the same gray area is later contested and litigated.

technology were adopted as the industry standard.<sup>12</sup> Based on that promise, the IEEE adopted the technology as the standard and it quickly became ubiquitous within the field.<sup>13</sup> By 2002, National had assigned the patents in question to Vertical Networks; Vertical, searching for new revenue, rescinded the promise to the IEEE and began to license the technology well in excess of the initial \$1000 price.<sup>14</sup> Negotiated Data was assigned the relevant patents in late 2003, and the company continued to make increased royalty demands and began to initiate lawsuits to enforce them.<sup>15</sup> The FTC undertook an investigation and issued a complaint and proposed consent order proceeding on both antitrust and consumer protection theories.<sup>16</sup> The complaint alleged that Negotiated Data's actions constituted both "unfair methods of competition in or affecting commerce" and "unfair acts or practices in or affecting commerce in violation of Section 5."<sup>17</sup>

The Commission's statement noted, "because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court."<sup>18</sup> The dissent, however, opined that if the Commission is concerned about "spillover effects in private litigation . . . then the proposed settlement must account for the impact of FTC decisions upon the prosecution of claims based on state, as well as federal, causes of action."<sup>19</sup>

Indeed the *Negotiated Data* decision is particularly troubling if follow-on actions are a meaningful possibility. Negotiated Data's actions look anticompetitive, but don't fall strictly within classic antitrust violations, particularly in light of the Supreme Court's recent precedent.<sup>20</sup> The difficulty with *Negotiated Data* as a Sherman Act Section 2 case, is that "[a]rguably there's no exclusionary contact."<sup>21</sup> Because the initial commitment was made in good faith, and the increase and prices only came years later, "you wouldn't be able to find exclusionary conduct at the time of the original competition to choose a standard."<sup>22</sup> The FTC's subsequent enforcement action then begs the question, "[d]oes that mean that any-

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<sup>12</sup> *Negotiated Data*, 73 Fed. Reg. at 5847.

<sup>13</sup> *Id.* at 5848.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Negotiated Data* Complaint at ¶38, ¶39 available at <http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf>.

<sup>18</sup> *Negotiated Data*, 73 Fed. Reg. at 5849, n.9.

<sup>19</sup> *Id.* at 5854.

<sup>20</sup> See *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

<sup>21</sup> Stephen Calkins, Susan DeSanto & Melanie Sabo, Discussion held by the ABA Antitrust Section: An Update on IP & the Agencies: N-Data and Rambus (Washington, D.C., Feb. 29, 2008) available at <http://www.abanet.org/antitrust/mo/premium-at/at-bb/08/AT80229.mp3> (Melanie Sabo speaking).

<sup>22</sup> *Id.*

time anybody does not honor a contractual commitment and prices are raised . . . we have an unfair method of competition?”<sup>23</sup>

As commentators have alluded to, it can't be enough to have an antitrust violation every time a company rescinds a promise.<sup>24</sup> At the same time, Negotiated Data's action looks anticompetitive on its face. Making a promise to a standardizing agency that gives rise to a technology used in nearly every computer currently on the market, only to rescind that promise and raise rates to a level that bears no correlation to the time or money invested in the initial research and development of the technology smacks plainly of unfairness and anticompetitiveness. The FTC, having substantial latitude with their construction of Section 5, is in a unique position to prevent or remedy these types of abuses.

Should the precedent trickle down to private consumers, however, courts would be placed in the uncomfortable position of determining exactly what *Negotiated Data* means, without the benefit of the Commission's prosecutorial discretion serving to filter out the more questionable violations. Because it really can't be enough for the rescission of a promise to lead to antitrust violations, the prospect of state courts across the country applying their own gloss to *Negotiated Data* is particularly likely to lead to disparate and troublesome results.

Not only would follow-on actions lead to wide-ranging judicial interpretations of difficult subject matter, but it would ultimately undermine the principle of affording deference to the Commission in Section 5 actions. If a federal court has to worry about private companies bringing treble damage antitrust actions against Negotiated Data and other similar offenders subsequent to an FTC action, the court can no longer be comfortable with the Commission's interpretation of the law. Suddenly, the court must question whether this action will lead to antitrust violations for each breach of contract that leads to higher prices, because the next party to bring such an action will not be an agency charged with protecting consumers, but will instead be brought by a company concerned only with maximizing value for its owners.

### III. THE DATA

From the outset, twenty-one states and the District of Columbia utilize anti-trust and consumer protection statutes that are not constructed in accordance with Section 5 by either statute or case law.<sup>25</sup> Lacking this incorporation, these states do not present any possibility of follow-on actions in the traditional sense.

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<sup>23</sup> *Id.* (Stephen Calkins speaking).

<sup>24</sup> *Id.*

<sup>25</sup> ARK. CODE ANN. § 4-88-108 (West, Westlaw through July 25, 2008); CAL. BUS. & PROF. CODE §§ 17200-17209 (West, Westlaw through Ch. 209 of 2008 reg. Sess. and Ch. 7 of 2007-2008 3d extra Sess.); COLO. REV. STAT. ANN. § 6-1-105 (West, Westlaw through May 20, 2008); D.C. CODE ANN. §§ 28-3901 to 28-3913 (Westlaw through July 7, 2008); DEL. CODE ANN. tit. 6 § 2532 (Westlaw through 76 Laws 2008, chs. 391, 395-402 & 405); IND. CODE ANN. § 24-5-0.5-3 (West, Westlaw through 2008 2d Sess.); IOWA CODE § 714.16 (West, Westlaw through 2008 Sess.); KAN. STAT. ANN. § 50-626 (Westlaw through 2007 Sess.); KY. REV. STAT. ANN. §§ 367.120 to 367.360 (West, Westlaw through 2007 legislation); MICH. COMP. LAWS ANN.

The remaining twenty-nine states incorporate the Commission's interpretation of Section 5 and the related decisional law into the construction of their Little FTC Acts.<sup>26</sup> Of the twenty-nine, two states don't provide private rights of action,<sup>27</sup> and seven<sup>28</sup> do not have an antitrust, or 'unfair method of competition,' portion of the statute.<sup>29</sup> In these twenty-states, consent orders like *Negotiated Data*, can serve as the basis for a private state action, brought under the State's Little FTC Act. To the extent that *Negotiated Data* can be viewed as extending the bounds of Section 5, this trickle down of private actions expands the scope of a company's antitrust liability and makes them accountable to a multitude of potential plaintiffs.

This, however, doesn't tell the whole story. Five states have no provision for multiple damages, and recovery can be made only for actual harm.<sup>30</sup> In twelve states, damages may be doubled or trebled only at the discretion of the court or on findings of willful and knowing conduct.<sup>31</sup> Finally, only three states that incorporate Section 5 jurisprudence also require damages for Little FTC Act violations to be trebled as would be the case with a Sherman Act violation.<sup>32</sup> Only in these three states is the major concern for the dissent present: that Commission actions for injunctions or disgorgement of profits could lead to treble damage claims or class actions.

#### IV. OTHER CONSIDERATIONS

It also bears noting that a permissive statutory structure makes incorporation of a *Negotiated Data*, or other similar Section 5 violation possible, but doesn't

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§ 445.903 (West, Westlaw through P.A.2008, No. 1-238 of 2008 Sess.); MINN. STAT. ANN. § 325D.09 (West, Westlaw through 2008 Sess.); MO. ANN. STAT. § 407.020 (West, Westlaw through June 24, 2008); NEB. REV. STAT. § 87-302 (Westlaw through 2007 1st Sess.); NEV. REV. STAT. ANN. § 598.0903 (West, Westlaw through 2007 74th Sess. and the 23rd special Sess.); N.J. STAT. ANN. § 56:8-1 et. seq. (West, Westlaw through L.2008, c. 45 & J.R. No. 3.); N.D. CENT. CODE §§ 51-10-01 to 15-20-08 (Westlaw through 2007 Sess.); OKLA. STAT. ANN. tit.15 § 753 (West, Westlaw through July 1, 2008); OR. REV. STAT. ANN. § 646.607 (West, Westlaw through 2007 Sess.); S.C. CODE ANN. §§ 37-1-101 to 37-1-303 (Westlaw through 2007 Sess.); VA. CODE ANN. § 59.1-200 (West, Westlaw through 2008 1st special Sess.); WIS. STAT. ANN. § 423.301 (West, Westlaw through 2007 Act 242); WYO. STAT. ANN. § 40-12-105 (Westlaw through 2008 budget Sess.).

<sup>26</sup> See Appendix A; see also, e.g., R.I. GEN. LAWS § 6-13.1-3 (Westlaw through 2007 legislation) ("It is the intent of the legislature that in construing §§ 6-13.1-1 and 6-13.1-2 due consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts relating to [§5] as from time to time amended.").

<sup>27</sup> See Appendix A, Arizona and Idaho.

<sup>28</sup> See Appendix A, Category A.

<sup>29</sup> Without an antitrust portion of the Little FTC Act, consumer protection actions may be incorporated, but antitrust actions will not be. Consumer protection follow-on actions do not cause the same level of concern because the cause of action typically lies with the consumer and the damages don't rise to the level of a typical antitrust action.

<sup>30</sup> See Appendix A, Category B.

<sup>31</sup> See Appendix A, Category C.

<sup>32</sup> See Appendix A, Category D.

make it an inevitability. For instance, Rhode Island’s Little FTC Act proscribes “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>33</sup> The state has a statute that incorporates Commission consent orders, and they allow for punitive damages at the court’s discretion.<sup>34</sup> However, the private right of action statute only confers a cause of action on “[a]ny person who purchases or leases goods or services primarily for personal, family, or household.”<sup>35</sup> Where the operative statute appears to allow for an antitrust cause of action, the private right of action statute only confers a private right on natural persons, and wouldn’t benefit a business that has suffered an antitrust injury. Furthermore, even in consumer protection actions where a right of action is clear, some Rhode Island trial courts have been hesitant to recognize the authority of a Commission consent decree despite the presence of deference statute, noting that consent orders “can recite whatever provisions the consenting parties agree to cite; [the decree] in no way reflects or has the force of law.”<sup>36</sup>

Finally, concerns over Commission and decisional law incorporation into state Little FTC Acts presuppose that the state antitrust laws have some meaningful application. Some of these statutes, however, apply only to intrastate activity, rather than interstate activity. New York’s antitrust statute, for example, applies where there is significant intrastate activity, but “[w]here the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce, it is clear that Federal antitrust laws operate to preempt the field and oust state courts of jurisdiction [sic].”<sup>37</sup> Other states have held similarly.<sup>38</sup> To the extent that Little FTC Acts amount to antitrust acts, problems between intrastate and interstate activity can curtail their scope.

## V. CONCLUSION

There remain twelve states in which a company could be subject to multiple damages for willful and knowing conduct, or multiple damages at the discretion of a court, and there are three more in which mandatory trebling occurs under the Little FTC Act. Currently, however, the follow-on actions that are possible are not numerous enough, nor are they certain enough, to give the Commission or the courts cause for concern. As Stephen Calkins, former General Counsel at the Commission, observed, “the world that drives the Supreme Court in the Sherman Act to say that we really need to be constrained does not exist when we come to

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<sup>33</sup> R.I. GEN. LAWS § 6-13.1-2 (Westlaw through 2007 legislation).

<sup>34</sup> See Appendix A, Rhode Island.

<sup>35</sup> R.I. GEN. LAWS § 6-13.1-5.2 (Westlaw through 2007 legislation).

<sup>36</sup> *Chavers v. Fleet Bank, N.A.*, No. PC 00-5237, 2001 WL 506776 at \*7 (R.I. Super. Ct., Apr. 20, 2001).

<sup>37</sup> *Two Queens v. Scoza*, 745 N.Y.S.2d 517, 519 (N.Y. App. Div. 2002).

<sup>38</sup> See *Abbott Laboratories v. Durrett*, 746 So.2d 316 (Ala. 1999) (holding that Alabama’s antitrust laws do not apply to interstate commerce); *Dzik & Dzik, P.C. v. Vision Service Plan*, No. 836, 1989 WL 3082 (Tenn. App., Jan. 20, 1989) (holding that Tennessee antitrust laws apply only to transactions that are predominately intrastate in nature).

Little FTC Acts . . . . It continues to be fair to say that the FTC quite reasonably can be more aggressive under Section 5 than, say, the Justice Department could be under Section 2.”<sup>39</sup> The paradigm remains one in which the only follow-on actions possible are those that arise in single damage or discretionary multiple damage states. For the vast majority the country, follow-on actions simply do not figure prominently into the picture of liability.

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<sup>39</sup> Calkins, *supra* note 16 (Stephen Calkins speaking) (relying on an earlier version of Appendix A).

**APPENDIX A: STATE LITTLE FTC ACTS AND THEIR CHARACTERISTICS**

<b>State:</b>	<b>Operative Statute:</b>	<b>*</b>	<b>Deference to FTC:</b>	<b>Private Action:</b>	<b>Multiple Damages:</b>	<b>†</b>
<b>Alabama</b>	ALA. CODE § 8-19-5 (Westlaw through Acts 2008-270 & 2008-280)	N o	ALA. CODE §8-19-6 ("[I]n construing Section 8-19-5, due consideration and great weight shall be given where applicable to interpretations of the [FTC] and the federal courts relating to [§5], as from time to time amended.")	ALA. CODE §8-19-10	ALA. CODE §8-19-10(a)(2) (allowing treble damages at the court's discretion).	<b>A</b>
<b>Alaska</b>	ALASKA STAT. § 45.50.471 (Westlaw through 2d Reg. Sess. of 2008)	Y e s	ALASKA STAT. § 45.50.545 ("[D]ue consideration and great weight should be given the interpretations of [§5] . . . .")	ALASKA STAT. §45.50.531	ALASKA STAT. §45.50.531 (providing for mandatory trebling).	<b>D</b>
<b>Arizona</b>	ARK. CODE ANN. § 44-1522 (West, Westlaw through Jul. 7, 2008)	Y e s	ARK. CODE ANN. § 44-1522(c) ("[T]he courts may use as a guide interpretations given by the [FTC] and the federal courts to 15 United States Code §§ 45, 52 and 55(a)(1).")	No	No	<b>A</b>
<b>Connecticut</b>	CONN. GEN. STAT. ANN. § 42-110b (West, Westlaw through the 2008 Feb. regular Sess.)	Y e s	CONN. GEN. STAT. ANN. § 42-110b ("[T]he commissioner and the courts of this state shall be guided by interpretations given by the [FTC] and the federal courts to [§5], as from time to time amended.")	CONN. GEN. STAT. ANN. § 42-110g	CONN. GEN. STAT. ANN. § 42-110g (allowing discretionary punitive damages)	<b>C</b>
<b>Florida</b>	FLA. STAT. ANN. § 501.204(a) (West, Westlaw through 2008 2d Sess.)	Y e s	FLA. STAT. ANN. § 501.204(b) ("[D]ue consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts relating to [§5] as of July 1, 2006.")	FLA. STAT. ANN. §501.211	No	<b>B</b>
<b>Georgia</b>	GA. CODE ANN. § 10-1-393 (West, Westlaw through 2007 regular Sess.)	N o	GA. CODE ANN. § 10-1-391(b) ("It is the intent of the General Assembly that this part be interpreted and construed consistently with the interpretations given by the FTC in the federal courts pursuant to [§5] . . . .")	GA. CODE ANN. § 10-1-399	GA. CODE ANN. § 10-1-399 (providing exemplary damages for intentional violations)	<b>A</b>
<b>Hawaii</b>	HAW. REV. STAT. § 480-2 (Westlaw through 2007 3d special Sess.)	Y e s	HAW. REV. STAT. § 480-2(b) "[T]he courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the [FTC] and the federal courts interpreting[§5], as from time to time amended.")	HAW. REV. STAT. § 480-13	HAW. REV. STAT. § 480-13 (providing for mandatory trebling)	<b>D</b>
<b>Idaho</b>	IDAHO CODE ANN. § 48-603A (Westlaw through 2007 2d regular Sess.)	Y e s	IDAHO CODE ANN. § 48-604 ("[D]ue consideration and great weight shall be given to the interpretation of the [FTC] and the federal courts relating to [§5], as from time to time amended . . . .")	No	No	<b>A</b>
<b>Illinois</b>	815 ILL. COMP. STAT. ANN. 505/2 (West, Westlaw through P.A. 95-747 of 2008 Sess.)	Y e s	815 ILL. COMP. STAT. ANN. 505/2 ("In construing this section consideration shall be given to the interpretations of the [FTC] and the federal courts relating to [§5].")	815 ILL. COMP. STAT. ANN. 505/10a	815 ILL. COMP. STAT. ANN. 505/10a (allowing punitive damages at the court's discretion)	<b>C</b>
<b>Louisiana</b>	LA. REV. STAT. ANN. 51:1405 (Westlaw through 2008 2d extraordinary Sess.)	Y e s	Gour v. Daray Motor Co., 373 So.2d 571 (1979) (holding federal decisions & FTC interpretations are appropriate sources of precedent)	LA. REV. STAT. ANN. § 51:1409	LA. REV. STAT. ANN. § 51:1409 (providing for treble damages for knowing violations)	<b>C</b>
<b>Maine</b>	ME. REV. ST 5 §205-A et. seq. (Westlaw through Ch. 700 2008 2d Sess. & 2008 1st special Sess.)	Y e s	ME. REV. STAT. ANN. tit. 5 § 207(1) ("[T]he courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to [§5].")	ME. REV. STAT. ANN. tit. 5 § 213	No	<b>B</b>
<b>Maryland</b>	MD. CODE ANN., COM. LAW § 13-301 (West, Westlaw through July 1, 2008)	Y e s	MD. CODE ANN., COM. LAW § 13-105 ("[I]n construing the term 'unfair or deceptive trade practices', due consideration and weight be given to the interpretations of [§5] by the [FTC] and the federal courts.")	MD. CODE ANN., COM. LAW § 13-408	No	<b>B</b>

<b>Massachusetts</b>	MASS. GEN LAWS ANN. ch. 93A § 2 (West, Westlaw through 2d Sess., 2008)	Y e s	MASS. GEN. LAWS ANN. ch. 93A § 2 ("[T]he courts will be guided by the interpretations given by the [FTC] and the Federal Courts to [§5].")	MASS. GEN. LAWS ANN. ch. 93A § 9	MASS. GEN. LAWS ANN. ch. 93A § 9 (providing for double or treble damages for knowing and willful violations or failures to settle in good faith)	<b>C</b>
<b>Mississippi</b>	MISS. CODE ANN. § 75-24-5 (West, Westlaw through 2007)	Y e s	MISS. CODE ANN. § 75-24-3 ("[T]he courts will be guided by the interpretations given by the Federal Trade Commission and the federal courts to [§5].")	MISS. CODE ANN. § 75-24-15	No	<b>B</b>
<b>Montana</b>	MONT. CODE ANN. § 30-14-103 (Westlaw through May 2007 Sess.)	Y e s	MONT. CODE ANN. § 30-14-104 ("[D]ue consideration and weight shall be given to the interpretations of the [FTC] and the federal courts relating to section [§5], as amended.")	MONT. CODE ANN. § 30-14-133	MONT. CODE ANN. § 30-14-133 (allowing multiple damages at the court's discretion)	<b>C</b>
<b>New Hampshire</b>	N.H. REV. STAT. § 358-A:2 (Westlaw through ch. 211 of 2008 Sess.)	Y e s	N.H. REV. STAT. ANN. § 358-A:13 ("[C]ourts may be guided by the interpretation and construction given [§5], by the [FTC] and the federal courts.")	N.H. REV. STAT. ANN. § 358-A:10	N.H. REV. STAT. ANN. § 358-A:10 (providing treble damages for knowing and willful violations)	<b>C</b>
<b>New Mexico</b>	N.H. REV. STAT. ANN. 1978, § 57-12-3 (Westlaw through July 1, 2008)	Y e s	N.M. STAT. ANN. § 57-12-4 ("[T]he courts to the extent possible will be guided by the interpretations given by the [FTC] and the federal courts.")	N.M. STAT. ANN. § 57-12-10	N.M. STAT. ANN. § 57-12-10 (providing treble damages for willful violations)	<b>C</b>
<b>New York</b>	N.Y. GEN. BUS. LAWS § 349 (McKinney, Westlaw through 2007 legislation)	N o	State by Lefkowitz v. Colorado State Christian College of Church of Inner Power, Inc., 346 N.Y.S.2d 482 (N.Y. Sup. Ct. 1973).	N.Y. GEN. BUS. LAWS § 350-e	N.Y. GEN. BUS. LAWS § 350-e (providing treble damages for willful and knowing actions, subject to a cap)	<b>A</b>
<b>North Carolina</b>	N.C. GEN. STAT. ANN. § 75-1.1 (West, Westlaw through S.L. 2008-5 of 2008 Sess.)	Y e s	Marshall v. Miller, 276 S.E.2d 397 (1981) (holding that federal precedent interpreting §5 may be used to interpret the North Carolina Little FTC Act)	N.C. GEN. STAT. ANN. § 75-16	N.C. GEN. STAT. ANN. § 75-16 (requiring trebling of damages)	<b>D</b>
<b>Ohio</b>	OHIO REV. CODE ANN. § 1345.02 (West, Westlaw through July 24, 2008)	N o	OHIO REV. CODE ANN. § 1345.02(c) ("[T]he court shall give due consideration and great weight to [FTC] orders, trade regulation rules and guides, and the federal courts' interpretations of [§5], as amended.	OHIO REV. CODE ANN. § 1345.09	No	<b>A</b>
<b>Pennsylvania</b>	73 PA CONS. STAT. ANN. § 201-3 (Westlaw through Act 2008-18)	Y e s	Commonwealth v. Hush-Tone Indus., Inc., 4 Pa. Commw. 1, 21 (1972) (holding federal decisions & FTC interpretations are appropriate sources of precedent)	73 PA CONS. STAT. ANN. § 201-9.2	73 PA CONS. STAT. ANN. § 201-9.2 (providing for treble damages at the court's discretion)	<b>C</b>
<b>Rhode Island</b>	R.I. GEN. LAWS § 6-13.1-2 (Westlaw through 2007 legislation)	Y e s	R.I. GEN. LAWS § 6-13.1-3 ("[D]ue consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts relating to [§5], as from time to time amended.")	R.I. GEN. LAWS § 6-13.1-5.2	R.I. GEN. LAWS § 6-13.1-5.2 (allowing punitive damages at the court's discretion)	<b>C</b>
<b>South Carolina</b>	S.C. CODE ANN. § 39-5-20(a) (Westlaw through 2007 regular Sess.)	Y e s	S.C. CODE ANN. § 39-5-20(b) ("[I]n construing paragraph (a) of this section the courts will be guided by the interpretations given by the [FTC] and the Federal Courts to [§5], as from time to time amended.")	S.C. CODE ANN. § 39-5-140	S.C. CODE ANN. § 39-5-140 (providing for mandatory trebling for willful and knowing violations)	<b>C</b>
<b>Tennessee</b>	TENN. CODE ANN. § 47-18-104 (West, Westlaw through May 15, 2008)	N o	TENN. CODE ANN. § 47-18-115 ("[T]his part shall be interpreted and construed consistently with the interpretations given by the [FTC] and the federal courts pursuant to [§5].")	TENN. CODE ANN. § 47-18-109(a)(1)	TENN. CODE ANN. § 47-18-109(a)(3) (providing for treble damages for willful and knowing violations)	<b>A</b>
<b>Texas</b>	TEX. BUS. & COM. CODE ANN. § 17.46(a) (Westlaw through 2007 regular Sess.)	N o	TEX. BUS. & COM. CODE ANN. § 17.46(c) ("[C]ourts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the [FTC] and federal courts to [§5].")	TEX. BUS. & COM. CODE ANN. § 17.50	TEX. BUS. & COM. CODE ANN. § 17.50 (providing for treble damages for knowing violations)	<b>A</b>

<b>Utah</b>	UTAH CODE ANN. 1953 § 13-11-4 (West, Westlaw through 2008 general Sess.)	No	UTAH CODE ANN. 1953 § 13-11-2 ("To make state regulation of consumer sales practices not inconsistent with the policies of [§5] relating to consumer protection.") (footnote omitted)	UTAH CODE ANN. 1953 § 13-11-19	No	<b>A</b>
<b>Vermont</b>	VT. STAT. ANN. tit. 9 § 2453(a) (Westlaw through 2007-08 Sess., n. 83)	Yes	VT. STAT. ANN. tit. 9 § 2453(b) ("[I]n construing subsection (a) of this section, the courts of this state will be guided by the construction of similar terms contained in [§5.]")	VT. STAT. ANN. tit. 9 § 2465(a)	VT. STAT. ANN. tit. 9 § 2465(a) (allowing exemplary damages up to three times actual damages)	<b>C</b>
<b>Washington</b>	WASH. REV. CODE ANN. § 19.86.020 (West, Westlaw through July 31, 2008)	Yes	WASH. REV. CODE ANN. § 19.86.920 ("T]he courts be guided by final decisions of the federal courts and final orders of the [FTC] interpreting the various federal statutes dealing with the same or similar matters . . .")	WASH. REV. CODE ANN. § 19.86.090	WASH. REV. CODE ANN. § 19.86.090 (allowing treble damages in the court's discretion, subject to a cap)	<b>C</b>
<b>West Virginia</b>	W. VA. CODE, § 46A-6-104 (West, Westlaw through 2008 2d extraordinary Sess.)	Yes	W. VA. CODE ANN. § 46A-6-101(1) ("It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.")	W. Va. Code Ann. § 46A-6-106	No	<b>B</b>

\* This column indicates whether the state's Little FTC Act has an antitrust component, typically denoted in the statute by the language: "unfair methods of competition."

† This column places states in categories according to the nature of their Little FTC Act. States that do not incorporate federal and FTC law are not included. Category **A** includes states that have Little FTC Acts that incorporate FTC and federal law, but either do not have a private right of action, or do not have an antitrust component. Category **B** includes states that have an antitrust component, incorporate FTC and federal law, but provide for actual damages only. Category **C** includes states that have an antitrust component, incorporate FTC and federal law, provide a private right of action, and where multiple damages are discretionary or for willful and knowing conduct. Category **D** includes states that have an antitrust component, incorporate FTC and federal law, provide a private right of action, and make treble damages mandatory.