The University of
Kansas Law Review

October 2005 Volume 54, No. 1

Common-Sense Construction of Consumer Protection Acts

Victor E. Schwartz
& Cary Silverman

Common-Sense Construction of Consumer Protection Acts

*Victor E. Schwartz** *& Cary Silverman***

---

* Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C., office of the law firm of Shook, Hardy & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S TORTS (11th ed. 2005). He has served on the advisory committees of the American Law Institute's Restatement of the Law of Torts: Products Liability, Apportionment of Liability, and General Principles projects. Schwartz received his B.A. summa cum laude from Boston University and his J.D. magna cum laude from Columbia University. In 2003, he was named one of the nation's Legal Reform Champions by *Chief Legal Executive* magazine; the American Legislative Exchange Council, the nation's largest membership organization of state legislators, also named Schwartz the Private Sector Person of 2003.

** Cary Silverman is an associate in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received a B.S. in Management Science from the State University of New York College at Geneseo in 1997, and an M.P.A. and a J.D. with honors from The George Washington University Law School in 2000, where he served as managing editor of *The Environmental Lawyer*.

I. INTRODUCTION

State consumer protection acts (CPAs), often referred to as unfair and deceptive trade practices acts, are drafted in sweeping language, prohibiting all conduct that is "unfair" or "deceptive." States adopted these laws based on a similar federal statute, the Federal Trade Commission Act (FTC Act), in the 1960s and 1970s. The crucial difference between the FTC Act and CPAs is that most state laws, unlike the federal law, provide consumers with a private right of action. Unlike government agencies, private plaintiffs are not constricted to bringing actions in the public interest. They do not have to weigh the broad public-policy implications of their lawsuits or make judgments about how to expend limited resources. They do not have to answer to elected officials and the public. Unlike public enforcement, which is often injunctive in nature and meant to stop practices found to be unfair or deceptive, private actions punish businesses for conduct they may not have known was wrong.

In many states, the CPA is quite generous and provides a strong incentive to sue. The broad wording of these statutes, the hope that they will be construed liberally in favor of the consumer, and a dearth of case law make these open-ended statutes especially attractive to plaintiffs' lawyers who seek to circumvent traditional, rational requirements of the common law. CPAs often do not explicitly require the traditional elements of common law fraud and negligent misrepresentation claims, such as reliance, intent, injury, and damages. This allows lawyers to argue that proof of such basic elements is unnecessary and that plaintiffs should be able to receive a monetary award for a misleading advertisement, even if they never saw it. CPAs often allow recovery of statutory damages that can be far in excess of actual damages as well as an award of attorneys' fees. In some states, every prevailing plaintiff receives an award of three times the actual damages (treble damages), punishing the defendant even if it made an innocent mistake or did not realize its conduct violated the law.

As this Article will show, variations in statutory language and court interpretation of legislative intent have led to widely varying application of CPAs, despite their common origin and purpose. In many instances, CPAs have created liability or the threat of liability where none previously existed. This trend has accelerated in some quarters in recent years. A few judges have turned CPAs into springboards for a "universal tort," providing a claim in any lawsuit involving conduct that could possibly be categorized as unfair or deceptive. Claims that would traditionally have been brought as product liability, environmental, or contract claims are recast as violations of a consumer protection law and circumvent otherwise applicable and well-reasoned legal safeguards. It is irrelevant in some of these lawsuits that either the federal or state government permits the conduct attacked. This allows plaintiffs' lawyers—and judges who follow their leads—to regulate entire industries. For instance, private attorneys have used CPAs to attack the fast food industry for the nation's obesity problem and are reportedly planning to sue soft-drink makers for selling soda in schools.[1] Creative plaintiffs' lawyers are using CPAs in cases involving medical laboratory billing practices and insurance policies.[2] Plaintiffs have attempted to bring nationwide class actions, regardless of state statutes that vary widely in their requirements and remedies, in which they claim that "light" cigarette advertisements and packaging imply that cigarettes are healthy.[3] Most recently, lawyers filed CPA claims against the dairy industry for its claims that milk is part of a healthy weight-loss program and against supermarkets and dairy companies for failing to warn about the effects of lactose intolerance on milk cartons.[4]

Judges have often resisted these extensions of existing law. The broad wording of these statutes leaves courts with the power to make reasoned choices. Courts can read a statute in the broadest sense, diluting or eliminating many of the fundamental elements of a tort claim and awarding damages regardless of causation or injury, or they can require plaintiffs to satisfy basic standing and proof requirements. Courts can award what are essentially punitive damages and attorneys' fees without a showing of bad conduct, or they can direct punishment only at those who intentionally deceive the public. Courts that reduce or eliminate the need to show reliance and damages can then lower the bar to certification of class action lawsuits, because these individual issues of fact are no longer relevant to a claim, or they can uphold procedural safeguards applicable to all class action litigation. Courts may follow the path of private plaintiffs and use CPAs as weapons in individual

---

1. *See* Pelman *ex rel.* Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005); Caroline E. Mayer, *Lawyers Ready Suit Over Soda*, WASH. POST, Dec. 2, 2005, at D4.

2. *See* James R. Keller, *Illinois Consumer Fraud Act: A Primer on Recent Developments*, 87 ILL. B.J. 474, 474 nn.5 & 7 (1999) (citing Illinois cases).

3. *See* Blue Cross & Blue Shield v. Philip Morris USA, 344 F.3d 211 (2d Cir. 2003) (appealing a judgment against defendant tobacco companies); Price v. Philip Morris, Inc., No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. Mar. 21, 2003) (awarding $10.1 billion), *overruled on other grounds*, 793 N.E.2d 942 (Ill. App. Ct. 2003), *vacated*, No. 96644, 2003 Ill. LEXIS 2625 (Ill. Sept. 16, 2003).

4. *See infra* note 203.

disputes, or they may require CPA claims to be in the public interest. Courts can choose to disrespect the interests of sister states by giving their state's CPA extraterritorial application, or they can limit use of the statute to protecting the interests of their own state's consumers.

Where judges have not placed reasonable limits on CPAs, voters have taken action to do so. For example, California voters, by a fifty-nine percent majority,[5] supported Proposition 64 in 2004, amending their consumer protection statute, Section 17200.[6] That law had resulted in a flood of "shakedown" lawsuits against small businesses for technical violations of state laws or regulations, such as using too small of a font size in advertisements, even when no one had been harmed. California voters realized that when left unchecked, CPAs have resulted in unfair, uncertain, unpredictable, and substantial liability for businesses, especially small ones.

After examining the history of the FTC Act and the variations of state CPAs, this Article suggests several steps courts can take in deciding private claims under CPAs. It suggests that courts apply a common-sense construction to CPAs with indeterminate language and require fundamental elements of tort law. In cases where the language of the statutes lack the flexibility to allow such a construction, or where the judiciary chooses not to act, the Article suggests that state legislatures should intervene. For this purpose, the Article provides several principles that legislators should consider in amending CPAs.

II. THE HISTORIC FOUNDATION OF CONSUMER PROTECTION ACTS

State consumer protection statutes have their origin in common law fraud and misrepresentation claims as well as in federal consumer protection law. Yet, when states adopted CPAs, they did not explicitly include many of the required elements of the common law actions in the statutes. They also failed to fully appreciate Congress's concerns with creating a private right of action for such a broad range of conduct. This combination has resulted in the abuse of CPAs today.

---

5. *See* CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE AND SUPPLEMENT TO THE STATEMENT OF VOTE, 2004 PRESIDENTIAL GENERAL ELECTION, NOV. 2, 2004, at 45 (2004), http://www.ss.ca.gov/elections/sov/2004_general/ssov/formatted_ballot_measures_detail.pdf.

6. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 1997 & Supp. 2005).

A. *Consumer Protection Prior to the Twentieth Century*

What is known today as actionable misrepresentation or nondisclosure previously was known as the tort action of deceit.[7] The present tort of misrepresentation evolved from the "Writ of Deceit," which dates back to the year 1201.[8] This Writ only applied to the use of a legal procedure to swindle another.[9] Later, the tort developed to provide "a remedy for many wrongs which we should now regard as breaches of contract, such as false warranties in the sale of goods."[10] Here, tort law and contract law merged: courts generally limited the action to direct transactions between the plaintiff and the defendant.[11]

The common law further developed to recognize, in certain circumstances, claims for fraudulent misrepresentation or deceit, negligent or innocent misrepresentation, and concealment and nondisclosure. An action for fraudulent misrepresentation generally requires the plaintiff to show (1) the defendant knew its statement was false, inaccurate, or lacked basis in fact; (2) the defendant had an intent to deceive; (3) the misstatement was material, meaning that the absent information would have affected the plaintiff's decision to purchase the product; (4) the plaintiff relied upon the misrepresentation; (5) the reliance was objectively reasonable or justifiable; and (6) the reliance was a substantial factor in causing a monetary loss.[12]

The common law also developed to allow claims for negligent misrepresentation, which courts did not historically recognize under the law of deceit. Although scienter is not a required element of a negligent misrepresentation claim, a plaintiff must show either (1) that the defendant made a false statement because of a lack of reasonable care in ascertaining the facts or in the manner of expression or (2) absence of skill or competence expected in a given industry or profession.[13] The

---

7. DAN B. DOBBS ET AL., PROSSER & KEETON ON TORTS § 105, at 727 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

8. *Id.*

9. *Id.* § 105, at 727–28.

10. *Id.* § 105, at 728.

11. *Id.* It was not until 1789, as the notion of caveat emptor subsided, that the tort of deceit was first applied where the plaintiff had no dealings with the defendant but had been induced by a misrepresentation to extend credit to a third person. *See id.* (citing Pasley v. Freeman, (1789) 100 Eng. Rep. 450 (K.B.)).

12. *See* RESTATEMENT (SECOND) OF TORTS §§ 525–526, 537–538, 546, 548, 548A (1989); *see also* DAN B. DOBBS, THE LAW OF TORTS §§ 470, 472, 474 (2000); PROSSER & KEETON ON TORTS, *supra* note 7, §§ 107–110.

13. PROSSER & KEETON ON TORTS, *supra* note 7, § 107.

plaintiff must also show reasonable reliance, injury, causation, and damages.[14] Today, nondisclosure may also be the basis for common law liability, such as when a special confidential or fiduciary relationship exists between the plaintiff and the defendant that justifies reliance based on trust or confidence.[15]

Although the strength of caveat emptor as a concept in American law had diminished by the beginning of the twentieth century, common law remedies remained inadequate to protect consumers in some situations. For instance, the law governing misrepresentation claims required that a person first suffer an injury before bringing a claim. The law did not allow for a proactive approach to stop obviously fraudulent practices before an individual was injured. It was particularly difficult for a plaintiff to show a defendant's intent to deceive—a required element of a fraud claim—and the relatively small damages in some cases did not warrant the expenses that accompanied a lawsuit.[16] In many situations, breach of contract actions also were insufficient because a business could make false claims about its product or advertise lower-than-actual prices without entering into a contract.[17]

B. *Origin and Development of Federal Government Regulation and Enforcement*

The inadequacy of common law tools with which a consumer could address false advertising and deceitful commercial schemes in some circumstances eventually led Congress in 1914 to establish the Federal Trade Commission (FTC) and empower it to regulate such conduct.[18] The FTC consisted, as it does today, of five members appointed by the President with the advice and consent of the Senate.[19] Congress was concerned about the growth and spread of monopolies when it passed the FTC Act, so the Act initially charged the Commission with regulating

---

14. *Id.* §§ 108–110.

15. *Id.* § 106; VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 1012–13 (10th ed. 2000) (citations omitted) [hereinafter PROSSER, WADE & SCHWARTZ].

16. Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 374 (1990).

17. An individual bringing a consumer protection action as a breach of contract claim might also have to overcome defenses such as the statute of frauds, the parol evidence rule, and privity of contract requirements. *See* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 451–52 (1991) (discussing these various defenses).

18. *See* Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2000)) (establishing the FTC).

19. *See* 15 U.S.C. § 41 (setting the number and qualifications for FTC commissioners).

"unfair methods of competition."[20] Thus, in the beginning, the Commission focused largely on antitrust and other trade regulation violations.

After the Supreme Court found that the FTC lacked power to regulate activities that had no effect on competition between businesses, such as false advertising,[21] Congress amended the FTC Act to declare unlawful all "unfair or deceptive acts or practices in commerce," laying the foundation of federal consumer protection today.[22] The Wheeler-Lea Act of 1938 provided the FTC with broad authority to prohibit unfair or deceptive acts.[23] The Act itself provided little guidance as to which activities were "unfair or deceptive," because Congress recognized that "it would undertake an endless task" by attempting to provide an exhaustive list of prohibited practices.[24] For this reason, Congress decided, by a "general declaration," to condemn unfair practices and "leave it to the commission to determine what practices were unfair."[25]

---

20. § 5, 38 Stat. at 719.

21. *See* FTC v. Raladam Co., 283 U.S. 643, 654 (1931) (holding that the FTC has no authority to issue a cease-and-desist order with regard to false advertising promoting an ineffective weight-loss product where the advertising caused harm only to consumers); *see also* FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 313 (1934) (suggesting that Congress should expand the power of the FTC to regulate unfair practices that exploit consumers); ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1935), *reprinted in* 6 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4836–37 (Earl W. Kintner, ed., 1983) [hereinafter Kintner] (advocating for a statutory change).

22. Wheeler-Lea Act of 1938, Pub. L. No. 75-447, §3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)). Today, more than half of the FTC's 1000-plus full-time employees focus on consumer protection. FTC, FISCAL YEAR 2006 CONGRESSIONAL JUSTIFICATION 13 (2005), *available at* http://www.ftc.gov/ftc/oed/fmo/budgetsummary06.pdf. The FTC aggressively uses its cease-and-desist power to protect America's consumers. Justin Dingfelder & Sandra Brickels, *To Protect Consumers, the FTC Means Business*, 45 FED. LAW., Jan. 1998, at 24–25. In 2004, "the FTC brought 83 actions in federal district court to protect consumers against unfair and deceptive trade practices, and obtained 110 orders requiring the return of more than $380 million in redress to consumers." FTC, FISCAL YEAR 2006 CONGRESSIONAL JUSTIFICATION, *supra*, at 1. "In the first quarter of . . . 2005, the FTC brought 21 actions in federal district court to protect consumers and obtained 16 judgments ordering the return of nearly $160 million in consumer redress." *Id.* at 5. "These cases attacked a wide range of fraud and deception, including bogus weight loss products, advance-fee credit card scams, business opportunity schemes, deceptive spam, fraudulent telemarketing, deceptive credit counseling services, deceptive and unfair debt collection practices, and violations of the Fair Credit Reporting Act (FCRA)." *Id.* The Commission's 2006 budget request was $211 million, $119 million of which was designated for consumer protection. *Id.* at 3. Funds budgeted for consumer protection have kept pace with inflation during the past three years, from $105 million actual in fiscal year 2004, to $115 million estimated in fiscal year 2005, to $119 million proposed for fiscal year 2006. *Id.* at 20. The FTC's overall budget request for fiscal year 2006 represented a $6.7 million increase over its 2005 budget. *Id.* at 1.

23. *See* § 3, 52 Stat. at 111.

24. H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.).

25. S. REP. NO. 597, at 13 (1914), *reprinted in* 5 Kintner, *supra* note 21, at 3909–10.

The definitions of "unfair" and "deceptive" continue to evolve through administrative adjudications, case law, FTC rulemaking, and agency "guides."[26] The FTC, based on its understanding of public values, has broad discretion to determine when an act is unfair.[27] The definition of an unfair act, as developed by the FTC[28] and codified in the United States Code, is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[29] Unfair acts or practices traditionally included coercive or high-pressure selling, withholding material information, unsubstantiated claims, and post-purchase rights and remedies.[30] They

26. The FTC is authorized to promulgate general interpretive rules, as well as rules declaring particular practices to be "unfair or deceptive" where it believes such practices to be "prevalent." 15 U.S.C. § 57a (2000). The FTC has adopted regulations designating particular practices as unfair or deceptive, such as those involving home purchases, consumer credit contracts, and funeral industry practices. *See, e.g.*, 16 C.F.R. § 429 (2005) (providing a home purchaser with the right to cancel a contract within three business days); *id.* § 444 (unfair credit practices); *id.* § 453 (funeral industry practices). These rules target areas where consumers are particularly vulnerable or where there is a danger of coercion through high-pressure sales tactics. A violation of an FTC rule is considered a per se violation of the Act and may also be treated as such under state consumer protection laws. *See* David J. Federbush, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, 73 FLA. B.J., May 1999, at 26, 32–33. The FTC has also issued informal "guides" on various practices such as deceptive pricing, advertising of warranties, use of the word "free," use of endorsements and testimonials, and fuel economy for new automobiles. *See, e.g.*, Guides Against Deceptive Pricing, 16 C.F.R. § 233 (2005); Guides for the Advertising of Warranties and Guarantees, *id.* § 239; Guide Concerning Use of the Word "Free" and Similar Representations, *id.* § 251; Guides for the Use of Endorsements and Testimonials in Advertising, *id.* § 255. These guides do not have the same legal force as Commission rules.

27. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[T]he [FTC] does not arrogate excessive power to itself if, in measuring a practice against the . . . congressionally mandated standard of fairness, it . . . considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); *see generally* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935 (2000) (discussing the development of the law of unfairness); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and its Impact on State Law*, 46 WAYNE L. REV. 1869 (2000) (same).

28. During the 1970s, the FTC was particularly aggressive in attacking what it considered unfair practices, leading to calls for congressional intervention. *See* 6 Kintner, *supra* note 21, at 4938 (stating that during the 1970s the FTC aggressively attacked numerous practices that were neither anticompetitive nor outright deceptive). In 1980, in response to an announced congressional oversight hearing, the Commission issued a "Policy Statement on Unfairness." Letter from Michael Pertschule, Chairman, et al., to Sens. Wendell H. Ford & John C. Danforth, FTC Policy Statement on Unfairness (Dec. 17, 1980) [hereinafter Unfairness Statement], *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. This informal letter, signed by each of the five FTC Commissioners, was the basis of the definition codified by Congress in 1994. S. REP. NO. 103-130, at 13 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1776, 1787 ("This section [intends] to codify, as a statutory limitation on unfair acts or practices, the principles of the FTC's December 17, 1980, policy statement on unfairness, reaffirmed by a letter from the FTC dated March 5, 1982.").

29. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (1994) (codified at 15 U.S.C. § 45(n)) (explaining when an act or practice can be declared unlawful on the ground that it is unfair).

have evolved to include theft, breaking of other laws, using insufficient care, interfering with consumer rights, and advertising that promotes unsafe practices.[31]

The definition of a deceptive act has similarly developed over time. Historically, the test for deception was whether the act or practice had the *tendency or capacity* to deceive the general public.[32] The "general public" was sometimes defined as "'that vast multitude which includes the ignorant, [the] unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.'"[33] This changed in 1983 when the Commission issued a policy statement shifting away from a rather extreme and fatuous standard to a more moderate, "reasonable" consumer standard.[34] Courts have adopted the reasoning of this "Deception Statement,"[35] under which a practice or omission is deceptive if (1) it is likely to mislead consumers; (2) the consumer's interpretation of the representation is reasonable under the circumstances; and (3) the representation is "material" in that it is likely to affect either a consumer's choice of whether to purchase a product or the consumer's health or safety in its use.[36] The potential impact of a representation is viewed from the perspective of the targeted group.[37] For example, greater scrutiny is given to practices targeting those who are particularly

30. *See* Calkins, *supra* note 27, at 1961 (citing PETER C. WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE ch. 5 (1999)).

31. *Id.* at 1962.

32. Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 487 (Mass. 2004) (citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965)). *See* Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) (supporting the FTC's finding that by implication and innuendo a deceptive impression had been created); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) (finding advertisement deceptive because it had the "tendency and capacity to deceive a substantial portion of the purchasing public").

33. *See Aspinall*, 813 N.E.2d at 487 (quoting 1 RUDOLF CALLMAN, UNFAIR COMPETITION AND TRADE-MARKS § 19.2(a)(1), at 341–44 (2d ed. 1950)); *see also* Geismar v. Abraham & Strauss, 439 N.Y.S.2d 1005, 1007 (N.Y. Sup. Ct. 1981) (stating that New York's deceptive advertising and unfair trade practices laws "were enacted to safeguard the 'vast multitude which includes the ignorant, the unthinking and the credulous.' . . . The test is not whether the average man would be deceived.") (quoting Floersheim v. Weinburger, 346 F. Supp. 950, 957 (D.D.C. 1972)).

34. Letter from James C. Miller III, Chairman, to Rep. John D. Dingell, Chairman of House Comm'n on Energy & Commerce, FTC Policy Statement on Deception (Oct. 14, 1983) [hereinafter Deception Statement], *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

35. Only the Chairman of the Commission, James C. Miller III, signed the FTC's 1983 Deception Statement. *See id.* A split Commission adopted the policy statement in Cliffdale Assocs., Inc., 103 F.T.C. 110, 184 (1984), and federal courts have applied it since that time. *See, e.g.*, FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994); Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992); Sw. Sunsites, Inc. v. FTC, 785 F.2d 1431, 1436 (9th Cir. 1986).

36. Deception Statement, *supra* note 34.

37. *Id.*

susceptible to exaggerated claims, such as elderly people or children.[38] Practices and representations directed to a sophisticated or well-educated audience, such as physicians, are judged in light of the expected knowledge of that group.[39]

C. *Why Congress Placed Enforcement Solely With the Government and Not With Private Lawyers Under the FTC Act*

Even prior to the 1938 amendments, the Supreme Court observed that the meaning and application of unfairness "belongs to that class of phrases which do not admit of precise definition," but are arrived at as a result of "the gradual process of judicial inclusion and exclusion."[40] Members of Congress extensively debated the definition of "unfair" during consideration of the 1914 Act, and many were concerned that such a broad provision—without clarification—was an unconstitutional delegation of legislative power, which would allow for arbitrary or abusive enforcement.[41]

One significant factor in calming the concerns of Congress was that the power to determine unfair practices would be placed in a nonpartisan Commission, composed of "a body of five men, intelligent men, . . . [including] lawyers, economists, publicists, and men experienced in industry, who will . . . be able to determine justly whether the practice is contrary to good morals or not."[42] An additional factor ameliorating Congress's concern at the time of the 1938 expansion of the Act to include consumer protection was that the FTC's power was "merely preventative and cooperative rather than penal."[43] The FTC Act's remedies continue to be primarily injunctive in nature and the Commission generally acts through instituting an administrative proceeding or an action in federal court seeking an order that the respondent "cease and desist from the violation of the law so charged."[44] The FTC may seek equitable relief including a preliminary or permanent

38. *Id.*

39. *Id.*

40. FTC v. Raladam Co., 283 U.S. 643, 648 (1931), *superseded by statute*, Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111 (1938), *as recognized in* Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978).

41. *See, e.g.*, 51 CONG. REC. 11,084–109, 11,112–16 (1914).

42. *Id.* at 11,108–09 (statement of Sen. Newlands). Senator Newlands continued, "I would rather have the opinion of such a commission upon a question of good morals in business than to have the opinion of the court upon such a question." *Id.*

43. S. REP. NO. 74-2, at 1 (1936).

44. 15 U.S.C. §§ 45(b), 53(b) (2000).

injunction, freezing of assets, and corrective advertising.[45] The Commission also has authority to seek restitution for injured consumers and may impose substantial fines for violation of its orders.[46] In addition, the Commission's broad authority to bring actions for violations of the Act is tempered by budgetary and staffing restraints and a requirement that the Commission pursue actions only when they significantly further the public interest.[47]

Through these means, enforcement was placed solely with the government, not with private lawyers. In fact, a private right of action was considered and rejected when Congress considered the FTC Act in 1914. At that time, Senator Clapp of Minnesota proposed an amendment that provided as follows:

> [A]ny person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefore in any district court of the United States in the district in which the defendant resides or may be found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of the suit, together with a reasonable attorney's fee.[48]

---

45. *See id.* § 57b(b).

46. In 1975, Congress expanded the FTC's authority to permit the Commission to seek restitution to those injured by a company's deceptive acts through a civil action in court. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, § 19, 88 Stat. 2201, 2201–02 (1975) (codified as amended at 15 U.S.C. § 57b (2000)). In some cases, a court may order a company to pay consumers substantial sums. *See* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions of Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1140 (1992) (discussing a federal case where the court awarded restitution in the amount of $1.96 million against a retail art business that engaged in deceptive sales practices). More often, when faced with an FTC action, a company may opt to settle with the Commission. If a business fails to abide by an order of the Commission or federal court, the FTC can institute a punitive action and seek fines of up to $10,000 per violation. *See* 15 U.S.C. § 45(l) (2000) (capping fines at $10,000). The amount of the civil fine is generally based on "the good or bad faith of the respondent; the injury to the public; the respondent's ability to pay; the desire to eliminate the benefits derived by a violation; and the necessity of vindicating the FTC's authority." Dingfelder & Brickels, *supra* note 22, at 26 (citing United States v. Reader's Digest Ass'n, Inc., 494 F. Supp. 770, 772 (D. Del. 1980), *aff'd*, 662 F.2d 955 (3d Cir. 1981)). These civil penalties can easily escalate into the millions of dollars because each day of violating an FTC order is considered a separate offense. *See id.* at 27 (discussing a $2.4 million penalty paid by General Nutrition, Inc., regarding claims made for vitamin supplements; a $2.75 million penalty against a manufacturer for claims made in advertising its "Miracle Ear" hearing aids; and a $1.5 million penalty against a manufacturer of skin care products for unsubstantiated claims regarding a baldness treatment, a wrinkle lotion, and a burn cream). In some circumstances, the FTC may seek criminal penalties for advertising that is intentionally deceptive and dangerous to the public's health. *See* 15 U.S.C. § 54(a) (2000).

47. *See* 15 U.S.C. § 53(b) (2000) (requiring the Commission to find that bringing an action in federal court to enjoin a violation of the FTC Act is in the public interest).

48. *See* 51 CONG. REC. 13,113 (1914).

Senator Clapp viewed this amendment, modeled after the Sherman antitrust law, as "putting [a] remedy in the hands of the aggrieved party" and providing "a very strong incentive to the observance of and obedience to the law by those against whom the law is directed as a regulating and controlling force."[49]

The proposed amendment was opposed on a number of grounds. The first was a question of interpretation. Congress feared courts might allow consumers to go directly to court without prior FTC action, which would have allowed judges rather than commissioners to decide whether conduct was fair.[50] Even if courts construed the Act to require a FTC ruling that conduct was unlawful before consumers could bring a private right of action, the concerns of some were not relieved. As one member noted, "[I]f no man on earth can know whether he is disobeying the law or not until some time in the future, when some commission finds out and tells him that he is disobeying the law, does not the Senator think that mulcting him in treble damages is a little bit harsh?"[51] In addition, some members of Congress thought opening two forums for deciding violations under the Act, the Commission and federal courts, could lead to confusion and conflict.[52]

Other members opposed the amendment's provision of treble damages.[53] For example, restraint of trade or monopoly under the Sherman antitrust law, upon which the amendment was modeled, was a criminal act subject to stiff penalties, and thus treble damages in that situation may have been appropriate.[54] The FTC Act, however, is unlike other laws providing for treble damages, which ordinarily involve a criminal act or, at the very least, "a high degree of moral turpitude . . . the same [in] character as punitive or exemplary damages."[55] It was also noted that such a provision could lead corporations to vigorously fight

---

49. *Id.*

50. *See id.* at 13,114–15 (colloquy between Sens. McCumber and Clapp); *id.* at 13,115 (colloquy between Sens. Brandegee and Clapp).

51. *See id.* at 13,114 (statement of Sen. McCumber). Senator McCumber continued, "[I]f this amendment is incorporated in the bill, you immediately provide for the punishment of an offense of which the offender can know nothing, at least until some quasi legislative body has passed judgment upon the question whether or not he has a right to do a particular thing." *Id. See also id.* at 13,118 (statement of Sen. Williams) ("It looks to me as if this provision might be retroactive in a rather oppressive manner.").

52. *See id.* at 13,120 (statements of Sens. Stone and Reed).

53. *See id.* at 13,115–16 (statement of Sen. Newlands).

54. *See id.* at 13,116–17 (statement of Sen. Walsh).

55. *Id.* at 13,116 (statement of Sen. Walsh).

FTC rulings in court "to the bitter end," rather than immediately abandon the practice.[56]

Some members of Congress believed that citizens injured by an unfair act could already exercise their rights at common law to bring an action for recovery.[57] In addition, members of Congress expressed concern that "a certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working up such suits," particularly given a broad right of action for "unfair" conduct.[58] Members feared that "[t]he number of these suits . . . no man can estimate."[59] What makes this legislative history so interesting today is that many members of Congress foretold the very problems that would arise when legislators added private causes of action to state CPAs.

After further consideration, Senator Clapp revised his proposed amendment to clarify that a private right of action would only exist after the Commission had declared the conduct unlawful.[60] Nevertheless, the Senate decisively rejected the proposed amendment by a forty-one to eighteen bipartisan vote.[61] Although Congress significantly expanded the reach of the FTC Act in passing the Wheeler-Lea Act of 1938[62] and later strengthened FTC-enforcement mechanisms, expanded redress, and increased civil penalties with the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975,[63] in the FTC Act's ninety years of existence, Congress has chosen not to amend it to recognize a private right of action.

The federal judiciary upheld congressional intent and expressed similar concern over the potential for abuse when it rejected in 1973 a request that it find an implied private right of action under the FTC Act.[64] The United States Court of Appeals for the District of Columbia Circuit

---

56. *See id.* at 13,115–16 (statements of Sens. Brandegee and Newlands).

57. *See, e.g.*, *id.* at 11,112 (statement of Sen. Newlands) ("[P]roceedings under this act will not, of course, interfere with the private right of any man who is injured by a competitor by practices such as have been referred to bring a suit either at law or in equity for enforcement of his rights."). One Senator suggested that findings of the Commission might be introduced as prima facie evidence of unlawful conduct in a civil suit. *See id.* at 13,151 (statement of Sen. Cummins).

58. *Id.* at 13,120 (statement of Sen. Stone).

59. *Id.*

60. *Id.* at 13,143.

61. *Id.* at 13,149. *See also id.* at 13,150 (colloquy between Sens. Cummins and Clapp debating need for private remedy in addition to public enforcement); Ward, *supra* note 46, at 1150–51.

62. *See supra* notes 21–24 and accompanying text.

63. *See supra* note 46.

64. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 986 (D.C. Cir. 1973) ("Private enforcement of the Federal Trade Commission Act would pose serious problems to the enforcement activities of the FTC, and is inconsistent with the legislative scheme established by Congress.").

found that a private remedy would over penalize companies that had committed practices not considered unfair, deceptive, or misleading prior to their commission.[65] In rejecting a private right of action, the court also noted that the FTC was composed of a body of experts and economists who could create policy in a reasoned, orderly, and forward-looking fashion.[66] The court found that private lawsuits, on the other hand, created policy in a piecemeal and retroactive manner.[67]

This Article does not advocate for the elimination of private rights of action under CPAs. Nonetheless, all of these concerns ring true as we consider how private rights of action should be interpreted under state CPAs.

III. STATES ADOPT CONSUMER PROTECTION LEGISLATION

During the 1960s and 1970s, many states adopted their own CPAs,[68] often referred to as "little-FTC Acts."[69] Most little-FTC Acts were based on alternative forms suggested by the FTC[70] or model state legislation developed by the National Conference of Commissioners on Uniform State Laws.[71] Although these laws take various forms, each broadly prohibits unfair or deceptive acts, as does the FTCA Act.[72] Most state statutes also include a nonexclusive—but sometimes extensive—list of prohibited practices.[73] The crucial difference, however, is that almost all

65. *See id.* at 998 (stating that the advantage of the FTC acting in an advisory capacity to those in compliance with the Act would be endangered).

66. *Id.* at 998–99.

67. *Id.* at 997–98.

68. J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 357 (1992).

69. *See id.* at 347 n.1 (citing Karns, *supra* note 16).

70. *See* Council of State Governments, Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law, at C4–C5 (1969); *see generally* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971).

71. Uniform Deceptive Trade Practices Act (amended 1966), 7A U.L.A. 139 (2002).

72. *See, e.g.*, ALASKA STAT. § 45.50.471 (2004); KY. REV. STAT. ANN. § 367.170 (LexisNexis 1996); LA. REV. STAT. ANN. § 51:1409 (2003); MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2004); MICH. COMP. LAWS ANN. § 445.903 (West 2002); MISS. CODE ANN. § 75-24-5(1) (West 1999); MONT. CODE ANN. § 30-14-103 (2003); N.C. GEN. STAT. § 75-1.1(a) (2003); OR. REV. STAT. § 646.608(1)(u) (2003). The District of Columbia's statute, however, does not explicitly recognize a violation of the act for "unfair" trade practices, and courts have not permitted such actions. *See* D.C. CODE ANN. § 28-3904 (LexisNexis 2001); Atwater v. D.C. Dep't of Consumer & Regulator Affairs, 566 A.2d 462, 465 (D.C. 1989).

73. *See, e.g.*, ALASKA STAT. ANN. § 45.50.471(b); ARK. CODE ANN. §§ 4-88-107(a), -109 (Supp. 2003); COLO. REV. STAT. § 6-1-105(1)(a)–(ww) (2004); D.C. CODE ANN. § 28-3904(a)–(ee); GA. CODE ANN. § 10-1-393.1 (2000); IDAHO CODE ANN. § 48-603 (2003); IOWA CODE ANN. § 714.16(2)(b)–(n) (West 2003); MINN. STAT. ANN. § 325D.44(1) (West 2004); MISS. CODE ANN. § 75-24-5(2); OHIO REV. CODE ANN. § 1345.02(B) (LexisNexis 2002); OKLA. STAT. ANN. tit. 15, §

state CPAs provide consumers with a private right of action to enforce their provisions.

The federal and state laws were meant to complement each other.[74] In the "heyday of consumerism," the FTC urged states to adopt their own little-FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels.[75] Most state laws include a provision directing state regulators to look to the FTC for guidance in terms of substantive law, encouraging state regulators to emphasize enforcement and remedies, rather than focus on policymaking.[76] All fifty states and the District of Columbia now have adopted little-FTC Acts.[77]

Unlike the FTC Act, which provides for enforcement only by state agencies, nearly every state CPA provides consumers with a private right of action in addition to government enforcement.[78] Only Iowa relies exclusively on its Attorney General to enforce its consumer protection law in court.[79] Although the little-FTC Acts of Arizona and Delaware do not explicitly provide for a private right of action, courts in those states have found that citizens have an implied right to bring lawsuits for violations of the statutes.[80]

---

753 (West 1993); OR. REV. STAT. § 646.608(1); TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 2002) (amended by H.R. 2018, 78th Leg. ch. 728 Tex.); W. VA. CODE ANN. § 46A-6-102 (LexisNexis 1999). States may also have numerous other consumer protection statutes addressing particular practices.

74. *See* VT. STAT. ANN. tit. 9, § 2451 (2004) (recognizing that the purpose of the Vermont Consumer Fraud Act is to "complement the enforcement of federal statutes and decisions governing unfair methods of competition and unfair and deceptive acts or practices in order to protect the public, and to encourage fair and honest competition"); W. VA. CODE ANN. § 46A-6-101(1) (same).

75. Franke & Ballam, *supra* note 68, at 356–57.

76. *Id.*

77. *See* Karns, *supra* note 16, at 373–74 n.2 (citing state statutes).

78. *See* Sovern, *supra* note 17, at 448–52 (describing the opportunities states provide to consumers). In several states, legislatures first enacted laws providing only for state attorney general enforcement but later added a private right of action. For example, New Jersey enacted its Consumer Fraud Act in 1960 "'to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer.'" Cox v. Sears Roebuck & Co., 647 A.2d 454, 460 (N.J. 1994) (quoting Senate Committee, Statement to Senate Bill No. 199 (1960)). The New Jersey law was amended to provide for citizen lawsuits in 1971. *See* N.J. STAT. ANN. § 56:8-19 (West 2001). *See also* N.Y. GEN. BUS. LAW § 349(h) (McKinney 2004) (amended 1980); 73 PA. STAT. ANN. § 201-9.2 (West Supp. 2005) (amended 1976); WASH. REV. CODE ANN. § 19.86.010 (West 1999) (amended 1970).

79. *See* Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 227–28 (Iowa 1998).

80. *See* Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119, 1122 (Ariz. 1974); Young v. Joyce, 351 A.2d 857, 859 (Del. 1975). In fact, for the first seven years of its existence, it was believed that only the state Attorney General could bring actions under Arizona's CPA. *See* Edwin M. Gaines, Jr., *Arizona's Consumer Fraud Act: A Standard of Conduct*, 22 ARIZ. L. REV. 321, 323 (1980).

A. Elements Necessary to Bring a Private Claim

The elements necessary to bring private lawsuits under little-FTC Acts vary from state to state. In some cases, the required elements of a claim are explicitly stated in the legislation. In many other cases, the requirements for bringing a private lawsuit are based on the judiciary's interpretation of the law. The great variation in the interpretation of CPAs is significant for two reasons. First, it demonstrates the clear choices courts often have when applying CPAs. Second, the vast differences in the application of state laws makes it particularly inappropriate for courts to certify multi-state class actions alleging CPA claims or to apply the CPA of one state to conduct that occurred in another state.

Even the very definition of a prohibited act varies from state to state. In Washington, a practice is unfair if it "'offends public policy as . . . [expressed] by statutes, . . . [or] is immoral, unethical, oppressive or unscrupulous; . . . [and] causes substantial injury to consumers.'"[81] It is deceptive if it has the potential "to deceive a substantial portion of the public."[82] Texas law limits the definition of "false, misleading, or deceptive" to specific, enumerated acts in private rights of action but does not apply this limitation in enforcement actions brought by its Attorney General.[83] This assures that businesses have notice of prohibited conduct before being sued for damages. A handful of states require consumers to attempt to settle with the company or exhaust administrative procedures before instituting a lawsuit.[84] Many state laws provide that the state is to interpret its law consistent with that of the FTC or look to the FTC for guidance in deciding prohibited practices.[85]

---

81. Blake v. Fed. Way Cycle Ctr., 698 P.2d 578, 583 (Wash. 1985) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972)).

82. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 535 (Wash. 1986) (en banc). *See also* 73 PA. STAT. ANN. § 201-2(4)(xxi) (West Supp. 2005) (prohibiting "engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding").

83. *See* TEX. BUS. & COM. CODE ANN. § 17.46(d) (Vernon 2002).

84. *See, e.g.*, GA. CODE ANN. § 10-1-399(b) (2000) (requiring a claimant to deliver a written demand for relief identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered to any prospective respondent at least thirty days prior to the filing of a private action); IND. CODE ANN. § 24-5-0.5-5(a) (LexisNexis 1996) (requiring the consumer to give notice to the supplier the sooner of six months after initial discovery of the deceptive act, one year following the transaction, or within thirty days of any time limitation with respect to a warranty); MISS. CODE ANN. § 75-24-15(2) (2000) (requiring consumers to make "a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General").

85. *See, e.g.*, MONT. CODE ANN. § 30-14-104 (2003); TENN. CODE ANN. § 47-18-115 (2001);

The most significant difference between state laws, however, is how they are applied in private lawsuits when issues of reliance, intent, and damages arise.

1. The Need to Show Reliance

Only a few states, such as Indiana, Texas, and Wyoming, explicitly require a showing of actual reliance in the text of the statute.[86] Courts in a number of other states have ruled that CPA laws require private litigants to show that they relied on the alleged unfair or deceptive act and that this reliance was "reasonable" or "justifiable."[87] Similarly, Kansas courts have interpreted the statutory requirement that a person bringing a private lawsuit under the act be "aggrieved" to require a showing of reliance.[88] In addition, courts in some states, such as Arizona, require a showing of actual reliance but do not necessarily require the reliance to be "reasonable."[89] Minnesota and North Dakota require a showing that the defendant intended that consumers rely on the alleged deceptive act, even if no one was actually misled.[90]

VT. STAT ANN. tit. 9, § 2453(b) (Supp. 2004); W. VA. CODE ANN. § 46A-6-101(1) (LexisNexis 1999).

86. IND. CODE ANN. § 24-5-0.5-4(a) (requiring reliance "upon an uncured or incurable deceptive act"); TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (Vernon Supp. 2005) (requiring that the deceptive act or practice be "relied on by a consumer to the consumer's detriment"); WYO. STAT. ANN. § 40-12-108(a) (2005) ("A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice."); *see also* VT. STAT. ANN. tit. 9, § 2461(b) (1993) (providing a private right of action to "[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by . . . [the act] . . . or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by [the act]").

87. *See, e.g.*, Lynas v. Williams, 454 S.E.2d 570, 574 (Ga. Ct. App. 1995) (finding that "justifiable reliance" is an essential element of a claim under Georgia's Fair Business Practices Act); Philip Morris, Inc., v. Angeletti, 752 A.2d 200, 234–39 (Md. 2000) (denying class certification while noting that action under consumer protection statutes would require a showing of individual reliance); Weinberg v. Sun Co., 777 A.2d 442, 445–46 (Pa. 2001) (holding that because Pennsylvania's Unfair Trade Practices and Consumer Protection Law is rooted in fraud prevention, it is likely the legislature intended to retain the common law elements of fraud, including reliance); *see also* Tim Torres Enters. v. Linscott, 416 N.W.2d 670, 675 (Wis. Ct. App. 1987) (noting with approval the trial court's instruction that "there must be some actual consumer reliance . . . before awarding pecuniary damages").

88. *See* Finstad v. Washburn Univ., 845 P.2d 685, 691–92 (Kan. 1993).

89. *See, e.g.*, Parks v. Macro-dynamics, Inc., 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979); Peery v. Hansen, 585 P.2d 574, 577–78 (Ariz. Ct. App. 1978) .

90. *See* N.D. CENT. CODE § 51-15-02 (1999); LeSage v. Norwest Bank Calhoun-Isles, 409 N.W.2d 536, 539–41 (Minn. Ct. App. 1987).