WASHBURN LAW JOURNAL

Fall 2007

"That's Unfair!" Says Who - The Government or Litigant?: Consumer Protection Claims Involving Regulated Conduct

VICTOR E. SCHWARTZ
CARY SILVERMAN
CHRISTOPHER E. APPEL

Volume 47
Number 1

"That's Unfair!" Says Who—The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct

Victor E. Schwartz,* Cary Silverman** & Christopher E. Appel***

* 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.

** Cary Silverman is a senior 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.

*** Christopher E. Appel is a staff attorney in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received a B.S. in Commerce and Economics from the University of Virginia in 2003, and a J.D. from Wake Forest University School of Law in 2006.

INTRODUCTION

State consumer protection acts (CPAs) broadly prohibit "unfair" or "deceptive" practices in the sale of products and services to consumers. What conduct falls within these amorphous terms is generally determined on a case-by-case basis, either through government enforcement or, increasingly, private lawsuits. But, what happens when a private lawsuit claims that representations or terms of service are unfair or misleading, when the conduct at issue is regulated, permitted, or explicitly approved by, a government agency? The result is tension between the statutory responsibility and reasoned decision making of regulatory authorities who serve the public and the unpredictable and inconsistent CPA claims brought by lawyers who have an understandable self-interest.

Here are a few real-life scenarios. Sunscreen makers face claims alleging that rather than protecting the public, their products "lull[] consumers into a false sense of security over prolonged sun exposure," exposing them to cancer and other dangers, despite Food and Drug Administration (FDA) approval of sunscreen labeling.[1] Dairy producers and grocers have faced a class action lawsuit claiming that their cartons should inform consumers of the effects of lactose intolerance, when federal regulators have found such labeling unwarranted.[2] Automobile insurers have defended suits claiming that they unfairly specified the use of non-Original Equipment Manufacturer (OEM) parts for repairs, even as some states require use of generic parts.[3] Some lawyers have picked up where personal injury attorneys left off, suing on behalf of all purchasers of FDA-approved pharmaceuticals who have *not* experienced a harmful effect from a drug and may have benefited from its use, claiming they simply paid too much due to undisclosed risks.[4] In many instances, CPA claims are "piled on" to product liability and other tort

1. *See* Jennifer Davies, *Suit Questions Effectiveness of Sunscreens Dermatologist Worried Wrong Message Being Sent*, SAN DIEGO UNION-TRIBUNE, Mar. 31, 2006, at A1, *available at* 2006 WLNR 5529128; 21 C.F.R. §§ 352.50, 352.52, 352.60 (2006).

2. *See* Plaintiffs' Class Action Complaint at 1-4, Mills v. Giant of Maryland, No. 05-0008054 (D.C. Super. Ct. 2006). The consumer protection claim was withdrawn when the case was removed to federal court, which ultimately dismissed this claim due to federal preemption. *See* Mills v. Giant of Maryland, 441 F. Supp. 2d 104, 110-11 (D.D.C. 2006). An appeal is pending. *See* Reply Brief of Appellants, Mills v. Giant of Maryland, No. 06-7148, 2007 WL 988922 (D.C. Cir. Apr. 2, 2007). Frito-Lay has faced the threat of a similar CPA claim alleging their potato chip bags should warn of the potential effects of olestra, a fat substitute approved by the FDA, when the FDA has specifically decided that such warnings were not needed. *See* Bruce Mohl, *Nutrition Group Seeks Warning Labels for Olestra; But State Law May Help Frito-Lay if Lawsuit is Filed*, BOSTON GLOBE, Jan. 5, 2006, at E3. Frito-Lay decided to settle the case by agreeing to place "made with olestra" more prominently on product packaging, rather than defend against the lawsuit. *See* Associated Press, *Frito-Lay to Add Labeling for Fake Fat*, KANSAS CITY STAR, June 2, 2006, at A14, *available at* 2006 WLNR 9441000.

3. *See* Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 810-11 (Ill. 2005); *see also* Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1217 (2001).

4. *See infra* Section IV.B.

claims. In other words, a plaintiffs' lawyer may assert CPA claims as a fallback should he or she fail to show that the product was defective, that the defendant was negligent, or that his or her client was injured as a result. A lawyer may also include CPA claims in a complaint as a basis for obtaining attorneys' fees not ordinarily available in personal injury claims.[5]

Most state consumer protection statutes recognize the value of consistency between government policymaking and private consumer protection lawsuits. CPAs often exempt conduct in compliance with state or federal regulations from their coverage. Application of this sound policy, however, is not consistently and predictably applied, exposing businesses that have carefully followed government requirements to potentially massive liability. In some cases, courts narrowly interpret such exemptions, allowing plaintiffs' lawyers to circumvent the clear language of the law.[6] In other instances, the significance of regulatory compliance is relegated to dictum when a court relies on other grounds to dismiss a CPA claim, such as failure to show injury or damages or to meet class certification standards.[7] Nevertheless, in recent years, several courts have rendered strong decisions giving new life to regulatory compliance exemptions.[8] These examples demonstrate that courts have a clear choice in deciding who determines whether conduct is unfair or deceptive—government agencies charged with regulating products and services for the public good, or lawyers as private enforcers who seek the often generous recovery available under the statute.

This article begins by examining the origin and policy underlying CPAs, including the role of government agencies in deciding what was unfair and deceptive at their inception as well as the continued importance of congruence between regulation and litigation today. Next, the article surveys the language of exemptions to CPAs that recognize the interaction between government regulation and CPA claims, placing such provisions in three general categories based on their language and apparent scope. Recognizing that the language of such exemptions does not necessarily represent the scope of their application in practice, the article closely examines how courts have interpreted and applied them, finding significant variation. Finally, the article concludes that courts should read regulatory compliance provisions in a manner that respects the authority and institutional expertise of government agencies. It

5. *See, e.g.*, Lisa Brennan, *Vioxx Plaintiffs' Lawyers Win $4.4 Million in Fees Under Consumer Fraud Act*, 188 N.J.L.J. 1136 (June 25, 2007) (reporting a case involving both product liability and consumer fraud claims in which a New Jersey court awarded the plaintiffs' attorneys $4.4 million in fees even though the plaintiffs collected approximately $4,000 on their consumer claim, while the judgment included $13.5 million on the product liability claim).

6. *See infra* Section III.B.

7. *See infra* notes 96, 97, 100-102 and accompanying text (discussing *Avery*).

8. *See, e.g.*, Price v. Philip Morris, Inc., 848 N.E.2d 1, 6 (Ill. 2005).

urges state legislatures to amend their CPA laws, where needed, to include regulatory compliance provisions when absent or when state courts allow lawsuits that conflict with public policy to proceed.

I. THE PUBLIC POLICY REASONS FOR CONGRUENCE BETWEEN CONSUMER PROTECTION ACTIONS AND GOVERNMENT REGULATION

A. The Importance of Government Regulation and Policymaking at the Origin of CPAs

Consumer protection statutes find their origin in common law fraud and misrepresentation claims as well as in federal consumer protection law.[9] Relying upon common law had its limitations for addressing deceptive sales and marketing practices. For example, the law governing misrepresentation claims required that a person first suffer an injury before bringing a claim. It was also particularly difficult for a plaintiff to show the required element of intent to deceive in a fraud claim, and the relatively small damage awards often did not justify the expenses that accompanied a lawsuit.[10] Breach of contract actions were similarly insufficient in many situations because a business could make false claims about its product or advertise lower-than-actual prices without entering into a contract.[11]

The inadequacy of common law tools with which a consumer could address false advertising and deceitful commercial schemes in these circumstances eventually led Congress in 1914 to establish the Federal Trade Commission (FTC)[12] and empowered it to regulate such "unfair or deceptive acts or practices" in consumer transactions in 1938.[13] The legislative history of the FTC Act shows that the primacy of government agencies in setting consumer protection policy was an essential consideration at the inception of consumer protection law. Congress exten-

---

9. *See* Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 6 (2005).

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

11. 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).

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

13. *See* Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a) (2000)). Congress at the time was concerned about the growth and spread of monopolies, so the Act initially charged the Commission with regulating "unfair methods of competition." *Id.*; *see also* Federal Trade Commission Act §§ 41-58. Thus, in the beginning, the FTC 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, Congress amended the FTC Act to declare unlawful all "unfair or deceptive acts or practices in commerce." Wheeler-Lea Act § 45(a).

sively debated the definition of "unfair" during consideration of the 1914 FTC 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.[14] Congress recognized that "it would undertake an endless task" by attempting to provide an exhaustive list of prohibited practices.[15] Therefore, Congress decided, "by a general declaration [to] condemn[] unfair practices [and] leave it to the [FTC] to determine what practices were unfair."[16] Moreover, 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.[17] Some members of Congress also thought that opening two forums for deciding violations under the Act, the FTC and federal courts, could lead to confusion and conflict.[18] Members 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.[19] They feared that "[t]he number of these suits. . . no man can estimate."[20]

Thus, a significant factor quieting congressional concerns during the formative years of the FTC was that the power to determine unfair practices would be placed in a nonpartisan Commission.[21] Enforcement is placed solely with government regulators, not with private lawyers. In fact, Congress considered and rejected a private right of action when it debated the FTC Act in 1914.[22] What makes this legislative history so

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

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

16. S. REP. NO. 597, at 13 (1914), *reprinted in* 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3909-10 (Earl W. Kintner ed., 1983) [hereinafter Kintner]. Even before the 1938 amendments, the Supreme Court observed that the meaning and application of unfairness "belongs to that class of phrases which does not admit of precise definition," but are arrived at as a result of "the gradual process of judicial inclusion and exclusion." FTC v. Raladam Co., 283 U.S. 643, 648 (1931), *superseded by statute*, Wheeler-Lea Act § 45(a), *as recognized in* Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978).

17. *See* 51 CONG. REC. at 13,114-15 (1914) (colloquy between Sens. McCumber and Clapp); *id.* at 13,115 (colloquy between Sens. Brandegee and Clapp).

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

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

20. *Id.*

21. *See, e.g.*, *id.* at 11,084-109. Senator Newlands noted 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." *Id.* at 11,109.

22. *See id.* at 13,113. The federal judiciary upheld this view and expressed similar concern over the potential for abuse when, in 1973, it rejected a request that it find an implied private right of action under the FTC Act. *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."). In rejecting a private right of action, the court noted that the FTC was composed of a body of experts and economists that could create policy in a reasoned, orderly, and forward-looking fashion. *Id.* at 998-99. The court found that private lawsuits, on the other hand, created policy in a piecemeal and retroactive manner. *Id.* at 997-98.

interesting is that many members of Congress foretold the very problems that would arise when legislators added private causes of action to state CPAs and left too few safeguards over the types of claims brought. A clear and consistently applied exemption for conduct permitted or authorized by government agencies is absent in many states.

B. Considering the Interaction of Consumer Protection Claims and Government Regulation Today

Most state legislatures adopted CPAs in the 1960s and 1970s.[23] State consumer protection laws, like their federal counterpart, broadly prohibit unfair and deceptive trade practices. A critical difference is that, unlike the FTC Act, nearly every state's CPA provides consumers with a private right of action in addition to government enforcement.[24] This distinction is important because the expanded enforcement authority has, as predicted by Congress, opened the door to much broader types of claims. Many state statutes now include a nonexclusive—but sometimes extensive—list of prohibited practices in order to facilitate this broad enforcement on a more local level.[25] Guidelines for what constitutes acceptable practices, however, often remain less certain and receive significantly varying treatment from state to state.

In the first ten to twenty years of their adoption, consumers used the private remedy provisions of CPAs only sporadically.[26] Even then, scholars predicted that the power of these provisions had been "severely underestimated."[27] In recent years, both the use and abuse of these statutes have resulted in increased scrutiny and criticism from scholars and commentators.[28] The increased frequency in which complaints in-

---

23. *See generally* 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); Patterson v. Beall, 19 P.3d 839 (Okla. 2000) (discussing Council of State Governments, Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law, at C4-C5 (1969)); William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971).

24. *See* Schwartz & Silverman, *supra* note 9, at 15-16 (discussing state adoption of mini-FTC acts). Iowa, however, does not authorize private lawsuits under its consumer protection statute, exclusively providing for government enforcement. *See* IOWA CODE ANN. § 714.16 (West 2003); *see also* Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998) (finding no private right of action).

25. *See, e.g.*, ALASKA STAT. § 45.50.471(b) (2006); ARK. CODE ANN. §§ 4-88-107(a)-109 (West 2001); COLO. REV. STAT. ANN. § 6-1-105(1)(a)-(ww) (West 2002); D.C. CODE ANN. § 28-3904(a)-(ee) (LexisNexis 2001); GA. CODE ANN. § 10-1-393.1 (2000); IDAHO CODE ANN. § 48-603 (2003); IOWA CODE ANN. § 714.16(2)(b)-(n); MINN. STAT. ANN. § 325D.44(1) (West 2004); MISS. CODE ANN. § 75-24-5(2) (2000); OHIO REV. CODE ANN. § 1345.02(B) (West 2004); OKLA. STAT. ANN. tit. 15, § 753 (West 1993); OR. REV. STAT. § 646.608(1) (2005); TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 2002) (amended by H.R. 2018, 79th Leg., 3d Sess. (Tex. 2006); W. VA. CODE ANN. § 46A-6-102(7) (LexisNexis 1999). States may also have numerous other consumer protection statutes addressing particular practices.

26. Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 522 (1980).

27. *Id.*

28. *See* James R. Keller, *Illinois Consumer Fraud Act: A Primer on Recent Developments*, 87

clude CPA claims has augmented tension between their general prohibition of unfair or deceptive acts and the oversight of government regulators with respect to the same products and services these private lawsuits attack.

There are several compelling public policy reasons for seeking congruence between private enforcement of CPAs and conduct regulated by government agencies. These considerations include consistency between federal and state regulatory goals; respect for the authority and expertise of government agencies; predictability and fairness for businesses that rely on government decision making; and the alternative means in place, often through administrative systems, for addressing consumer complaints.

1. Consistency Between Federal and State Regulatory Goals

When state legislatures adopted CPAs, they recognized the potential for tension between application of the state and federal consumer protection law and sought to avoid it. When the FTC urged states to adopt their own "little-FTC Acts,"[29] they did so as a way of combining resources to target unfair and deceptive practices at both the local and national levels.[30] The federal and state laws are meant to complement each other.[31] The adoption of state laws are not intended to create a new policy-making function that could be at odds with federal consumer protection efforts.

For that reason, many CPAs 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.[32] Thus, it was understood that the federal government, through the FTC, would continue to have the primary policymaking role in determining unfair and deceptive practices. The sharing of responsibilities in this way promotes consistency and helps assure that federal and state regulators do not work against one another. In addition, it provides guidance upon which businesses can

---

ILL. B.J. 474, 474 (1999) ("In cases unnoticed by many of us, the appellate courts have been shaping the Act into a powerful weapon."). *See generally* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006); Schwartz & Silverman, *supra* note 9, at 32-48 ; Keith E. Andrews, *Louisiana Unfair Trade Practices Act: Broad Language and Generous Remedies Supplemented by a Confusing Body of Case Law*, 41 LOY. L. REV. 759 (1996).

29. *See* Karns, *supra* note 10, at 374-77.

30. Franke & Ballam, *supra* note 23, at 356–57.

31. *See, e.g.*, VT. STAT. ANN. tit. 9, § 2451 (1993) (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 or deceptive acts or practices in order to protect the public, and to encourage fair and honest competition"); W. VA. CODE § 46A-6-101(1) (2006) (recognizing the same general purpose in West Virginia).

32. *See supra* text accompanying note 31; *see infra* Section III.A.

reasonably rely as to what practices are acceptable. Without such a system in place, businesses would be subject to a patchwork of interpretations from fifty states, the District of Columbia, and the federal government as to whether a given practice is unfair or deceptive. Today, as companies increasingly do business across state lines, such constituency is even more important than when Congress established the FTC.

2. Conflicting Actions Step on the Statutory Authority and Informed Judgment of Regulators

Congress and state legislatures have established and charged various government agencies with regulating industry practices to protect the public health and safety. These responsibilities often include approving or providing standards for marketing practices, labeling of products, and terms of service. Millions of public dollars are spent each year to fund regulatory agencies. These taxpayer funds allow agencies to hire experts to formulate policy, inspectors to monitor conduct and respond to consumer complaints, and lawyers to further the enforcement of the law. Government entities often reach decisions after careful deliberation and, in some cases, after a notice and comment period allowing the public to contribute to the development of regulatory policy. Public servants, understandably, may feel slighted when their reasoned decisions to regulate or not regulate a practice are ignored by lawyers who pursue private, not public, goals. At worst, such private, profit-motivated regulation can place public health and safety at risk.[33]

It would indeed be odd for the FTC, one federal agency, to declare a practice unfair or deceptive that a sister federal agency, such as the FDA, found perfectly acceptable. This oddity generally does not occur because the FTC defers to the public policy expertise of the FDA in arriving at decisions within its area of jurisdiction. The same holds true at the state level. It would be unusual, for example, to see a state attorney general enforcing a consumer protection law against a business for a practice authorized by a state insurance or public utility commission. The result should be no different when enforcement of a CPA comes through a private lawsuit rather than a state actor, but there is no public accountability or coordination, which work to limit such suits. Therefore, it falls upon courts to consider the appropriateness of CPA actions that claim conduct authorized or permitted by government regulators is unfair or deceptive. In many cases, such private lawsuits are an affront to expert decision makers at government agencies and the democratic policy-making process. They are a type of "regulation through litiga-

33. *See generally* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 56-60 (1983) (discussing the elements of effective product warnings and the risks presented by over-warning).

tion."[34]

3. Subjecting Government-Authorized Conduct to CPA Lawsuits Results in a Lack of Predictability and Fairness for Businesses

Private CPA lawsuits may not only damage the credibility of government agencies having jurisdiction over the practice at issue, but they also result in a lack of predictability for businesses. Regulated actors reasonably rely on the decisions, instructions, and guidance of government officials. If a government agency authorizes or permits a certain marketing or business practice, then a business that complies with the law would not expect to later find itself subject to liability on the basis that a plaintiff's lawyer, a judge, and individuals on a particular jury panel have reached a different conclusion. Moreover, in many states, violations of the CPA are subject to statutory (minimum) or treble (triple) damages, as well as a mandatory award of attorneys' fees to a prevailing plaintiff, exposing a defendant to liability far in excess of a purchaser's actual out-of-pocket loss.[35] CPA lawsuits are often brought as class actions, asserting claims on behalf of all purchasers in a state, or the entire country, during an extended period. Even if a CPA claim challenging government-regulated conduct ultimately results in a defense judgment, such litigation is costly and disruptive. Regulatory compliance exemptions provide an efficient means to dispose of such suits early in the litigation.

4. Effective Means Exist for Addressing Unfair or Deceptive Practices Involving Regulated Industries

In some areas, legislators have decided that government enforcement or administrative systems are preferable to civil litigation. Government enforcement allows publicly-accountable officials to determine policy. In bringing enforcement actions, government agencies have a degree of "prosecutorial discretion" in deciding whether to bring actions for minor or technical violations. Government enforcement also provides an effective screening mechanism for claims that are without merit in law or in fact. By reviewing consumer complaints, government officials can address questionable practices or resolve consumer disputes through informal means, reserving the need to call upon the resources of the judiciary only when legitimate complaints cannot be voluntarily resolved. Such informal mechanisms are not only useful from the perspective of the judiciary, but may often avoid the need for costly litiga-

34. Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, BRIEFLY, Nov. 1999, Vol. 3, No. 11.

35. *See* Schwartz & Silverman, *supra* note 9, at 22-24.

tion.

In addition, states have implemented specific administrative mechanisms for receiving, investigating, and remedying consumer complaints in some areas. In the insurance context, for example, state insurance departments receive and investigate hundreds of consumer complaints each year. Regulatory agencies usually have the power to serve subpoenas and hold hearings, and they may have a range of civil and criminal penalties available to them when needed to obtain compliance.[36] These well-developed procedures fall to the wayside when claims falling within the jurisdiction of the agency go straight into the judicial system.

II. THE LAY OF THE LAND: FINDING CONGRUENCE BETWEEN CPA LITIGATION AND GOVERNMENT REGULATION

All fifty states and the District of Columbia have adopted CPAs.[37] In adopting such laws, the vast majority of state legislatures, approximately two-thirds, explicitly recognized the desirability of having congruence between CPAs and government regulation. These provisions reflect

> a legislative policy of deference to the authority granted by Congress or the General Assembly to federal and state regulatory agencies and a recognition of the need for regulated actors to be able to rely on the directions received from such agencies without risk that such reliance may expose them to tort liability.[38]

Although the language of such provisions runs a wide gamut, it can be divided among three general categories: (1) a rule of construction suggesting or requiring that courts interpret the state's CPA in light of the interpretations and policy of the FTC; (2) an exemption for conduct authorized or permitted by a government agency; and (3) an exemption applicable to specific regulated industries or conduct. Some state laws include multiple exemptions and may be appropriately placed into more than a single category. A separate and distinct basis for dismissal of claims related to conduct regulated by federal agencies is found through application of constitutional principles of federal preemption, discussed in Section IV.

In applying these exemptions, courts have a clear choice as to whether to provide deference to regulatory expertise and authority, or to allow private claims to proceed unhindered. Each of the three types of regulatory compliance exemptions are subject to inconsistent and

---

36. *See, e.g.*, 215 ILL. COMP. STAT. ANN. 5/401.5 (West 1999) (outlining the investigative powers of the Department of Insurance); TENN. CODE ANN. § 56-458-111 (Supp. 2000) (stating the Insurance Commissioner's authority to enforce the code).

37. *See* Karns, *supra* note 10, at 373-74 n.2 (citing state statutes).

38. Price v. Philip Morris, Inc., 848 N.E.2d 1, 38 (Ill. 2005).

sometimes overly narrow application. Courts have interpreted provisions with substantially similar or even identical language to reach opposite conclusions as to the scope of conduct falling outside of the CPA. In some states, interpretation of exemptions for conduct permitted by regulatory agencies appears to be a matter of first impression, indicating that courts have overlooked their significance since adoption of private rights of action over three decades ago.[39]

A. FTC Rule of Construction

The first type of provision, incorporated into the consumer protection laws of about half of the states, is a rule of construction, rather than an outright exemption.[40] Such provisions state that courts and state government agencies should interpret the state's CPA in light of FTC policy, orders, regulations, or rulings, or give the FTC interpretation "great weight."[41] These rules of construction are rooted in the historic purpose of state CPAs as a complement to the FTC's policy expertise, whereby the FTC determines unfair or deceptive conduct and the state provides local enforcement resources.[42] Often, a FTC rule of construction is included in addition to one of the other forms of regulatory compliance exemptions.

An FTC rule of construction is important to the determination of some cases. For example, qualifications for manufactured products bearing the label "Made in the U.S.A." fall under the purview of FTC interpretation, which courts rely on to determine its proper usage.[43]

---

39. For example, as of the time of this writing, there does not appear to be any reported decision construing the scope of the regulatory compliance exemption to the CPAs of Arizona, Nevada, Ohio, South Dakota, Utah, or Wyoming.

40. *See* ALA. CODE § 8-19-6 (LexisNexis Supp. 2002); ARIZ. REV. STAT. ANN. § 44-1522(C) (2003); FLA. STAT § 501.204(2) (West 2006); GA. CODE ANN. § 10-1-391 (2000); IDAHO CODE ANN. § 48-604(1) (2003); 815 ILL. COMP. STAT. ANN. 505/2 (West 1999); MD. CODE ANN. COM. LAW. § 13-105 (Supp. 2005); MASS. ANN. LAWS ch. 93A, § 2(b) (LexisNexis 2005); MINN. STAT. ANN. § 325D.47 (West 2004); MISS. CODE ANN. § 75-24-3(C) (2000); MONT. CODE ANN. § 30-14-104 (2005); N.M. STAT. § 57-12-4 (2006); OHIO REV. CODE ANN. § 1345.02(C); R.I. GEN. LAWS § 6-13.1-3 (2001); S.C. CODE ANN. § 39-5-20(b) (1985); TENN. CODE ANN. § 47-18-115 (Supp. 2001); TEX. BUS. & COMM. CODE ANN. § 17.46(c); UTAH CODE ANN. § 13-11-2 (Supp. 2001); VT. STAT. ANN. tit. 9, § 2453(b) (1993); WASH. REV. CODE § 19.86.920 (West 1999); W. VA. CODE § 46A-6-101. Several states exempt conduct approved or authorized by the FTC. *See* ARIZ. REV. STAT. § 44-1523 (2003) (exempting advertisements subject to and in compliance with the rules and regulations of the FTC); ARK. CODE ANN. § 4-88-101 (Supp. 2001) (exempting advertising or practices subject to and in compliance with any rule, order, or statute administered by the FTC); N.Y. GEN. BUS. LAW § 349(d) (McKinney 2004) ("[I]t shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts."). These are distinct from FTC rules of construction because the language suggests that courts in these states must follow the interpretations and rulings of the FTC in contrast to offering them persuasive or deferential treatment.

41. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1522(C); MASS. ANN. LAWS ch. 93A, § 2(b); MISS. CODE ANN. § 75-24-3(c); N.M. STAT. § 57-12-4; S.C. CODE ANN. § 39-5-20(b).

42. *See* Schwartz & Silverman, *supra* note 9, at 16.

43. *See* Colgan v. Leatherman Tool Group, Inc., 38 Cal. Rptr. 3d 36, 53 (Cal. Ct. App. 2006);

Courts examining any industry that advertises a "free" product or service may similarly look to FTC guidelines to determine the appropriateness of such a claim.[44] The FTC publishes various other guides to help businesses avoid unfair or deceptive practices in advertising. These guides address such practices as the use of endorsements or testimonials,[45] use of "fine print,"[46] sale pricing,[47] advertising of warranties and guarantees,[48] and advertising of fuel economy of new cars.[49] In addition, the FTC has long-regulated the labeling of cigarettes, permitting the marketing of cigarettes as "light" or "low tar" so long as they comply with a specific testing and disclosure method adopted by the FTC.[50]

When a business diligently follows the instructions of the FTC in developing their marketing practices, it should reasonably expect that it acts fairly, and not be subject to a contrary determination under a state law that supposedly furthers the same policy goals.[51]

B. Authorized or Permitted Conduct

More than two-thirds of state legislatures have codified a policy that conduct authorized or permitted by a government agency is beyond the scope of the consumer protection law.[52] This form exempts conduct

---

see also Federal Trade Commission, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1997), http://www.ftc.gov/os/1997/12/epsmadeusa.htm (last visited Sept. 23, 2007); Federal Trade Commission, Complying with the Made in USA Standard (Dec. 1998), http://www.ftc.gov/bcp/conline/pubs/buspubs/madeusa.pdf (last visited Oct. 1, 2007).

44. *See* Luskin's Inc. v. Consumer Protection Div., 726 A.2d 702, 714 (Md. 1999) (analyzing an allegedly deceptive claim for "free" airline tickets); *see also* Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. pt. 251 (2005).

45. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2005).

46. Federal Trade Commission, Big Print. Little Print. What's the Deal? (June 2000), http://www.ftc.gov/bcp/conline/pubs/buspubs/bigprint.pdf (last visited Sept. 23, 2007).

47. Guides Against Deceptive Pricing, 16 C.F.R. pt. 233 (2005).

48. Guides for the Advertising of Warranties and Guarantees, 16 C.F.R. pt. 239 (2005).

49. Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. pt. 259 (2005).

50. *See* Price v. Philip Morris, Inc., 848 N.E.2d 1, 50 (Ill. 2005) (finding that the marketing of light cigarettes was not deceptive because of the FTC's close regulation and approval of the light cigarette marketing and disclosures at issue).

51. An FTC rule of construction may also be important for insurers because the FTC Act specifically provides that it does not apply to insurance practices. *See* 15 U.S.C. § 1011 (2000). For that reason, some courts have found that CPAs likewise do not apply to insurer conduct, but that such practices are regulated solely by state insurance commissions. *See* Britton v. Farmers Ins. Group, 721 P.2d 303, 323-24 (Mont. 1986) (holding plaintiff was not eligible for an award of attorneys fees and costs under the Montana's Unfair Trade Practices and Consumer Protection in an action for bad-faith refusal to pay under the insurance code).

52. *See* ARIZ. REV. STAT. ANN. § 44-1523 (FTC regulated conduct only); ARK. CODE ANN. § 4-88-101; COLO. REV. STAT. ANN. § 6-1-106(1)(a) (West 2002); CONN. GEN. STAT. ANN. § 42-110c(a) (West 2000); DEL. CODE ANN. tit. 6, § 2534 (2005); FLA. STAT. ANN. § 501.212 (West 2006); GA. CODE ANN. § 10-1-396 (2000); GA. CODE ANN. § 10-1-374(a) (2000); HAW. REV. STAT. § 481A-5 (1993); 815 ILL. COMP. STAT. ANN. 505/10b(1) (West 1999); 815 ILL. COMP. STAT. ANN. 510/4 (West 1999); IND. CODE ANN. § 24-5-0.5-6 (West 2006); IOWA CODE ANN. § 714.16(14) (FTC regulated conduct only); KY. REV. STAT. ANN. § 367.176 (LexisNexis 2002); LA. REV. STAT. ANN. § 51:1406 (2003); ME. REV. STAT. ANN. tit. 5 § 208 (2002); MASS. ANN. LAWS ch. 93A, § 3 (LexisNexis 2005); MICH. COMP. LAWS SERV. § 445.904 (LexisNexis 2006); MINN. STAT. ANN. § 325D.46 (West 2004); NEB. REV. STAT. § 59-1617 (2004); NEB. REV. STAT. § 87-304 (1999); NEV. REV. STAT. § 598.0955

"in compliance with,"[53] "required or specifically authorized under,"[54] "permitted under,"[55] or "otherwise permitted under"[56] a state or federal law or regulation, or an agency order or rule from the consumer protection law. These provisions are "based on the concept that the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of a trial court."[57] Yet, this most common regulatory exemption yields the least consistent application among state courts. There is little predictability or consistency in how courts interpret an authorized conduct exemption. Courts apply similar language, but reach divergent outcomes. As a result, regulated entities are left with uncertain liability exposure—a reality which contravenes the purpose behind those exemptions. Courts should consistently apply such exemptions to support the regulatory authority of government agencies and protect the reliance interests of employers.

1. Fully Exempting Regulated Industries and Professions

When government agencies comprehensively regulate industry practices, and consumers have avenues to file complaints, courts in several states have properly recognized that the CPA should not provide redundant or conflicting coverage. The nature of the regulation, rather than the wording of the statute, is of much more significance to courts in reaching such determinations.

Judicial interpretation of Georgia's consumer protection law, the Georgia Fair Business Practices Act (GFBPA), provides a compelling example. The Georgia law states that it does not apply to "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or

---

(2005); N.M. STAT. § 57-12-7 (2006); N.Y. GEN. BUS. LAW § 349(d) (federally-regulated conduct only); OHIO REV. CODE ANN. § 4165.04(A)(1) (West 2004); OHIO REV. CODE ANN. §1345.12(A) (West 2004); OR. REV. STAT. § 646.612 (2005); R.I. GEN. LAWS § 6-13.1-4 (2001); S.C. CODE ANN. § 39-5-40 (1985); S.D. CODIFIED LAWS § 37-24-10 (2004); TENN. CODE ANN. § 47-18-111(a) (2001); TEX. BUS. & COM. CODE ANN. § 17.49(b) (Vernon 2002) (FTC regulated conduct only); UTAH CODE ANN. § 13-11-22 (2001); UTAH CODE ANN. § 13-11a-5 (2001); VA. CODE ANN. § 59.1-199 (2006); WASH. REV. CODE ANN. § 19.86.170 (West 1999); WYO. STAT. ANN. § 40-12-110(a) (2007). Alaska's and Oklahoma's exemptions apply to all conduct "regulated under" state or federal law. ALASKA STAT. § 45.50.481(a) (2006); OKLA. STAT. tit. 15, § 754(2) (1993). The language of these provisions suggests that they should be interpreted broadly to exempt *any* activity regulated by a government agency as opposed to only conduct specifically authorized or approved by regulators.

53. *E.g.*, COLO. REV. STAT. ANN. § 6-1-106(1)(a); DEL. CODE ANN. tit. 6, § 2534; HAW. REV. STAT. § 481A-5; MINN. STAT. ANN. § 325D.46; OR. REV. STAT. § 646.612.

54. TENN. CODE ANN. § 47-18-111(a).

55. *E.g.*, ARK. CODE ANN. § 4-88-101; R.I. GEN. LAWS § 6-13.1-4; S.C. CODE ANN. § 39-5-40 (1985); S.D. CODIFIED LAWS § 37-24-10.

56. *E.g.*, CONN. GEN. STAT. ANN. § 42-110c(a); MASS. ANN. LAWS ch. 93A, § 3; ME. REV. STAT. ANN. tit. 5 § 208.

57. InMed Diagnostic Servs., L.L.C. v. MedQuest Assocs., Inc., 594 S.E.2d 552, 555 (S.C. Ct. App. 2004) (holding that CPA did not apply to the acquisition and use of medical equipment regulated by a state health facility licensure act).