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## Are State Consumer Protection Acts Really Little-FTC Acts?

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ARE STATE CONSUMER PROTECTION ACTS REALLY  
LITTLE-FTC ACTS?

*Henry N. Butler*\*

*Joshua D. Wright*\*\*

Abstract

State Consumer Protection Acts (CPAs) were designed to supplement the Federal Trade Commission’s (FTC) mission of protecting consumers and are often referred to as “Little-FTC Acts.” There is growing concern that enforcement under these acts is not only qualitatively different than FTC enforcement but may also be counterproductive for consumers. This Article examines a sample of CPA claims and compares them to the FTC standard. It identifies qualitative differences between CPA and FTC claims by commissioning a “Shadow Federal Trade Commission” of experts in consumer protection. The study finds that many CPA claims include conduct that would not be illegal under the FTC standards and most of the cases with illegal conduct would not warrant FTC enforcement. Even among CPA cases in which the plaintiff prevailed, nearly half do not include illegal conduct under the FTC standard and most of the cases with illegal conduct would not invoke FTC enforcement. The results clearly suggest private litigation under Little-FTC Acts tends to pursue a different consumer protection mission than the Bureau of Consumer Protection at the Federal Trade Commission.

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INTRODUCTION

During the 1960s, there was a perceived increase in demand from the American public and elected officials for consumer protection legislation.<sup>1</sup> In post-World War II America, a perception emerged that markets had become impersonal<sup>2</sup> and that the balance of power between consumers and merchants in the marketplace had shifted in favor of merchants.<sup>3</sup> Regulators viewed increased legal protection for consumers as necessary to restore the former balance.<sup>4</sup> Traditional common law protection was deemed inadequate.<sup>5</sup> State attorneys general attempted to respond to the

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1. For example, President John F. Kennedy promoted the consumer protection movement by defining the consumers’ “bill of rights” in a message to Congress in 1962. JOHN F. KENNEDY, CONSUMERS’ PROTECTION AND INTEREST PROGRAM, H.R. DOC. NO. 87–364, at 2 (2d Sess. 1962).

2. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1972); James R. Withrow, Jr., *The Inadequacies of Consumer Protection by Administrative Action*, 1967 N.Y. ST. B.A. ANTITRUST L. SYMP. 58, 64 (“The difficulties being faced by the consumer today are best understood in terms of the new ‘impersonality’ of the market place.”); see also NAT’L ASS’N OF ATT’Y GEN. COMM. ON THE OFFICE OF ATT’Y GEN., REPORT ON THE OFFICE OF ATTORNEY GENERAL 395–96 (1971) [hereinafter ATTORNEY GENERAL REPORT].

3. H. Peter Norstrand, *Treble Damage Actions for Victims of Unfair and Deceptive Trade Practices: A New Approach*, 4 NEW ENG. L. REV. 171, 175 (1969) (“[The] consumer has lost the leverage he once had in the marketplace. The disgruntled buyer can no longer hash out differences with his shopkeeper-neighbor; he is now confronted by impersonal bigness where responsibility and liability forever lie just one department away.”).

4. Brian J. Linn & Gretchen Newman, *Reasonable Attorneys’ Fees and Treble Damages—Balancing the Scales of Consumer Justice*, 10 GONZ. L. REV. 593, 597 (1975) (“[T]he goal is to reestablish equilibrium in the market place by recognizing that traditional remedies for fraud have proven ineffective in providing the aggrieved consumer adequate relief.”).

5. Common law causes of action—including deceit, misrepresentation, and breach of warranty—had relatively difficult burdens of proof and limited remedies. See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 6–7 (2005). As a consequence, they were thought to be insufficient to protect the consumer. *Id.* at 7.

apparent need for greater consumer protection by using existing statutory laws, such as lottery laws and printer's ink laws, to protect consumer interests. They also advocated broader statutory powers to combat consumer fraud and other deceptive practices.<sup>6</sup> The state legislatures' responses came in the form of a diverse collection of legislation commonly called Consumer Protection Acts (CPAs).<sup>7</sup>

Most CPAs were originally designed to supplement the Federal Trade Commission's (FTC) mission of protecting consumers from "unfair or deceptive acts or practices"<sup>8</sup> and are referred to as "Little-FTC Acts."<sup>9</sup> The FTC Act does not itself provide for private actions, but a primary means of achieving the CPAs' consumer protection goal is the private action that empowered consumer attorneys to act as private attorneys general.<sup>10</sup> In contrast to the FTC, private litigants under CPAs are not limited by political pressure or public duty.<sup>11</sup> Private litigants under CPAs also face different financial constraints as many CPAs mandate the award of multiple damages and attorneys' fees to successful plaintiffs.<sup>12</sup> As such, there may be support for the theory that CPAs do, in fact, fill a gap in existing consumer protection institutions by allowing private litigants to bring smaller scale cases where the consumer harm is felt locally or otherwise escapes the attention of the FTC. These cases may approximate FTC enforcement actions in terms of the nature and quality of the claims involved. However, the relatively smaller stakes involved in cases brought by private litigants may not attract FTC resources or satisfy the FTC requirement that consumer protection actions be in the public interest.<sup>13</sup>

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For example, to succeed in a tort action for false misrepresentation or deceit, the plaintiff must prove that there was intent to deceive, which is particularly difficult to do. *Id.* at 6. Actions in contract for breach of contract or breach of warranty are seldom more effective than actions in tort as merchants can make false claims without entering into contracts. *Id.* at 7.

6. ATTORNEY GENERAL REPORT, *supra* note 2, at 395–96 (noting acts of attorneys general including using existing laws and proposing new statutory powers).

7. See Schwartz & Silverman, *supra* note 5, at 15.

8. 15 U.S.C. § 45(a)(1) (2006).

9. See Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 438–39 (1991); see also Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 144 (2006).

10. Bauer, *supra* note 9, at 144.

11. The FTC and private litigants face different incentives and constraints that affect the nature of actions pursued. Sovern, *supra* note 9, at 437. For example, the FTC may decline to pursue an enforcement action that would be pursued by an individual consumer, or class of consumers, under a CPA. The FTC faces three primary limitations in selecting enforcement actions that do not constrain the private plaintiff. First, as political appointees, some FTC Commissioners are bound to be subject to political pressure to pursue or not pursue certain types of actions. *Id.* at 441. Second, the FTC has limited resources which must be rationed to enforcement actions against only the most serious improprieties. *Id.* at 442. Third, the FTC Act itself restricts the FTC to bring proceedings only when it would be in the public interest. *Id.*

12. Schwartz & Silverman, *supra* note 5, at 3.

13. Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or*

The consumer, on the other hand, is free to pursue any case in which she might expect to prevail.

State CPAs have become controversial.<sup>14</sup> There is growing concern that CPA enforcement and litigation are not only qualitatively different than FTC enforcement but also may be counterproductive for consumers. Critics argue that the combination of private rights of action, generous remedies, expansive and elusive definitions of illegal conduct, lack of administrative expertise, and relaxation of common law limitations have generated a set of incentives that encourages plaintiffs and their attorneys to file claims of dubious merit.<sup>15</sup> Critics suggest that CPAs' broader enforcement options place significant strains on the civil justice system without providing offsetting gains in consumer protection.<sup>16</sup> Proponents of CPAs counter that private rights of action and meaningful remedies are necessary to supplement FTC enforcement and provide sufficient incentives for individual plaintiffs to bring suit to deter conduct harmful to a larger class of consumers.<sup>17</sup> While both critics and proponents of CPA enforcement make claims about the nature and quality of state consumer protection litigation, it is difficult to compare state CPA litigation to FTC enforcement.

This Article closely examines a sample of CPA claims and compares them to the FTC Act standard for unfair and deceptive acts or practices. It identifies qualitative differences between CPA and FTC claims by commissioning a "Shadow Federal Trade Commission" of consumer protection experts. These experts evaluated a sample of CPA claims under the FTC standard. These two studies generate data that are critical to informing policy debates on the appropriate role of CPAs in the civil justice system.

Part I of this Article provides the background and history of CPAs. Part II describes the data and research methodology for the "Shadow FTC" study. Part III presents the Shadow FTC results. The basic result is that the Little-FTC Acts appear to have taken on a much broader consumer

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*Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 554 (1980).

14. Compare Schwartz & Silverman, *supra* note 5, at 5 (recounting history of CPAs, including California's where voters restricted their statute because of its perceived use to "shakedown" small businesses), and Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155, 156 (2004) (arguing that it does not make sense to have CPAs and common law doctrines "operate on top of each other and over the same range of transactions"), with Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 830-33 (2006) (describing state CPAs as popular).

15. See Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 7-9 (2010); see also Schwartz & Silverman, *supra* note 5, at 33.

16. See, e.g., Butler & Johnston, *supra* note 15, at 7-11; Greve, *supra* note 14, at 174-78; Schwartz & Silverman, *supra* note 5, at 49-50.

17. See, e.g., Braucher, *supra* note 14, at 832-33.

protection function than the FTC. Part IV considers the policy implications of these results.

## I. BACKGROUND AND HISTORY OF CONSUMER PROTECTION ACTS

### A. *Criticism of Former Methods of Consumer Protection and the Call for CPAs*

The push for states to adopt CPAs appears to have come from the confluence of three related forces in the late 1960s: criticism of FTC consumer protection efforts, popular demand for consumer protection and business regulation, and frustration with common law causes of action. These three forces touch on each of the existing institutions of consumer protection: federal regulation, market forces, and state common law.<sup>18</sup> It was the perceived inadequacies of each of these institutions that led states to enact CPAs.

The FTC was the target of criticism of federal consumer protection. By 1969, denouncement of the FTC had reached its zenith with publication of critical reports from “Nader’s Raiders,”<sup>19</sup> the American Bar Association,<sup>20</sup> and Professor Richard Posner.<sup>21</sup> This criticism addressed a range of perceived problems with the FTC,<sup>22</sup> including those offered by prior critics:<sup>23</sup> poor leadership,<sup>24</sup> insufficient and misallocated resources,<sup>25</sup>

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18. See Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy* (Geo. Mason Univ. Sch. of Law, Law and Econ. Working Paper Series No. 04-19, 2004), available at [http://ssrn.com/abstract\\_id=545182](http://ssrn.com/abstract_id=545182) (describing the institutions of consumer protection yet neglecting the role of state consumer protection laws).

19. EDWARD F. COX ET AL., ‘THE NADER REPORT’ ON THE FEDERAL TRADE COMMISSION vii–xiv (1969).

20. REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

21. Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 & n.1 (1969) (listing publications between 1924 and 1969 criticizing the Federal Trade Commission). Posner was also a member of the ABA Commission that authored the 1969 report. See REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 20.

22. Posner, *supra* note 21, at 47 (“The Commission is rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent.”); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 20, at 1 (“Through lack of effective direction, the FTC has failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner. . . . Through an inadequate system of recruitment and promotion, it has acquired and elevated to important positions a number of staff members of insufficient competence. The failure of the FTC to establish and adhere to a system of priorities has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern. The primary responsibility for these failures must rest with the leadership of the Commission.”); COX ET AL., *supra* note 19, at 39 (“1. The FTC has failed to detect violations systematically. 2. The FTC has failed to establish efficient priorities for its enforcement energy. 3. The FTC has failed to enforce the powers it has with energy and speed. 4. The FTC has failed to seek sufficient statutory authority to make its work effective.”).

23. Posner, *supra* note 21, at 47 (“What is remarkable about these studies, which span a

political favoritism and regulatory capture,<sup>26</sup> and protection of producers in the name of consumer protection.<sup>27</sup>

Proponents of stronger regulation argued that federal regulation and market forces no longer adequately protected consumers. The increasingly impersonal nature of transactions in the post-World War II economy had undercut consumers' power to protect themselves through market-based and reputation-based mechanisms.<sup>28</sup> Consumer protection advocates also pointed to the increasing complexity of credit arrangements, marketing schemes,<sup>29</sup> and warranty disclaimers as evidence of the breakdown of the traditional "arm's-length bargain" approach to consumer transactions.<sup>30</sup> The general perception was that the balance of power between consumers and merchants in the marketplace had shifted towards merchants, who now enjoyed disproportionate influence in consumer transactions. It appears that there was widespread support for greater legal protection for consumers in order to restore the former balance.<sup>31</sup>

The final factor leading to the push for states to enact CPAs was the view that common law causes of action were insufficient to protect the consumer—particularly because they imposed impractically high evidentiary burdens in exchange for meager remedies.<sup>32</sup> The common law actions for fraudulent misrepresentation and deceit serve as examples of the common law's impracticality in consumer protection cases. These causes of action required actual injury to mature; this requirement

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period of 45 years, is the sameness of their conclusions.”).

24. *Id.* at 87 (“[T]he Commission today is probably more poorly managed than other federal agencies.”); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 20, at 35–36; COX ET AL., *supra* note 19, at 169–71.

25. REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 20, at 26–28.

26. COX ET AL., *supra* note 19, at 130–40.

27. Posner, *supra* note 21, at 71 (“A perusal of FTC rules and decisions reveals hundreds of cases in which prohibitory orders have been entered against practices, not involving serious deception, by which sellers have attempted to market a new, often cheaper, substitute for an existing product.”).

28. ATTORNEY GENERAL REPORT, *supra* note 2, at 395–96; Lovett, *supra* note 2, at 725; Withrow, *supra* note 2, at 64 (“The difficulties being faced by the consumer today are best understood in terms of the new ‘impersonality’ of the market place.”).

29. ATTORNEY GENERAL REPORT, *supra* note 2, at 395.

30. Lovett, *supra* note 2, at 725.

31. Linn & Newman, *supra* note 4, at 597 (“[T]he goal is to reestablish equilibrium in the market place by recognizing that traditional remedies for fraud have proven ineffective in providing the aggrieved consumer adequate relief.”); Norstrand, *supra* note 3, at 175 (“[The] consumer has lost the leverage he once had in the marketplace. The disgruntled buyer can no longer hash out differences with his shopkeeper-neighbor; he is now confronted by impersonal bigness where responsibility and liability forever lie just one department away.”).

32. Robert H. Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 NEW ENG. L. REV. 71, 72 (1969) (“It was, after all, primarily the failure of the legal system to provide adequate remedies which led to the great consumer movement of the past decade with the resultant deluge of new laws.”).

precluded prospective injunctions against merchants engaging in potentially deceptive acts. An additional barrier to consumer protection suits was the requirement that an injured party had the difficult burden of proving that there was intent to deceive.<sup>33</sup> Actions for breach of contract or warranty were seldom more effective than actions in tort because merchants could make false claims without entering into contracts.<sup>34</sup> Even where a contract existed, contractual defenses such as reliance and privity requirements could impede consumer recovery.<sup>35</sup> Further, even if the consumer had a valid claim and could meet the burden of proof, she might still have chosen to forego pursuit of the claim if it involved a pecuniary loss that was small relative to the cost of bringing suit.

In the face of FTC criticism, popular demand for increased regulation of business and frustration with the limits of common law causes of action, many states adopted consumer protection legislation in the late 1960s and early 1970s. By 1981, every state had adopted some consumer protection legislation. Most states have frequently amended their consumer protection legislation, resulting in great variation between states—even where the same model act was initially adopted.<sup>36</sup>

### B. *Consumer Fraud Acts and Early Model Acts*

By 1962, eight states had responded to the call for consumer protection and passed some act aimed at protecting consumers.<sup>37</sup> These early CPAs generally armed state attorneys general with the power to seek and receive injunctions against specific practices. One early adopter, New Jersey, passed a “consumer fraud” statute in 1960 that became the model for several states’ initial CPAs.<sup>38</sup> The act gave the Attorney General broad powers to investigate alleged unlawful practices, to obtain an injunction against persons engaging or about to engage in the unlawful practices, and to seek restitution for those harmed by the prohibited practices.<sup>39</sup> While several states passed similar acts, others, such as Washington, enacted legislation modeled on the FTC Act and the Clayton Act.<sup>40</sup>

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33. Schwartz & Silverman, *supra* note 5, at 7 (noting barriers to common law actions, including the preclusion of prospective remedies and problems in proving an intent to deceive).

34. *Id.*

35. Sovern, *supra* note 9, at 451–52.

36. I DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 2:10, app. at 3A (2009).

37. *Id.* app. at 3A.

38. ch. 39, § 1–12 1960 N.J. Laws 137 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-148 (2010)).

39. *Id.* § 8.

40. Consumer Protection-Unfair Competition and Acts, 1961, ch. 216, § 2, Wash. Sess. 1956 (codified as amended at WASH. REV. CODE §§ 19.86.010–19.86.920 (2010)). Section 2 of the Washington legislation paralleled the FTC Act and read: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” *Id.*

Several uniform and model statutes appeared in the late 1960s.<sup>41</sup> Many modern CPA attributes can be traced back to these early model and uniform statutes. The first of the uniform consumer protection statutes to appear was the Uniform Deceptive Trade Practices Act (UDTPA), which was drafted by the National Conference of Commissioners on Uniform State Laws in 1964 and rewritten in 1966.<sup>42</sup> The UDTPA lists twelve deceptive trade practices, the first eleven of which can be roughly divided into three categories of prohibited conduct: misleading trade identification, false advertising, and deceptive advertising.<sup>43</sup> The final listed practice was a general prohibition of “any other conduct which similarly creates a likelihood of confusion or misunderstanding.”<sup>44</sup> The twelve deceptive trade practices prohibited by the UDTPA, including the final, more general prohibition of other unfair conduct, were primarily intended to prevent unfair business competition, not to protect consumers.<sup>45</sup>

The UDTPA granted a private right of action but limited the remedy to injunctive relief. The UDTPA did not contain the restrictions of common law causes of action—neither proof of damages nor intent to deceive were required to obtain an injunction.<sup>46</sup> As amended in 1966, the UDTPA authorized reasonable attorneys’ fees to be granted to the plaintiff if the defendant willfully and knowingly engaged in the deceptive practice and to the defendant if the plaintiff knew his complaint was groundless.<sup>47</sup> Most of the states that initially adopted the UDTPA in some form later amended their consumer protection law to allow monetary relief to consumers.<sup>48</sup>

The Model Unfair Trade Practices and Consumer Protection Law (UTPCPL) is the model statute most commonly associated with modern CPA laws.<sup>49</sup> Developed by the FTC and adopted by the Committee on Suggested State Legislation of the Council of State Governments, the UTPCPL was originally published in 1967, only to be amended in 1969 and again in 1970.<sup>50</sup> The UTPCPL was less innovative than comprehensive. It brought together many elements of prior pieces of consumer protection legislation and, in doing so, created an attractive private cause of action.

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41. See ATTORNEY GENERAL REPORT, *supra* note 2, at 400.

42. *Id.*; Bauer, *supra* note 9, at 145.

43. COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 253, 258–62 (1964).

44. *Id.* at 262.

45. See 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10; see also Bauer, *supra* note 9, at 145.

46. COMM’RS ON UNIF. STATE LAWS, *supra* note 43, at 262.

47. COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 299 (1966).

48. See 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10.

49. *Id.*

50. ATTORNEY GENERAL REPORT, *supra* note 2, at 399.

The 1970 version of the UTPCPL offered a choice of three forms of unlawful practices.<sup>51</sup> The first alternative form of unlawful practices used essentially the same language as § 5 of the FTC Act: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”<sup>52</sup> This language has led many commentators to refer to CPAs in this vein as “Little-FTC Acts.”<sup>53</sup> Twenty states initially adopted such acts.<sup>54</sup>

The second alternative form of unlawful practices prohibited by the UTPCPL resembled the language of the consumer fraud acts adopted in the early and mid-1960s by states such as New Jersey.<sup>55</sup> This alternative defined as unlawful “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.”<sup>56</sup> This definition does not prohibit the broad category of “unfair practices.”<sup>57</sup> Although a number of states had adopted similar consumer fraud acts earlier in the 1960s, no state adopted this language based upon the UTPCPL.<sup>58</sup>

The third alternative offered by the UTPCPL, known as the “laundry list’ approach,” included the twelve competition-focused prohibitions enumerated in the UDTPA.<sup>59</sup> It added an additional thirteenth provision focused more directly on consumers.<sup>60</sup> This thirteenth provision prohibited

51. 29 COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 142 (1969).

52. *Id.* at 142, 146. The first version of the UTPCPL in 1967 used this language to define the prohibited acts. 26 COUNCIL OF STATE GOV'TS, 1967 SUGGESTED STATE LEGISLATION, at A-73 (1966).

53. 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10.

54. *Id.*

55. *See* 29 COUNCIL OF STATE GOV'TS, *supra* note 51, at 142.

56. *Id.*

57. *See* 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10.

58. *Id.*; *see also* 29 COUNCIL OF STATE GOV'TS, *supra* note 51, at 142.

59. *See* 29 COUNCIL OF STATE GOV'TS, *supra* note 51, at 142; *see also* 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10.

60. *See* 29 COUNCIL OF STATE GOV'TS, *supra* note 51, at 142, 146–47 (“The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful: (1) passing off goods or services as those of another; (2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; (3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another; (4) using deceptive representations or designations of geographic origin in connection with goods or services; (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand; (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (8) disparaging the goods, services, or business of another by false or misleading representation of fact; (9) advertising goods or services with intent not to sell than as advertised; (10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity; (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or (13) engaging in any act or practice which is unfair or deceptive to the

any act or practice that was “unfair or deceptive to the consumer.”<sup>61</sup> Twenty-six jurisdictions adopted this language.<sup>62</sup> Today, most of the states that had originally adopted the third form no longer rely exclusively on the laundry list approach; however, five jurisdictions still prohibit only specific acts without a “catch-all” provision prohibiting unfair and deceptive practices.<sup>63</sup>

The UTPCPL gave state attorneys general powers similar to those in earlier consumer fraud acts.<sup>64</sup> Section 5 authorized the Attorney General to act to enforce the prohibition of acts and practices defined in § 2:

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice. . . .<sup>65</sup>

The attorney general was also entitled to seek relief by restitution or disgorgement of money or property acquired as a result of any act declared unlawful by the UTPCPL<sup>66</sup> and civil penalties for a knowing violation of the UTPCPL.<sup>67</sup>

In addition to attorney general enforcement, the UTPCPL authorized private actions for monetary damages. Section 8 of the UTPCPL authorized private suits and class actions for monetary damages as well as injunctive relief.<sup>68</sup> Private individuals could recover the greater of “actual damages or \$200,” with punitive damages and equitable relief available at

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consumer.”).

61. *Id.* at 142.

62. 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:10 & n.6 (“Alabama, Arkansas, Arizona, California, Georgia, Guam, Hawaii, Idaho, Indiana, Kansas, Maryland, Michigan, Nebraska, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Virgin Islands, and West Virginia.”).

63. *Id.* § 2:10 & n.7 (listing Colorado, District of Columbia, Indiana, Mississippi, and New York as maintaining pure laundry lists approaches). The twenty-one other jurisdictions that use a laundry list approach also have some general prohibition of unfair and deceptive acts. *Id.* § 2:10.

64. *See* 29 COUNCIL OF STATE GOV’TS, *supra* note 51, at 145, 150–52. Sections 11 through 14 granted the Attorney General broad investigatory powers, the power to issue subpoenas, and the power to enforce the investigatory demands. *Id.* at 150–52.

65. *Id.* at 147–48.

66. *Id.* at 148.

67. *Id.* at 152.

68. *Id.* at 148–49. Section 8(a) read in part: “Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action . . . .” *Id.*

the court's discretion.<sup>69</sup> Section 8(b) authorized "persons similarly situated" to bring a class action. Section 8(d) stated that the court "may award, in addition to the relief provided in this Section, reasonable attorneys' fees and costs."<sup>70</sup>

The UTPCPL consciously attempted not to stray too far from relevant FTC enforcement standards. Section 3 stated that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act . . . ."<sup>71</sup> Further, it empowered the Attorney General to "make rules and regulations interpreting" the prohibited actions but that "[s]uch rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act . . . ."<sup>72</sup> Twenty-eight states currently reference the FTC in their CPAs.<sup>73</sup>

### C. Comparing Federal and State Consumer Protection

Having been enacted in the face of criticism of the FTC, it is not surprising that state and federal consumer protection legislation have noticeable differences. The key differences are that states provide a private right of action, different remedies, and relaxed common law limitations on consumer protection actions when compared to FTC policy standards.<sup>74</sup>

The FTC Act does not include a private enforcement mechanism, yet every CPA grants consumers a private right of action.<sup>75</sup> This difference is driven by the "balance of power" argument that in interactions between businesses and consumers, more power must be shifted towards consumers. This argument suggests that a private remedy for wronged consumers is necessary for the effective prosecution of consumer complaints.<sup>76</sup> These private rights of action were envisioned as a complement to public agency administrative enforcement under the FTC Act. Although public enforcement under the FTC Act requires the

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69. *Id.* at 149.

70. *Id.*

71. *Id.* at 147.

72. *Id.*

73. 1 PRIDGEN & ALDERMAN, *supra* note 36, app. at 3B. Most states' statutes provide that the courts should be guided by FTC interpretations except that such interpretations are not dispositive. *See generally* CAROLYN L. CARTER & JONATHAN SHELDON, NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (7th ed. 2008) (surveying state statutes).

74. *Compare* 1 PRIDGEN & ALDERMAN, *supra* note 36, § 2:9, app. at 5A–6A, with 15 U.S.C. § 45 (2006).

75. *See* 1 PRIDGEN & ALDERMAN, *supra* note 36, app. at 5A. Iowa was the last state without a private right of action but recently enacted one with the Private Right of Action for Consumer Fraud Act. *See* IOWA CODE ANN. § 714H.5 (West 2010).

76. *See* ATTORNEY GENERAL REPORT, *supra* note 2, at 408; *see also* Norstrand, *supra* note 3, at 174–75.

Commission to consider the public interest in deciding whether to challenge a practice, only a few states include a public interest requirement for private actions.<sup>77</sup>

A second difference between CPAs and FTC consumer protection is that the statutes confer different remedies.<sup>78</sup> Remedies available under the FTC Act include injunctions, cease and desist orders, consent decrees, and the disgorgement of profits.<sup>79</sup> While at least a dozen CPAs limit plaintiffs to actual damages, restitution, or equitable relief,<sup>80</sup> the majority of statutes provide additional remedies, including statutory damages, treble damages, and punitive damages.<sup>81</sup> Nearly all states authorize the discretionary award of attorneys' fees.<sup>82</sup>

A third dimension upon which CPAs differ from the FTC Act, and also from one another, is the degree to which state legislation and judicial interpretation have relaxed the common law limitations on consumer

77. *See, e.g.*, *Hall v. Walter*, 969 P.2d 224, 234 (Colo. 1998) (stating that the practice challenged by an individual under the state's statute must significantly impact the public as actual or potential consumers); *Zeeman v. Black*, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980) (stating that unless the defendant's actions had or has potential harm for the consumer public they are not directly regulated by Georgia's respective statute); *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (stating that public interest must be demonstrated to state a claim under the private attorney general statute); *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136, 139 (Neb. 2000) (holding that to be actionable under the CPA the unfair or deceptive act must have impact on the public interest); *Jefferies v. Phillips*, 451 S.E.2d 21, 23 (S.C. Ct. App. 1994) (stating that to be actionable under that state's CPA, unfair or deceptive practices must adversely affect the public interest); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) (en banc) (stating that private litigant must establish a public interest impact to establish a prima facie case under the CPA).

78. *See* *Butler & Johnston*, *supra* note 15, at 16–17.

79. 15 U.S.C. § 45 (2006).

80. *Schwartz & Silverman*, *supra* note 5, at 22. *See, e.g.*, ARK. CODE ANN. § 4-88-113 (LexisNexis 2010); FLA. STAT. ANN. § 501.211(2) (West 2010); IND. CODE ANN. § 24-5-0.5-4(b) (West 2010); ME. REV. STAT. ANN. tit. 10, § 1213 (West 2010); MD. CODE ANN., COM. LAW § 13-408 (West 2010); MINN. STAT. ANN. § 325D.45 (West 2010); MISS. CODE ANN. § 75-24-15(1) (LexisNexis 2010); NEB. REV. STAT. ANN. § 59-1609 (West 2010); S.D. CODIFIED LAWS § 37-24-31 (West 2010); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2010); WIS. STAT. ANN. § 100.18(11)(b)(2) (West 2010); WYO. STAT. ANN. § 40-12-108(b) (West 2010).

81. *See* *Schwartz & Silverman*, *supra* note 5, at 23–24. In some cases, damages are doubled or trebled regardless of the egregiousness of the defendant's conduct. *E.g.*, ALASKA STAT. ANN. § 45.50.531(a) (West 2010); D.C. CODE ANN. § 28-3905(k) (2010); HAW. REV. STAT. ANN. § 480-13(a) (West 2010); N.J. STAT. ANN. § 56:8-19 (West 2010); N.C. GEN. STAT. § 75-16 (West 2010); WIS. STAT. ANN. § 100.20(5) (West 2010). Nine states provide for treble damages if the defendant acted intentionally, willfully, knowingly, or in bad faith. COLO. REV. STAT. § 6-1-113(2)(a)(III) (West 2010); GA. CODE ANN. § 10-1-399(c) (West 2010); MASS. GEN. LAWS ANN., ch. 93A, § 9(3) (West 2010); N.H. REV. STAT. ANN. § 358-A:10 (West 2010); N.M. STAT. ANN. § 57-12-10(B) (West 2010); N.Y. GEN. BUS. LAW § 349(h) (McKinney 2010); S.C. CODE ANN. § 39-5-140(a) (West 2010); TENN. CODE ANN. § 47-18-109(a)(3) (West 2010); VA. CODE ANN. § 59.1-204(A) (West 2010); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2010).

82. *See* *Schwartz & Silverman*, *supra* note 5, at 25–27.

protection claims. The common law requirement of reliance is a useful example. The majority of statutes do not require a CPA plaintiff to show that he or she relied on the defendant's allegedly deceptive act or statement,<sup>83</sup> while the FTC requires *reasonable* reliance in its definitions of both unfair and deceptive practices.<sup>84</sup> Other state courts have held that a misrepresentation, absent evidence of other harm to the consumer or that the plaintiff relied on the misrepresentation, is sufficient to demonstrate consumer injury.<sup>85</sup> Some state courts have held that defenses such as the statute of frauds,<sup>86</sup> warranty disclaimers,<sup>87</sup> the doctrine of substantial performance,<sup>88</sup> the parol evidence rule,<sup>89</sup> the common law merger doctrine,<sup>90</sup> contractual limitations on liability or remedies,<sup>91</sup> and privity of contract requirements<sup>92</sup> are not available to defendants in consumer protection cases.

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83. *Id.* at 18–19.

84. Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Commerce (Oct. 14, 1983), *available at* [www.ftc.gov/bcp/policystmt/ad-decpet.htm](http://www.ftc.gov/bcp/policystmt/ad-decpet.htm); Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, and Paul Rand Dixon, David A. Clanton, Robert Pitofsky, and Patricia P. Bailey, Comm'rs, Fed. Trade Comm., to Wendell H. Ford, Chairman, Consumer Subcomm. of Comm. on Commerce, Sci., & Transp., and John C. Danforth, Ranking Minority Member, Consumer Subcomm. of Comm. on Commerce, Sci., & Transp. (Dec. 17, 1980), *available at* [www.ftc.gov/bcp/policystmt/ad-unfair.htm](http://www.ftc.gov/bcp/policystmt/ad-unfair.htm).

85. *See, e.g.*, *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 486 (Mass. 2005).

86. *See, e.g.*, *McClure v. Duggan*, 674 F. Supp. 211, 224 (N.D. Tex. 1987) (holding the statute of frauds was not applicable under Texas deceptive trade practices act).

87. *See, e.g.*, *Attaway v. Tom's Auto Sales, Inc.*, 242 S.E.2d 740, 742–43 (Ga. Ct. App. 1978).

88. *See, e.g.*, *Smith v. Baldwin*, 611 S.W.2d 611, 614 (Tex. 1980). The court stated that “[a] primary purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.” *Id.* at 616.

89. *See, e.g.*, *Capp Homes v. Duarte*, 617 F.2d 900, 902 n.1 (1st Cir. 1980) (holding that parol evidence may be used in Massachusetts consumer protection cases); *Teague Motor Co. v. Rowton*, 733 P.2d 93, 96 (Or. Ct. App. 1987) (holding that parol evidence may be used in Oregon consumer protection cases); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (holding that parol evidence may be used in Texas consumer protection cases).

90. *See, e.g.*, *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988) (holding that the common law doctrine of merger is no defense to a claim for breach of express warranty under Texas's DTPA); *see also* Karen S. Guerra, *DTPA Precludes Use of Merger Doctrine and Parol Evidence Rule in Breach of Warranty Suit*; *Alvarado v. Bolton*, 41 BAYLOR L. REV. 373, 376–80 (1989).

91. *See, e.g.*, *Int'l Nickel Co. v. Trammel Crow Distrib. Corp.*, 803 F.2d 150, 155–56 (5th Cir. 1986) (holding contractual limitations inapplicable in suit under Texas “Little-FTC Act”); *Corral v. Rollins Protective Servs. Co.*, 732 P.2d 1260, 1271 (Kan. 1987) (holding similarly under Kansas law); *Reliance Universal, Inc. v. Sparks Indus. Servs., Inc.*, 688 S.W.2d 890, 893 (Tex. Ct. App. 1985) (holding similarly under Texas law).

92. *See, e.g.*, *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540–41 (Tex. 1981) (holding that privity between the plaintiff and defendant is not required under Texas's DTPA); *see also* Lotte D. Bostick, Comment, *The DTPA and Privity: Let the Buyer Beware Becomes Let the Buyer Recover*, 39 BAYLOR L. REV. 787, 795–96 (1987).

The CPAs' attractive private right of action, unlike the FTC standard, is often divorced from a public interest requirement and from common-law limitations. These differences have caused some to suggest that CPAs may be subject to abuse by litigants who have suffered no actual harm and that this abuse will ultimately harm, rather than protect, consumers.<sup>93</sup>

#### D. *Expanding and Amending CPAs*

Amendments and judicial interpretation of CPAs have tended to expand rather than contract the rights of consumers.<sup>94</sup> Massachusetts' experience is representative of the early expansion of CPAs. Massachusetts' original CPA gave the Commonwealth's Attorney General the authority to investigate and subpoena<sup>95</sup> and, in the interest of the public, bring an action seeking injunctive relief and civil penalties up to \$10,000.<sup>96</sup> The law originally did not provide for any type of private action, and aggrieved consumers could seek recourse only through common law alternatives in tort or contract.<sup>97</sup> In 1969, the CPA was amended to give a private right of action by adopting language similar to § 8 of the UTPCPL.<sup>98</sup> The amendment allowed consumers to receive the greater of treble damages or \$25 upon proof of injury by an unfair or deceptive practice.<sup>99</sup>

Amendments to CPAs have often sought to provide adequate incentives for consumers to act as private enforcers. Proponents of CPAs argued that if consumers were not willing to litigate and pursue complaints, CPAs could not fulfill their intended purpose of deterring deceptive and unfair trade practices. Suits involving common law actions were often uneconomical for the aggrieved consumer because of high burdens of proof and the difficulty of establishing damages. CPAs circumvent those issues by providing causes of action that require less rigorous burdens of proof than their common law counterparts. For example, the UDTPA stated that "[p]roof of monetary damage, loss of profits, or intent to deceive is not required [to receive relief]."<sup>100</sup> CPA expansion has also often involved a reduction in the consumers' burden of proof.<sup>101</sup>

These reductions in the burden of proof have been controversial. Some commentators argued that the presence of a credible threat in the form of a

93. See Butler & Johnston, *supra* note 15, at 69.

94. However, this is not true for all state statutes. For example, the Illinois Supreme Court has contracted the geographic scope of its CPA. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853 (Ill. 2005) (limiting class actions brought under the Illinois Consumer Fraud Act to fraudulent transactions that occur within Illinois borders).

95. MASS GEN. LAWS ANN., ch. 93A, § 6 (1969).

96. *Id.* § 4.

97. Norstrand, *supra* note 3, at 173.

98. See ATTORNEY GENERAL REPORT, *supra* note 2, at 408; see also *supra* note 68.

99. ATTORNEY GENERAL REPORT, *supra* note 2, at 408.

100. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3(a) (1966).

101. David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 326–28 (1969).

private right of action with treble damages would be enough to restore the equilibrium between consumers and merchants, and reductions in the burden of proof are therefore not necessary.<sup>102</sup> Others recognize that CPAs give rise to the potential for harassment of legitimate business conduct<sup>103</sup> and that vague consumer fraud statutes invite the possibility of abuse.<sup>104</sup>

Amendments to CPAs have also tended to include provisions allowing class actions. States were slower to adopt class action provisions than private rights of action in large part because of concerns of abuse. In 1971, the National Association of Attorneys General recommended that states empower attorneys general to bring class action suits<sup>105</sup> but warned that allowing private class action suits would “provide[] too great an opportunity for frivolous suits.”<sup>106</sup> Balancing these concerns, some states adopted the provision of private class action suits along with provisions intended to make it harder to bring a frivolous class action suit. For example, Massachusetts attempted to avoid frivolous class actions by requiring a thirty-day opportunity for the respondent to the potential class action to make restitution.<sup>107</sup> Alaska’s class action provision required a bond and approval by the attorney general before a class action suit could be certified.<sup>108</sup> The Uniform Consumer Sales Practice Act provided fee-shifting in favor of defendants if a class action suit was found to be groundless.<sup>109</sup>

#### E. Modern Concerns Emerge

By the early 1990s, the increasing use of CPAs generated criticism that CPAs were being used in ways that the legislatures never intended, leading to substantial abuse and frivolous lawsuits.<sup>110</sup> Commentators and experts began to question whether CPAs were fulfilling their original promise to supplement public enforcement and enhance consumer outcomes and whether the courts were interpreting the statutes correctly, especially in the private litigation context.<sup>111</sup> Others argued that the low threshold for unfair and deceptive acts had gone too far in aiding plaintiffs, encouraging claims

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102. Norstrand, *supra* note 3, at 175 (“Even if rarely invoked, awareness by the consumer that he need not be helpless when victimized by fraud can only improve the commercial climate. If this means ‘*caveat vendor*’, then so be it.”).

103. Lovett, *supra* note 2, at 744–45.

104. *E.g.*, Rice, *supra* note 101, at 340.

105. ATTORNEY GENERAL REPORT, *supra* note 2, at 409.

106. *Id.*

107. *Id.*

108. *Id.* at 409–10.

109. *Id.* at 409.

110. Wayne E. Green, *Lawyers Give Deceptive-Trade Statutes New Day in Court, Wider Interpretations*, WALL ST. J., Jan. 24, 1990, at B1.

111. Perry A. Craft, *State Consumer Protection Enforcement: Recent Trends and Developments*, 59 ANTITRUST L.J. 997, 997, 1000 (1991) (stating that throughout the 1980s states’ attorneys general were active in enforcement of their states CPAs, without substantial criticism).

that ultimately were not in the public interest,<sup>112</sup> and that the low level of proof required in a CPA claim made it too easy for an unharmed consumer to succeed and receive substantial damages.<sup>113</sup> In addition, some commentators have argued that claims were increasingly brought under the auspices of consumer protection that would have traditionally been brought as environmental, product liability, or contract claims.<sup>114</sup> Recent commentators have argued that modern CPA liability, characterized by supra-compensatory remedies and minimal injury requirements, may have harmful consequences for consumers by taxing socially desirable business conduct such as communications between merchants and consumers.<sup>115</sup> What follows is the first attempt to bring a large-scale, empirical analysis to bear on these modern concerns.

## II. SHADOW FEDERAL TRADE COMMISSION

Many of the key policy questions involving CPAs require some comparison of CPA claims to other possible standards for consumer protection. This section focuses on whether there are important qualitative differences in claims between those brought in courts and enforcement actions brought under § 5 of the FTC Act standards by creating an expert panel to review and apply the FTC standard to a sample of cases litigated under CPAs. CPA claims are compared to the benchmark established by the FTC consumer protection standard. Recognizing the differences in claims brought under federal and state consumer protection authority is an important first step to understanding the consumer protection litigation landscape. These possible differences, read in conjunction with the evidence that litigation activity is highly correlated with CPA statutes that make lawsuits more attractive to plaintiffs, raise the possibility that claims brought under CPAs are of a different nature than those enforced by the FTC.

In order to test whether qualitative differences exist between CPA cases and those falling under the FTC's standards for unfair and deceptive practices, an expert review panel, the Shadow FTC, consisting of five Shadow Commissioners with substantial consumer protection experience at or with the FTC, reviewed sets of one page case scenarios of representative CPA cases. The Shadow FTC panelists answered questions on whether they believed these cases would likely contain illegal conduct and, if so, would they likely be enforced under the FTC standard. The Shadow FTC's responses allow identification of important differences

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112. Sovern, *supra* note 9, at 437.

113. Jon Mize, Comment, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 653–54 (2005); Schwartz & Silverman, *supra* note 5, at 3.

114. Schwartz & Silverman, *supra* note 5, at 3–4.

115. See Butler & Johnston, *supra* note 15, at 35–36, 44, 47–51. Actual and potential defendant merchants may pass the costs of CPA litigation on to consumers through higher prices. *Id.*

between the actual outcomes of the CPA cases used in the review and likely outcomes under the FTC standard.

#### A. *Shadow FTC Selection*

Five individuals with substantial experience at or with the FTC Bureau of Consumer Protection were invited to serve as Shadow Commissioners. The Shadow Commissioners include four former directors or deputy directors of the Bureau of Consumer Protection who are practitioners and academics with significant expertise on consumer protection issues. The fifth Shadow Commissioner did not serve at the FTC but had substantial experience as a practitioner. The Shadow FTC was selected to ensure a balance in political orientation with two Shadow Commissioners who served in the FTC during Democratic administrations and two who served in the FTC during Republican administrations. The fifth Shadow Commissioner did not serve at the FTC under an administration of either party and, therefore, is considered unaffiliated.

#### B. *Sample Selection of Cases*

A key feature of the Shadow FTC study is the inclusion of litigated cases that generated substantive decisions under CPAs. The cases were obtained from a database of approximately 17,000 CPA decisions.<sup>116</sup> Three distinct samples of cases were constructed.

The first sample began with a randomly generated sample of 500 reported CPA decisions from the original population database. From these 500 reported CPA decisions, eighty-six contained case facts sufficient to develop one-page scenarios, and fifty of these eighty-six were randomly chosen.

The second sample was drawn from reported CPA decisions in state appellate courts but not federal district courts because the former were more likely to have reached final disposition as a “clear win” and less likely to have remaining appeals. To be clear, this sample is intentionally biased toward including the strongest CPA claims. For each state, a specific search string was created that contained that state’s CPA title, abbreviation, or citation as well as variations on the term “damage award.”<sup>117</sup> These search strings were then applied to each state’s “State Cases, Combined” database in Lexis from 2000 through 2007. This search resulted in 3,637 reported CPA decisions. We removed CPA claimant losses, wins that were subsequently overturned on appeal, and false positives generated by the search string. We then randomly selected and created the fifty “clear win” cases.

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116. See SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS, AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION (2009) (describing the database), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1708175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708175).

117. The search string used for the term “damage awards” was “damage! w/s award!”.

The third sample consisted of FTC cases which provide a control group. Eight decisions were randomly selected, each representing a case the FTC brought in court containing sufficient case facts.<sup>118</sup> Two cases, which the FTC investigated but ultimately dismissed the complaints, were separately chosen and added to the second sample.<sup>119</sup> The third sample involves “clear wins” for CPA claimants at the state trial court level on the CPA claim in which the result was either unchallenged or upheld on appeal.

### C. Case Summaries and Questionnaires

After selecting the three samples of cases, we developed one-page summaries of the cases and a questionnaire for completion by the Shadow Commissioners. Party names and identifying case characteristics were removed so that Shadow Commissioners could not directly identify the cases. Before distributing the questionnaires to the Shadow Commissioners, an additional expert in FTC consumer protection actions who was not a member of the Shadow FTC reviewed the questions and case scenarios. Based on the reviewer’s feedback, adjustments were made to the questions and scenarios to ensure that the Shadow Commissioners could complete the review of all sixty scenarios—from each of the three samples—in three hours or less. After testing the questionnaire, the questions in Figure 1 were used for each scenario.<sup>120</sup>

The survey process took place in two rounds during which the Shadow Commissioners reviewed 110 one-page case scenarios. After reading the scenarios, each Shadow Commissioner determined whether he or she believed the practice was unfair or deceptive according to FTC standards and whether he or she believed the FTC would initiate an enforcement action. The Shadow Commissioners were asked to base their answers only on the information presented in the scenario, their understanding of current federal consumer protection law, their expertise, and the assumptions that (1) the FTC has jurisdiction over the entity or entities and (2) the practice is in or affects interstate or foreign commerce.

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118. The set of FTC cases from which we drew the eight was a set of FTC cases captured by the original over-inclusive search string used to identify cases for the population database. These cases had been removed from the final population database because they did not include CPA claims brought by either party in the suit at issue.

119. These two cases were not included in the population database nor randomly chosen as we had only limited available information on FTC investigations where the Commission ultimately withdrew the complaint.

120. To limit potential ordering effects, we changed the order of the scenarios three times with different versions issued randomly to the Shadow Commissioners. We randomized the order by drawing the sixty numbers three separate times. After the Shadow Commissioners completed the questionnaires, we collected the responses and informed the Shadow Commissioners of the origin of the scenarios. We then coded the results of the questionnaire, identifying the Shadow Commissioners only by a study code number.

Shadow Commissioners were not told prior to completing each round that the case scenarios were derived from litigated consumer protection cases. Further, the Shadow Commissioners did not know the identities of the other Shadow Commissioners, did not collaborate in answering the questions, and could not consult any outside sources. The Shadow Commissioners were not allowed to return to previous scenarios once they had answered a question. Shadow Commissioners were compensated for their participation. For an example of scenarios, see Appendices A and B.

Round 1 included the fifty cases from the random sample and the ten cases from the FTC control sample. The random sample allows inferences to be drawn concerning the nature of CPA claims distributed throughout the civil justice system.

Round 2 focused on the “clear wins” discussed above and examined how a sample of successful CPA claims would fare under the FTC standard. Each decision in the population database of reported CPA decisions represents a unique case and was not previously presented to the Shadow Commissioners in Round 1. The Shadow Commissioners answered the same questions in three hours or less under the same parameters as Round 1, with the exception that during Round 2 the Shadow Commissioners were aware that the case scenarios were derived from litigated consumer protection cases. The Shadow Commissioners did not know the cases all represented CPA claimant wins.<sup>121</sup>

The Shadow FTC review of litigated cases provides the opportunity to evaluate the distribution of CPA claims currently moving through the civil justice system. While we do not observe all litigated cases, this study presents an important first step in collecting and analyzing data relevant to resolving important policy debates surrounding CPAs and civil justice reform more generally. Questions 1a and 2a in Figure 1 focus on whether the Shadow Commissioner believes the available excerpted facts constitute illegal conduct under the FTC Policy Statements for deception or unfairness.<sup>122</sup> Question 3a goes a step further to ask Shadow Commissioners whether, relying on their expertise and experience with FTC consumer protection enforcement, they believe the FTC would initiate an enforcement action in the particular case.

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121. To limit ordering effects, we changed the order of the scenarios three times with different versions issued randomly to the Shadow Commissioners. We randomized the order by drawing the fifty numbers three separate times. We then coded the results with the Shadow Commissioners identified only by a new study code number.

122. Letter from James C. Miller III to John D. Dingell, *supra* note 84; Letter from Michael Pertschuk, Paul Rand, David A. Clanton, Robert Pitofsky, and Patricia P. Bailey to Wendell H. Ford and John C. Danforth, *supra* note 84.

**FIGURE 1**

Q1a. Based on the case facts, do you believe the alleged practice is legally deceptive under the FTC's deception policy statement?  Yes  No

Q1b. If no, please identify the legal prerequisite or prerequisites for deception that are not satisfied.

- A misrepresentation, omission or practice that is likely to mislead the consumer
- The consumer's interpretation or reaction to the misrepresentation, omission or practice is reasonable under the circumstances
- The representation, omission or practice must be material

Q2a. Based on the case facts, do you believe the alleged practice is legally unfair under the FTC's unfairness policy statement?  Yes  No

Q2b. If no, please identify the legal prerequisite or prerequisites for unfairness that are not satisfied.

- Cause substantial injury
- Consumer injury not outweighed by offsetting consumer or competitive benefits
- Injury could not have been reasonably avoided

Q3a. Based on the facts presented above, do you believe the FTC would initiate a consumer protection enforcement action?  Yes  No

Q3b. Briefly explain:

**III. EMPIRICAL RESULTS**

We first consider the Shadow Commission's view of the illegality of state CPA claims under the FTC standard. We then consider whether, if the Shadow Commission considered an activity to be illegal, the Shadow Commission would pursue an enforcement action against the illegal activity. Finally, we test the quality of the Shadow FTC's decision making against decisions by the actual FTC.

Since the goal of the Shadow FTC was to simulate the hypothetical actions of the FTC, only aggregate results appear below rather than individual Shadow Commissioner votes. The results focus on the answers given by the majority (three or more) of the Shadow Commissioners. Unanimous votes were common, making up between 24% and 62% of responses depending on question and round.

Votes in which more than one commissioner disagreed with the majority were rare. Three-to-two split votes in which three commissioners voted one way and two the other were few. The large majority of votes were either 5-0 or 4-1. In Round 1, out of the fifty non-FTC cases, the

Shadow Commissioners were split thirty times in seventeen case scenarios: eight times over deceptive conduct, thirteen times over unfair conduct, and nine times over the likelihood of enforcement. Similarly in the Round 2 scenarios, out of fifty non-FTC cases, the Shadow Commissioners were split thirty times in nineteen case scenarios: sixteen times over deceptive conduct, nine times over unfair conduct, and five times over the likelihood of enforcement. We then examined instances of split voting to identify a possible bias by political affiliation. It is unlikely that political affiliation drove split decisions. Of the thirty votes that were split, only seventeen split in such a way that both Republicans voted in one way, and both Democrats voted the other.

#### A. *Illegality*

A critical empirical challenge in the CPA policy debate is to identify the quality of CPA claims currently working through the civil justice system. For Round 1, the Shadow Commission found that most cases did not meet FTC illegality standards. A majority of Shadow Commissioners believed that the alleged practice was illegal, either deceptive or unfair under the relevant FTC Policy Statement, in only eleven out of fifty (22%) case scenarios.

This result suggests at the very least that the CPA claims litigated in state and federal courts differ from those involving illegal conduct under the FTC standard. In other words, a substantial majority of CPA litigation involves claims consistent with behavior that is likely legal under the FTC standard. This result is consistent with the concern that CPAs apply more lenient and plaintiff friendly standards, which lower the quality of a claim required to justify filing on an expected value basis.

Nonetheless, our Round 1 results should be interpreted with caution. Other possible explanations exist for the Shadow FTC's determination that the CPA claims in our random sample of case scenarios do not violate federal consumer protection law under FTC standards. One possible explanation is that the cases' fact descriptions forming the basis of the excerpts given to Shadow Commissioners may not have included all of the facts ultimately relevant to the determination of liability. A second reason could be that in Round 1, while the Shadow Commission found that three cases presented illegal actions that the FTC would likely enforce, only two cases had a clear CPA claimant win at trial.<sup>123</sup>

In Round 2, the sample of case scenarios involve "clear wins" for CPA claimants at the state trial court level on the CPA claim where the result was either unchallenged or upheld on appeal. Again, this is a sample biased intentionally toward the most successful CPA claims. Our key finding from Round 2 is that the Shadow Commission believed that there was either

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123. The two cases do not include the ongoing cases of Round 1, and they make up only 4.5% of the forty-four closed cases.

unfair or deceptive conduct under the FTC standards in thirty-one cases (or 62% of the time). Although all Shadow Commissioners answered the questions on illegal acts for every scenario, in seven cases the Shadow Commission had tied answers to the question on enforcement due to non-responses. Removing those cases, a majority of Shadow Commissioners believed that there was an unfair or deceptive act pursuant to the FTC standards in twenty-four out of forty-three cases (55.8%).

The Round 1 and 2 questionnaires were constructed in the same manner and taken by the same set of Shadow Commissioners at different times. The differences between the Shadow Commission determinations in Round 1 and Round 2, when evaluating a random sample of CPA cases and clear CPA wins respectively, are striking.<sup>124</sup> Not surprisingly, the Shadow FTC was more likely to believe that the scenarios for clear CPA wins (Round 2) involved illegal conduct than the general CPA cases (Round 1) as can be seen in Table 1. The difference is significant at the 1% level.<sup>125</sup>

**TABLE 1**

	<b>Round 1</b>	<b>Round 2</b>	<b>Round 2*</b>	<b>FTC Controls</b>
Total Cases	50	50	43	10
Possible Illegal Conduct	11	31	24	10
% of Total	22.0%	62.0%	55.8%	100.0%
Possible FTC Enforcement	6	10	10	10
% of Total	12.0%	20.0%	23.3%	100.0%
% of Possible Illegal Conduct	54.5%	32.3%	41.7%	100.0%

\* Excludes cases where the enforcement question resulted in a tie vote.

Not surprisingly, for successful CPA claims in Round 2, the Shadow FTC was more likely to find possible illegal conduct than in the representative sample of cases from Round 1. However, even for Round 2's successful CPA claims, the Shadow FTC only found possible illegal conduct in just over one-half of the cases.<sup>126</sup>

124. Note that the underlying population of cases in Round 2 is a complete subset of the underlying population of cases in Round 1. As such, there is some overlap that the z-statistics in this section do not take into account. However, given the positive relationship between CPA cases that survive to trial and the likelihood that the Shadow Commission believes the conduct was illegal under the FTC standards and/or that the FTC would initiate an enforcement action, it is likely that this overlap functionally understates the true difference between clear CPA wins and all other CPA cases.

125. A two-group test of proportions allows us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the scenario contained some illegal conduct under the FTC standards is the same between the two rounds at the 1% level ( $z = -4.052$ ,  $p = 0.000$ ). We get similar results for the non-parametric Spearman rank correlation.

126. One possible concern is that the composition of cases across the rounds differed on some

It is striking that nineteen of the fifty clear win cases involved activity that the Shadow FTC would not consider illegal under the FTC standard. These Type 1 errors—finding innocent parties guilty of wrongdoing—could represent an important problem with CPAs. More specifically, under the plausible assumption that the FTC standard with its public interest requirement is less likely to condemn efficient and pro-competitive business conduct than the CPA standards, the Round 2 results suggest that CPA liability may condemn efficient, pro-competitive conduct. Further, liability for efficient business conduct under CPAs could further harm consumers through deterring efficient conduct more broadly. These Type 1 errors (“false positives”) in the consumer protection context are likely greater than the social costs associated with Type 2 errors (“false negatives”) because the market provides a self-correcting mechanism for the latter.<sup>127</sup> While direct empirical evidence on the social costs of errors is difficult to obtain, these results raise significant concerns about whether the unintended consequences of CPA liability outweigh its consumer protection value, and there is evidence from other settings that liability prone to significant Type 1 errors can lead to significant consumer losses.<sup>128</sup>

### B. Enforcement

In both rounds, the Shadow Commission supported enforcement in less than a quarter of the total scenarios. Of the eleven cases containing illegal conduct in Round 1, only six would result in FTC enforcement. In Round

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dimension other than the disposition of the claim. For example, Round 2 cases did not include federal district court cases, whereas Round 1 included both federal and state court decisions. However, if only the state appellate court cases in both rounds are analyzed, there is still a statistically significant difference at the 5% level. A two-group test of proportions allows us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the scenario contained some illegal conduct under the FTC standards is the same between the two rounds at the 5% level ( $z = -2.536$ ,  $p = 0.011$ ). We get similar results for the non-parametric Spearman rank correlation.

127. For a similar analysis of asymmetrical error costs in the related antitrust context, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

128. Even though the average price effect of liability costs may be small across industries, in some sectors it can be quite large. See Tomas J. Philipson & Eric Sun, *Is the Food and Drug Administration Safe and Effective?*, 22 J. ECON. PERSP. 85, 94–95 (2008) (suggesting that the deadweight losses to consumers and producers from the price increase due to product liability litigation in the pharmaceutical industry is in the tens of billions of dollars); Paul Rubin & Joanna Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221 (2007) (estimating that product liability has increased accidental deaths by raising the prices of safety-enhancing goods and services); Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & ECON. 247, 273 (1994) (suggesting that the price of vaccines went up twentyfold after product liability imposed). For a discussion of these costs in the consumer protection context related to financial services, see David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 LOY. CONSUMER L. REV. 277 (2010).

2, there were thirty-one cases of possible illegal activity, but only ten cases would trigger FTC enforcement. Although the Shadow Commission found possible illegal conduct in thirty-one Round 2 cases, the Shadow Commission would recommend enforcement in only ten of those cases.

When we dropped the seven cases with the tied results from the Shadow FTC from Round 2 but included all non-FTC cases from Round 1, the Shadow FTC believed that the FTC would initiate an enforcement action in six of the fifty general CPA cases (or 12%) and in ten of the forty-three clear CPA wins (or 23.3%), which can be seen in Table 1. This difference is statistically significant only at slightly above the 15% level.<sup>129</sup>

Thus, focusing exclusively on the clear CPA wins, the Shadow Commission identified deceptive or unfair conduct under the FTC standards in over half of the cases. Even in these cases, however, the Shadow Commission believed that the FTC would only bring enforcement actions less than a quarter of the time. While for every scenario in which the Shadow Commission believed the FTC would initiate an enforcement action the Shadow Commission also believed that either deceptive or unfair conduct occurred, the reverse is not true. Of the twenty-four cases where the Shadow Commission thought the scenario indicated some illegal conduct under the FTC standard, in ten of these cases the Shadow Commission also thought that the FTC would initiate an enforcement action. Specifically, the difference in proportions between scenarios believed to have illegal conduct and those believed would be enforced by the FTC based on the available case facts is significant at the 1% level.<sup>130</sup>

These findings could suggest that clear CPA wins may have been brought under similar standards to the FTC's but are less likely to be the type of case enforced by the FTC. As such, there is some support for the theory that CPAs allow private litigants to bring smaller scale cases that approximate FTC enforcement actions but might not warrant allocation of FTC resources.

### C. Control Results—FTC Cases

As discussed, ten FTC cases were included in Round 1 but were not otherwise designated as FTC cases in any way. The FTC litigated eight of these cases and issued complaints for the remaining two that it ultimately dismissed. The Shadow Commission agreed in each of the ten cases that

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129. A two-group test of proportions only allows us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the FTC would initiate an enforcement action based on the available case facts between the two rounds at above the 15% level ( $z = -1.434$ ,  $p = 0.152$ ). We get similar results for the non-parametric Spearman rank correlation.

130. For the forty-three cases that did not have a tied Shadow Commission, a two-sample test of proportions allowed us to reject the null hypothesis that the proportions of cases in which the majority of Shadow Commissioners believe there was illegal conduct and in which the majority of Shadow Commissioners believed the FTC would initiate an enforcement action were equal at the 1% level ( $z = 3.088$ ,  $p = 0.002$ ).

the scenario described unfair or deceptive conduct. This result suggests that the Shadow FTC was able to reach the same conclusion as the FTC in practice. In contrast to these FTC control cases, the Shadow Commission believed there was possible illegal conduct in only 15.9% or 22% of the general CPA cases depending on whether ongoing cases are included. The differences are statistically significant regardless of whether we count ongoing cases.<sup>131</sup> Likewise, in all ten of the FTC cases, a majority of Shadow Commissioners thought the FTC might initiate an enforcement action in contrast to the 6.8% or 12% of Round 1 general CPA cases the Shadow Commissioners agreed might have been enforced (depending on whether the ongoing cases are dropped). Again, these differences are statistically significant.<sup>132</sup>

The Shadow Commission identified similar characteristics in the FTC and state court scenarios and reached accurate conclusions regarding FTC action. This gives credence to the Shadow Commission's findings in non-FTC case scenarios. Further, the results may suggest that while the clear CPA wins are more similar to FTC cases than general CPA claims, even winning CPA cases are at least somewhat unlike FTC cases. In other words, the clear CPA wins may have a higher probability of involving illegal conduct under the FTC standards in the majority of instances but may not necessarily be cases the FTC is likely to enforce.

#### IV. CONCLUSIONS

This Article set out to study whether state Little-FTC Acts do, in fact, pursue the same mission as the FTC. This Article has produced a number of findings that will inform policy debates on CPAs. The Shadow Commission study demonstrates that there are qualitative differences between CPA decisions and actions that would likely be found illegal and enforced under relevant FTC standards. Most CPA claims would not constitute illegal conduct under FTC consumer protection standards. The Shadow FTC found that 78% of a sample of CPA claims would not constitute legally unfair or deceptive conduct under FTC policy statements. While relatively few CPA claims would constitute illegal conduct under the FTC standard (22%), even fewer (12%) would result in FTC enforcement action. Almost 40% of CPA claims where the consumer plaintiff prevailed at trial would not constitute illegal conduct under FTC

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131. A two-group test of proportions allows us to reject the null hypothesis that the proportion of cases in which the majority of Shadow Commissioners believed the scenarios contained some illegal conduct is the same between FTC cases and general CPA cases in Round 1 at the 1% level ( $z = -4.721$ ,  $p = 0.000$  for all cases and  $z = -5.168$ ,  $p = 0.000$  for completed cases only). We get similar results for the non-parametric Spearman rank correlation.

132. A two-group test of proportions allows us to reject the null hypothesis that the proportion of cases in which the majority of Shadow Commissioners believed the FTC would initiate an enforcement action based on available case facts is the same between FTC cases and general CPA cases in Round 1 at the 1% level ( $z = -5.745$ ,  $p = 0.000$  for all cases and  $z = -6.221$ ,  $p = 0.000$  for completed cases only). We get similar results for the non-parametric Spearman rank correlation.

standards. In a sample of CPA claims in which the consumer plaintiff prevailed in court, the Shadow FTC found that 38% of these successful claims would not constitute illegal conduct under the FTC standard. Although most of these successful cases would meet the FTC illegality standards, the Shadow survey results suggest that only 23% would likely be enforced by the FTC.

These findings have important implications for those interested in discussing and formulating public policy regarding CPAs:

- 1. To the extent that CPAs are envisioned as complements to FTC consumer protection, they appear to overshoot the mark.** While resource limitations prevent the FTC from pursuing enforcement in every case of unfair or deceptive conduct, this Article suggests that CPAs go well beyond filling this gap. Instead, CPAs may allow consumers to pursue different types of claims, including many that do not involve conduct that would be illegal under FTC standards for consumer protection.
- 2. To the extent that the FTC standard meets its goal of an optimal balance between the public interest and protection of individual consumers, it is uncertain that the broader coverage of CPAs benefits consumers.** The FTC standard seeks to limit consumer protection enforcement to those actions that will serve the public interest generally. CPAs that reach beyond this optimal enforcement goal may deter businesses from legitimate activity and force them to focus on legal matters unrelated to their business goals. Additionally, any increases in consumer protection that are provided by CPAs must be considered against the burdens that they impose on the civil justice system.

The results presented in this Article may inform policy discussions on CPAs, but the analysis has limitations. The case fact descriptions forming the basis of the excerpts given to Shadow Commissioners may not have included all of the facts ultimately relevant to the determination of liability. Nevertheless, the results clearly suggest that private litigation under Little-FTC Acts tends to pursue a different consumer protection mission than the Bureau of Consumer Protection at the Federal Trade Commission.

## APPENDIX A: SHADOW FTC SCENARIO EXAMPLE— ROUND 1

### Scenario 1:

**Real Estate Agent (REA)** buys and resells houses for a profit, and he became interested in purchasing a house being offered for sale by the U.S. Department of Housing and Urban Development (HUD). **REA** personally inspected the house and decided to make an offer to purchase it. His initial offer was rejected by HUD in favor of another offer but was placed as a back-up in the event the contract for sale with the winning bidder did not close. The winning bidder hired a licensed inspector to examine the house and found evidence of active termites inside the home, including noticeable holes in the bathroom ceiling and active termites in the baseboards. The winning bidder terminated the contract, and HUD then asked **REA** if he was still interested in purchasing the property. **REA** personally examined the house again and purchased it stating he did not see any evidence of termites in the house before he bought it. Shortly after purchasing the property, **REA** hired several contractors to make repairs and improvements, intending to place the house back on the market for sale once the repairs were completed.

Contractor had done remodeling work for **REA** in the past on a number of different houses, and was hired to perform general repair work including repainting the interior and exterior walls. During the course of making repairs, Contractor noticed evidence of active termites. Contractor may have informed **REA** about the termites and may have been told to continue his work making cosmetic repairs. Contractor has also apparently covered over termite damage in other homes for **REA**. Contractor went ahead with the repairs as asked by **REA**.

**Buyers** became aware of the house being sold by **REA** through their real estate agent. **Buyers** toured the house with his agent and it had been newly painted and carpeted. **Buyers** made an offer to purchase the house and, following a series of negotiations, signed an earnest money contract. On the same day he entered into the earnest money contract, **Buyers** received a “Seller’s Disclosure of Property Condition” form signed by **REA**. **REA** indicated on the form that he had no knowledge of any active termites, termite damage, or previous termite treatment. **Buyers** hired an inspector to examine the house, and an inspection was performed one month later. This inspection uncovered active termites on the house’s exterior, as well as evidence of previous termite treatment along the front porch. **REA** paid to have a “spot” treatment done for the termites on the exterior. The sale of the house to **Buyers** closed in the following month.

A few months later, **Buyers** discovered a swarm of termites inside their home. They telephoned **REA** who referred them to the pest control company that performed the spot treatment before closing. The company returned to the home and performed another spot treatment. This appeared to resolve the problem until the following year when termites again swarmed inside the house. This time **Buyers** paid for a full treatment by a different pest control company. **Buyers** also hired a general contractor to examine the house and estimate the cost of repairing the damage caused by the termites.

Q1a. Based on the case facts, do you believe the alleged practice is legally deceptive under the FTC's deception policy statement?  Yes  No

Q1b. If no, please identify the legal prerequisite or prerequisites for deception that are not satisfied.

- A misrepresentation, omission or practice that is likely to mislead the consumer
- The consumer's interpretation or reaction to the misrepresentation, omission or practice is reasonable under the circumstances
- The representation, omission or practice must be material

Q2a. Based on the case facts, do you believe the alleged practice is legally unfair under the FTC's unfairness policy statement?  Yes  No

Q2b. If no, please identify the legal prerequisite or prerequisites for unfairness that are not satisfied.

- Cause substantial injury
- Consumer injury not outweighed by offsetting consumer or competitive benefits
- Injury could not have been reasonably avoided

Q3a. Based on the facts presented above, do you believe the FTC would initiate a consumer protection enforcement action?  Yes  No

Q3b. Briefly explain \_\_\_\_\_

## APPENDIX B: SHADOW FTC SCENARIO EXAMPLE— ROUND 2

### Scenario 1:

**David D.** is a developmentally disabled young man who has been under the legal guardianship of his parents since he turned eighteen. At the age of twenty-one, **David D.** was living in his own apartment, but his parents strictly controlled his finances. They spoke with **David D.** nearly every day.

**David D.** wanted to buy a car but neither of his parents would allow him to do so. They assumed their word would be final because they did not realize that **David D.** could obtain any appreciable amount of money with his debit card. **David D.** went to **Car Dealership**, used his debit card to buy a new car, and received credit for a trade-in on his old car.

Days after **David D.** bought the car, his mother came to **Car Dealership** and explained that **David D.** was under the legal guardianship of his parents and had no legal authority to enter into a contract to buy the car. She showed **Car Dealership David D.**'s guardianship papers and asked to return the car. **Car Dealership** would not take back the car saying that the company sold cars to "a lot of people who aren't very smart" and that the contract was valid. **David D.**'s mother insisted that the contract was void, but **Car Dealership** handed the keys to **David D.** who drove off in the new car.

A few days later, **David D.** damaged the car in a one-car accident. His parents then managed to get the car away from **David D.** and return it to **Car Dealership**. However, when **David D.** called **Car Dealership** to ask for his trade-in back, someone at **Car Dealership** told him that he could not have it but could pick up his new car any time. **David D.** got a ride to **Car Dealership** and picked up the new car. The next day his parents were able to convince **David D.** to return the car to **Car Dealership** yet again, and this time he left the car there.

Several people called **Car Dealership** on behalf of **David D.**'s parents including the investigator for **David D.**'s guardianship case. **Car Dealership** was advised that the guardianship did indeed make the contract legally void but it apparently did not listen to that advice. **Car Dealership** did not seek legal advice on the validity of the contract until a month after the sale.

**Car Dealership** assigned **David D.**'s loan to a collection agency but never informed it of **David D.**'s incapacity. It also demanded storage fees from **David D.** for keeping the new car on its lot. It sold **David D.**'s trade-in on the same day the new car was brought back for the second time, even though the sale was still being contested.

Q1a. Based on the case facts, do you believe the alleged practice is legally deceptive under the FTC's deception policy statement?  Yes  No

Q1b. If no, please identify the legal prerequisite or prerequisites for deception that are not satisfied.

- A misrepresentation, omission or practice that is likely to mislead the consumer
- The consumer's interpretation or reaction to the misrepresentation, omission or practice is reasonable under the circumstances
- The representation, omission or practice must be material

Q2a. Based on the case facts, do you believe the alleged practice is legally unfair under the FTC's unfairness policy statement?  Yes  No

Q2b. If no, please identify the legal prerequisite or prerequisites for unfairness that are not satisfied.

- Cause substantial injury
- Consumer injury not outweighed by offsetting consumer or competitive benefits
- Injury could not have been reasonably avoided

Q3a. Based on the facts presented above, do you believe the FTC would initiate a consumer protection enforcement action?  Yes  No

Q3b. Briefly explain \_\_\_\_\_