Consumer Protection Acts or Consumer Litigation Acts?

A Historical and Empirical Examination of State CPAs

by Joanna M. Shepherd-Bailey

ATR FOUNDATION

Consumer Protection Acts or Consumer Litigation Acts?
A Historical and Empirical Examination of State CPAs

*by Joanna Shepherd-Bailey**

TABLE OF CONTENTS

*Professor Joanna Shepherd-Bailey is an Associate Professor of Law at Emory University School of Law. Before joining Emory, Professor Shepherd-Bailey was an Assistant Professor of Economics at Clemson University. She teaches classes in Torts, Law and Economics, Analytical Methods for Lawyers, Statistics, and Health Policy.

Professor Shepherd-Bailey's research focuses on empirical analyses of legal changes and legal institutions. Her recent research has empirically examined issues related to the healthcare industry, tort reform, employment law, corporate law, and judicial elections. She has published broadly in the top national law reviews, legal journals, and peer-reviewed economics journals. Recent publications have appeared in the New York University Law Review, Vanderbilt Law Review, Southern California Law Review, Duke Law Journal, UCLA Law Review, Michigan Law Review, The Journal of Law and Economics, The Journal of Legal Studies, and The American Law and Economics Review. In addition to publishing dozens of academic articles, Professor Shepherd-Bailey is an author of two textbooks, The Economic Analysis of Law and The Economics of Industrial Organization. Her research has been discussed on CNN Sunday, National Fox News, and The O'Reilly Factor, as well as in The Wall Street Journal and The New York Times.

Professor Shepherd-Bailey has been invited to testify before the U.S. House of Representatives Judiciary Committee and before the National Academy of Sciences. She has considerable experience as an economic and statistical expert, and has authored numerous expert reports, testified at both deposition and trial, and provided public policy research and white papers for many clients. Professor Shepherd-Bailey has also been invited to present her scholarly work by faculties at leading universities around the country including Harvard Law School, Stanford Law School, The University of Chicago Law School, NYU School of Law, The University of Michigan School of Law, Northwestern University School of Law, Duke Law School, Georgetown School of Law, and The University of Southern California School of Law.

I. INTRODUCTION

Consumer protection acts arose to resolve a contradiction in the American civil justice system. The early- and middle-twentieth-century American marketplace contained myriad new products, new merchants, new goods, and even new payment systems.[1] The post-war economic boom heralded untold innovations for consumers. With these innovations, however, arose the perception that merchants gained a dominant position in the merchant–consumer relationship; consumers were forced to rely on merchants increasing amounts across more and more decisions.[2] Simultaneously, these merchants tended to be further and further removed from both their customers and from the communities in which they sold products.[3] In part due to these increasingly impersonal and distant interactions, and in part due to the increasing complexity of American life, consumers felt victimized by even small breaches of a trust they had come to expect in the merchant–consumer relationship.[4]

Courts, the common law, and legislatures failed to adequately define or repair these small breaches. A consumer purchasing faulty goods might sometimes have recourse with a breach of contract suit, but, more often, consumers were forced to sue in the common-law tort of deceit—now fraud.[5] Fraud claims proved expensive and impractical; demonstrating an objectively, deliberately false statement of fact presented difficult proof problems for the average consumer.[6] Even where a potential plaintiff discovered persuasive evidence of intent to defraud, damages were typically so small as to render the suit economically pointless.[7] More fundamentally,

---

[1] *See, e.g.,* Remarks by Chairman Alan Greenspan at the Economic Development Conference of the Greenlining Institute (Oct. 11, 2007), *available at* http://www.federalreserve.gov/boarddocs/speeches/1997/19971011.htm.

[2] *Id.; see also* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?,* 63 Fla. L. Rev. 163, 164 (2011); James R. Withrow, Jr., *The Inadequacies of Consumer Protection by Administrative Action,* 1967 N.Y. State Bar Ass'n Antitrust Law Symposiums 58, 64; National Association of Attorneys General Committee on the Office of Attorney General, Report on the Attorney General 395 (1971) [hereinafter Attorney General Report].

[3] H. Peter Norstrand, *Treble Damage Actions for Victims of Unfair & Deceptive Trade Practices: A New Approach,* 4 New Eng. L. Rev. 171, 175 (1969); *see also* Nancy F. Koehn, *Consumerism and Consumption, in* The Encyclopedia of the United States in the Nineteenth Century (2000), available at www.gale.cengage.com/pdf/whitepapers/gdc/Consumerism_whtppr.pdf.

[4] Norstrand, *supra* note 3, at 175.

[5] *Id.* at 173.

[6] Butler & Wright, *supra* note 2, at 168 (citing Robert H. Quinn, *Consumer Protection Comes of Age in Massachusetts,* 4 New Eng. L. Rev. 71, 72 (1969)).

[7] Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts,* 54 U. Kan. L. Rev. 1, 6–7 (2005).

the types of claims consumers sought to vindicate through fraud evinced a basic shift in bargaining position from the traditional arm's-length model. Exaggerations regarding a product's putative effectiveness, or deliberately perplexing warranty or contractual terms, made for poor claims in the traditional fraud model, but nonetheless offended American mores about the proper relationship between merchant and consumer.[8] The language of American law lacked even the terminology to classify and define these wrongs: although often short of outright lies, the American public felt these sharp practices offended a fundamental sense of fairness and good faith in commercial dealings.[9]

Congress first sought to define and deter this new class of consumer harms through the Federal Trade Commission Act (the "FTC Act"). The FTC Act boldly expanded consumer protection law in part by introducing a broadly flexible prohibition against "unfair or deceptive acts of practices in or affecting commerce."[10] But Congress recognized the potential for mischief by prohibiting actions that could be characterized as merely "deceptive," much less "unfair."[11] Congress consequently included various procedural and remedial limitations on this prohibition, ensuring that the Federal Trade Commission could effectively police consumer abuses while simultaneously preventing the frivolous invocation of the federal government into marginal disputes.[12] One critical limitation was that the FTC Act enabled the federal agency, but not private plaintiffs, to bring complaints against practices as unfair or deceptive.[13] This compromise reflected the core observation that consumers benefited both from vindicating real and persistent, if slight, violations of reasonable expectations of fairness and forthrightness, as well as from refraining from over-prosecution of marginal (or specious) claims of unfairness or deception.[14] This compromise animated the Commission's

---

8 Attorney General Report, *supra* note 2, at 395; William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tulane L. Rev. 724, 725 (1971).

9 *See* Attorney General Report, *supra* note 2, at 395–96.

10 15 U.S.C. § 45(a)(1).

11 Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts* 21 (Nw. Univ. Sch. of Law Faculty Working Papers, Paper No. 184, 2009), *available at* http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/184.

12 *See* Marshall A. Leaffer & Michael H. Lipson, 48 Geo. Wash. L. Rev. 521 (1980).

13 Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 Tenn. L. Rev. 131, 146 (2006); *see also* 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).

14 Butler & Wright, *supra* note 2, at 165; *see also* Leaffer & Lipson, *supra* note 12, at 554 (stating that

early actions and was heralded as an initial success; but as with many new initiatives, the Commission eventually lost public confidence and was perceived as unable to sufficiently combat truly local consumer harms.

States then stepped in and advanced the consumer protection agenda through a series of State Consumer Protection Acts (CPAs). State CPAs both sought to replace the FTC Act and to supplement it; State CPAs were passed both because the FTC was widely perceived as failing to protect consumers and because the FTC Act represented a sensible compromise between two vital consumer interests.[15] States slowly provided to citizens the right to sue for consumer protection violations with, again, specific procedural and remedial restrictions reminiscent in part of the FTC Act's thoughtful balancing of consumer protection and litigation restraint.[16]

But in recent decades, this tradition of incremental change and thoughtful balancing has given way to surprising legislative and judicial overcorrections with a common theoretical mistake: the notion that additional consumer protection litigation necessarily protects consumers more. Historical analysis dating back to the FTC Act, basic economic theory, empirical scholarship, and common sense collectively affirm that the optimal amount of consumer protection litigation for consumers as a class is well shy of the theoretical maximum. Yet courts and legislatures have persisted in expanding ambiguous terms of art—ones which drew concern almost a century ago for exactly this reason. This has accompanied the gradual abolition of many of the procedural and remedial protections designed to ensure State CPAs do not become all-purpose business litigation or business rent-seeking statutes. The contemporary result is that the modern consumer protection act more closely resembles a consumer litigation act than the ideals embodied by the FTC Act, and that this devolution inflicts meaningful and measurable harms on consumers.

This paper explores the introduction, original mission of, and corruption of State CPAs. It proceeds in three additional parts. Part II outlines a brief history of American consumer protection laws, beginning with the common law and FTC Act, proceeding to the 1960s' and 1970s' introduction of the traditional State CPA, and concluding in the modern day, with the

the FTC is limited to pursuing those cases where consumer protection is in the general public interest).

[15] Robert H. Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 NEW ENG. L. REV. 71, 72 (1969) (finding insufficient the common law and FTC causes of action in protecting consumers).

[16] 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)) (finding that much of the initial State CPA statutes enacted were modeled off of—and even used direct terminology from—the FTC Act).

accompanying immodest expansions of State CPAs. Part III reviews and discusses the predictable litigation consequences of these expansions, including harm to consumers themselves, litigants, and the judicial system, and briefly surveys elementary economic theory as well as salient empirical data confirming that these unjustified CPA expansions harm consumers. Part IV concludes, recommending several salutary policy prescriptions for lawmakers considering amending a State CPA.

II. THE (D)EVOLUTION OF AMERICAN CONSUMER PROTECTION LAWS

Appreciating the missteps States committed in broadening CPAs beyond all recognition requires first understanding the historical context giving rise to consumer protection law. I next roughly divide and outline three phases of consumer protection development: the common law and FTC Act, the rise of State CPAs, and the subsequent divergence of federal and State consumer protection laws. As I discuss below, these three phases can be loosely characterized by the main goal of consumer protection legislation at the time. In the first phase, Congress sought to effectively define and deter a new class of wrongs to consumers that the existing legal system largely failed to remedy. In the second, States, with the help of the FTC in part, localized and individualized these rights while maintaining constraints against the proliferation of consumer-harming lawsuits. In the third, interest groups drove State disassembly of these constraints, inverting consumer protection acts into consumer litigation acts. I next detail these three phases.

A. From Caveat Emptor to the Federal Trade Commission

Broadly speaking, principles summarized in caveat emptor—"let the buyer beware"—predominated consumer purchases until the beginning of the twentieth century.[17] The common law generally assumed that "buyers and sellers were equally competent to judge the quality of goods,"[18] and that merchants and customers had some personal relationship and interaction.

Accordingly, merchants were presumed to have an incentive to maintain

[17] *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (holding that privity of duty is no longer required in products liability lawsuits, particularly when being brought against the manufacturer); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 2:1 (2013).

[18] PRIDGEN & ALDERMAN, *supra* note 17, at § 1:1.

a reputation for honesty and fair dealing, and the law also presumed that buyers and sellers were equally competent to examine the quality of goods, negotiate specific contractual terms at arm's length, and engage in reputational self-help for minor breaches of trading etiquette.[19] Contract and tort law provided some remedies for major breaches: breach of contract suits, quantum meruit, and doctrines regarding setoff and recoupment for executory agreements, and usually claims in deceit (now fraud) for single or completed transactions.[20] For single-instance transactions, an aggrieved consumer typically had to resort to a fraud claim for misrepresentations as to the nature or quality of purchased goods.[21]

Though a serviceable remedy in the pre-industrial economy, common-law fraud claims practically limited small consumer suits in numerous ways. The archetypical common-law fraud claim required an intentional statement of fact delivered with the purpose of deceiving the victim, the victim's justified reliance, and demonstrable damages.[22] But as many commentators then and since have noted, intent evidence proved notoriously difficult for consumers to effectively gather, especially because simple falsity could not stand as a heuristic for knowing or intentional falsity, which the tort required.[23] "Justifiable reliance" analysis proved similarly challenging—an expensive, fact-driven inquiry into the goods in question, the normal course of dealings in the community, and the particular circumstances surrounding the transaction.[24] A typically meager damages remedy also left the consumer to prove these expensive elements for little potential reward.[25] Given that the consumer's adversary generally retained control over the best evidence for at least the intentionality of the false statement, this information asymmetry often rendered fraud claims economically implausible for most consumers.[26]

---

[19] *See* Lovett, *supra* note 8, at 725 (suggesting that while these roles were assumed, there was an ever increasing breakdown of these responsibilities and incentives, particularly on the side of the merchant); *see also* Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation (Preliminary Report)* 6 (2009), available at http://ssrn.com/abstract=1708175 [hereinafter Searle Study].

[20] *See* Schwartz & Silverman, *supra* note 7, at 6–7.

[21] Michael S. Greve, *Consumer Law, Class Actions and the Common Law,* 7 Chapman L. Rev. 155, 156.

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

[23] *Id.*

[24] Pridgen & Alderman, *supra* note 17, at § 10:1; *see also* Jason M. Solomon, *Judging Plaintiffs,* 60 Vand. L. Rev. 1749, 1766–67 (2007).

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

[26] *Id.* (citing Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?,* 94 Dick. L. Rev. 373, 374 (1990).

These three key requirements correspond theoretically to the then-prevailing assumptions that consumers and merchants stood in equal positions to one another and in evaluating goods for sale. Therefore, a consumer claiming fraud had to demonstrate that the merchant's misstatement was intentional, as opposed to accidental, as both the merchant and consumer were in approximately equal positions to ascertain the truth of the claim as of the time of the sale.[27] The consumer further had to show that his reliance was justified: that a reasonable person in his position, dealing with the merchant as a peer, evaluating the goods and transaction at the time, would have reasonably believed the false claim was true.[28] And the consumer had to prove some demonstrable, quantifiable harm in damages for the purported trick.[29] One can imagine that a regular dealer in certain goods can ascertain cheaply and readily the value difference between his reasonable expectations and the defective goods he received; this is one of the many benefits of specialization.[30] But the modern consumer is usually by necessity a generalist, and to the extent the common law assumed that calculating or showing harm would prove straightforward for a deceived consumer, the common law fictively elevated that consumer to a merchant's sophistication.[31]

The twentieth century's start shook several of the assumptions underlying the common-law requirements to recover for fraud. "Buyers were not able to protect themselves from unscrupulous sellers and defective products,"[32] in part because these products became increasingly sophisticated and increasingly diverse. The legal obligations attending these items and their purchase also grew in complexity. The post-war period marked drastic increases in credit and financing arrangements, new national marketing initiatives, and unfamiliar warranty disclaimers, which often took consumers by surprise.[33] Sellers' nature changed as well: merchants were no longer "shopkeeper-neighbors" where disaffected buyers could avail themselves of informal remedies and pressures individually when dissatisfied.[34] Instead,

---

[27] *Id.*

[28] *Id.*

[29] *Id.* at 374, 390–91.

[30] *Id.* at 374; *see also* Lovett, *supra* note 8, at 726–31.

[31] Pridgen & Alderman, *supra* note 17, at § 1:1.

[32] *Id.*

[33] Lovett, *supra* note 8, at 725.

[34] Norstrand, *supra* note 3, at 175.

the "disgruntled buyer" was "confronted by impersonal bigness where responsibility and liability forever lie [sic] just one department away."[35] These changes led to the widespread belief that merchants managed to escape liability for practices that, if not vindicated in fraud claims, were essentially unfair.[36]

This common intuition tracks basic expectations regarding relative information and transaction costs between individual merchants and individual consumers versus larger merchants and individual consumers. At a high level of generality, one could expect the transaction costs of dealing with a potential product dispute to be roughly similar for the individual shopkeeper and the individual consumer: both take that individual's time and attention and both potentially strain a presumptively beneficial ongoing relationship. But where an entity grows large enough to deal with these complaints through internal specialization, economies of scale and the benefits of specialization reduce the cost of processing one complaint for the merchant relative to the consumer.[37] Moreover, the relative value of the transaction costs—transaction costs as a proportion of expendable resources—grows more lopsided against the consumer as merchants grow larger.[38] These lopsided transaction costs are beneficial to the merchant because they discourage consumers from seeking redress. A regime in which small harms to consumers are simply not worth pursuing by the consumers is one in which large merchants can theoretically cheat at the margins of reasonable expectations without effective penalty.[39] Thus, the mid-century fairness intuitions regarding the insufficiency of the common law tracked some simple economic common sense.

Congress appreciated the common law's fundamental deficiency when it deliberated the FTC Act, but also confronted a difficult problem in updating consumer protection law to redress this need: how to effectively define the class of impermissible acts in a way that neither invited constant evasion by merchants nor constant abuse by potentially mischievous

[35] Brian J. Linn & Gretchen Newman, *Part III: Implementing the Washington Consumer Protection Act,* 10 GONZ. L. REV. 593, 597 (1975).

[36] Butler & Wright, *supra* note 2, at 168.

[37] *See* G. Stigler, *The Division of Labor Is Limited by the Extent of the Market,* J. POLITICAL ECON. 59, 185–193 (1951) (identifying that increased specialization must entail increased economies of scales).

[38] *See* G. Becker & K. Murphy, *The Division of Labor, Coordination Costs and Knowledge,* QUANT. J. ECON. 107, 1137–160 (suggesting that there are increased coordination and transaction costs that arise from increased specialization, which leads to larger scale economies).

[39] Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic* Approach, 2010 COLUM. BUS. L. REV. 1, 24, 92).

litigants.[40] A defined list of particularly egregious practices would certainly benefit consumers by preventing known harms, for example, but would also invite sophisticated merchants to tweak these practices slightly, requiring yet another new legal intervention to prevent them. By contrast, a broad prohibition against all bad or undesirable business practices, accompanied by a federal lawsuit, could lead to the professional "hunting up and working [of] such suits."[41] Congress recognized that poorly-defined proscription could deter beneficial business dealings, lead to strategic or nuisance suits by competitors, and chill commerce through regulatory uncertainty.[42]

These two concerns ultimately both derived from the same source: a desire to protect consumers as a whole. The mid-century Congress initially contemplating a new step in consumer protection recognized that sophisticated entities could exploit consumers and evade regulation by iteratively evolving unscrupulous practices. Yet Congress also understood that consumers were often employers and tradesmen as well, and that sufficiently indefinite or complex legal hurdles could harm the citizens in one role that Congress intended to help in another.[43] In this sense, Congress sought to maximize consumer protection by considering how best to prevent consumer abuses through unfair commercial conduct while also preventing consumer abuses through inappropriate litigation.

Congress passed the FTC Act with a careful balance between these two broad concerns. Instead of prohibiting specific business practices, Congress created a multi-member administrative body—the Federal Trade Commission—and empowered it to define and enforce the prohibition against "unfair or deceptive acts or practices in or affecting commerce."[44] Understanding the potential breadth of this "unfair or deceptive" language, Congress paired the broad prohibition ("unfair or deceptive") with a tightly cordoned enforcement power: Congress entrusted only the FTC to sue under

---

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

[41] American Tort Reform Foundation, *State Consumer Protection Laws: Unhinged* 7 (2013), *available* at http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf [hereinafter ATRA (2013)] (CITING 51 CONG. REC. 13,113, AT 13,120 (1914) (statement of Sen. Stone)).

[42] Butler & Johnston, *supra* note 11, at 70.

[43] *See* 15 U.S.C. § 53(b) (2000) (requiring that only those actions in the public interest are pursued and investigated by the Commission); *see also* S. REP. NO. 74-2, 1 (1936).

[44] *See* Federal Trade Commission Act, Pub. L. No. 62-203, 38 Stat. 717 (1914) (codified and amended at 15 U.S.C. § 51-58 (2000) (establishing the FTC). In 1938, the consumer protection language was added. *Id.; see also* Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1)).

this power, and injunctions would be these suits' primary goal.[45] Congress expected the Commission's members would possess substantial business and commercial backgrounds in enforcing the FTC Act.[46] This expertise would enable the Commission to discern between malevolent business practices harming consumers and disingenuous claims of "unfairness" prompted only by consumer litigation—itself an abuse of consumers.[47] Finally, Congress required the Commission to consider the public interest, and not merely an individual consumer's interest, in bringing suit: Congress recognized that some practices might occasionally harm individual consumers, yet prove broadly beneficial to consumers and businesses as a whole, and entrusted the FTC with this calculus in its enforcement discretion.[48] In short, the FTC Act sought to deter consumer harm by issuing a firm and broad pro-consumer prohibition against unfair practices while strictly constraining the procedures, remedies, and conditions under which that prohibition could be enforced to prevent consumer abuses through frivolous litigation.[49]

Though the Commission was initially quite popular, the public's faith in it eventually waned. Though charged with its consumer protection mandate in 1938,[50] by 1969, the Commission had been assaulted as ineffective, politically captured, poorly managed, poorly directed, and fundamentally confused about its consumer protection mission.[51] Groups as diverse as the American Bar Association, Ralph Nader's "Raiders," and Professor Richard Posner observed and compiled the Commission's inefficiency and general failure to protect many consumers from harmful products, practices, or both.[52] The public no longer viewed the Commission as an effective solution to deter fundamentally unfair business practices, and turned to states and local regulators with this now-familiar problem.[53]

---

[45] 15 U.S.C. § 45 (2006); *see also* ATRA (2013), *supra* note 41, at 6.

[46] *See* 15 U.S.C. § 41 (setting the number of and qualifications for FTC Commissioners).

[47] *See* Butler & Johnston, *supra* note 11, at 20.

[48] Leaffer & Lipson, *supra* note 12, at 554.

[49] *See* Schwartz & Silverman, *supra* note 7, at 9.

[50] Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1)).

[51] Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 47 & n.1 (1969).

[52] *Id.;* Butler & Wright, *supra* note 2, at 167 (citing Edward F. Cox et al., *'The Nader Report' on the Federal Trade Commission,* at vii–xiv, 39 (1969); *Report of the ABA Commission to Study the Federal Trade Commission* 1 (1969).

[53] Butler & Wright, *supra* note 2, at 167–68 (citing Edward F. Cox, et al., *'The Nader Report' on the Federal Trade Commission* 39 (1969)); *Report of the ABA Commission to Study the Federal Trade Commission* 1 (1969); Posner, *supra* note 51, at 47.

B. The Rise of State CPAs

The FTC's perceived failure to protect consumers through ineffectiveness, capture, corruption or otherwise—and the increasing public pressure on State governments to address this lapse—inspired States to revisit the FTC Act compromise. Several pressures drove State-level legislation. First, the national Commission was viewed both as poorly run and as fundamentally unable to address truly local concerns regarding bad business practices.[54] State-level officers also could respond to local constituencies more effectively than a national Commission, and might understand the "public interest," in the words of the Commission's mandate, differently.[55] Finally, frustration with the lack of a private remedy fueled a popular desire for an individual consumer protection suit under State law, if not federal law.[56]

The earliest State CPAs responding to these concerns resembled New Jersey's "consumer fraud act." New Jersey's consumer fraud statute, passed in 1960, prohibited "fraud," "deception," "false promise[s]," and similar misrepresentations or omissions.[57] New Jersey's original act empowered the State Attorney General to investigate unlawful practices and seek injunctions and restitution for violations of the consumer fraud statute.[58] This expansion tracked the FTC Act concerns both structurally and in spirit: the original consumer fraud act focused on preventing ongoing consumer fraud and providing restitution for victims, rather than on attorney's fees or punitive damages, and charged the State Attorney General with responsibility for enforcing the Act.[59] Several states passed similar acts modeled on New Jersey's consumer fraud statute. Other early adopters modeled legislation directly on the FTC Act and the federal Clayton Act; for example, Washington's original consumer protection law simply forbade "unfair or deceptive acts or practices in the conduct of any trade of commerce."[60] This parallel to the federal FTC Act led these

[54] Posner, *supra* note 51, at 87.

[55] Butler & Johnston, *supra* note 11, at 8.

[56] Sovern, *supra* note 13, at 441–42.

[57] Alan S. Brown & Larry E. Hepler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 FDCC QUARTERLY 263, 266 (2005).

[58] *See* 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)).

[59] *See generally id.*

[60] 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)).

State-level variants to earn the moniker "little FTC Acts,"[61] though many commentators now use the term "little FTC Act" to refer to consumer protection laws more generally[62]—a tribute to these laws' origin.

By the mid-1960s, State responses converged around several model acts. The first two—New Jersey's consumer fraud act and the little FTC Act—garnered some significant state support; several states passed each in the early- to mid-1960s.[63] The third major response, in which many modern State CPAs have their origins, was the Uniform Deceptive Trade Practices Act (UDTPA). Developed by the National Conference of Commissioners on Uniform State Laws in 1964 and rewritten in 1966, the UDTPA was the first statute to pivot back slightly from relying on broad, generalized prohibitory language only, like the FTC Act, in favor of the "laundry list" model.[64] The "laundry list" approach enumerated twelve deceptive trade practices, such as false advertising and misleading trade identification, and included an open-ended prohibition against "any other conduct which similarly creates a likelihood of confusion or misunderstanding."[65] The UDTPA granted a limited private right of action; consumers could sue directly, but only for an injunction against the prohibited practices. The UDTPA eventually allowed for reasonable attorneys' fees, but only when the defendant "willingly and knowingly" deceived consumers.[66]

Each of these early models struggled with striking a new balance between the twin concerns underlying the FTC Act in light of the FTC's perceived failure. These early State laws were by necessity more aggressive than the original FTC Act. For example, the UDTPA did not require proof of damages or intent to deceive, alleviating two of the largest common-law tort of fraud burdens on potential plaintiffs.[67] Little FTC Acts directly imported the FTC's broad "unfair or deceptive" language into State law,

---

[61] 29 COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 142 (1969).

[62] *See generally* Butler & Wright, *supra* note 2, at 165; *see also* Sovern, *supra* note 13, at 438–39.

[63] *See* PRIDGEN & ALDERMAN, *supra* note 17, at § 2:10. The twenty states adopting this early legislation were Alaska, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

[64] ATTORNEY GENERAL REPORT, *supra* note 2, at 400; Bauer, *supra* note 13, at 145; 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).

[65] *Id.* at 262; *see* Butler & Wright, *supra* note 2, at 170; *see also* PRIDGEN & ALDERMAN, *supra* note 17, at § 2:10; *see also* Bauer, *supra* note 13, at 145.

[66] Butler & Wright, *supra* note 2, at 170.

[67] COMM'RS ON UNIF. STATE LAWS, *supra* note 64, at 262.

often to be enforced by State agencies with local confidence the federal Commission now lacked.[68] And the consumer fraud statute included a broad restitution remedy for its violation.[69] But all of these early laws contained significant restrictions to prevent consumer abuses through frivolous litigation as well. The earliest consumer fraud acts contemplated at least primary enforcement by the relevant State Attorney General; the little FTC Acts tracked known FTC jurisprudence and provided some measure of predictability; the UDTPA enumerated specific forbidden acts, did not originally contain a general damages remedy, and narrowed attorneys' fees sharply to penalize only deliberate offenders.[70]

Though these State laws each reflected a compromise between consumer protection and preventing excessive consumer litigation, they created an unruly patchwork of wildly divergent laws. The FTC, chastened by its publicly poor reputation in the consumer protection sphere, sought to rehabilitate its position and standardize these State laws through the Model Unfair Trade Practices and Consumer Protection Law (UTPCPL).[71] "Less innovative than comprehensive," the UTPCPL synthesized many of the various State acts into one model Act. The UTPCPL provided three formulations against unlawful practices. The first option, the little FTC Act, prohibited "unfair or deceptive acts or practices."[72] The second prohibited "false, misleading, or deceptive acts or practices."[73] The third borrowed the UDTPA's twelve prohibitions and replaced its catch-all language by banning any acts "unfair or deceptive to the consumer."[74] These liability formulations fairly tracked the developments in then-current State law.

The UTPCPL also empowered State Attorneys General to enforce the consumer protection law, like the consumer fraud acts, little FTC Acts, and UDTPA. It entitled the State Attorney General to seek an injunction against

---

68 Sovern, *supra* note 13, at 446.

69 See, e.g., 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)), § 8.

70 *See* COMM'RS ON UNIF. STATE LAWS, *supra* note 64, at 262; 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); *see also* PRIDGEN & ALDERMAN, *supra* note 17, at § 2:10.

71 Butler & Wright, *supra* note 2, at 170. This model was developed by the FTC and adopted by the Committee on Suggested State Legislation of the Council of State Governments. *Id.* (citing ATTORNEY GENERAL REPORT, *supra* note 2, at 399).

72 29 COUNCIL OF STATE GOV'TS, *supra* note 61, at 142, 146.

73 *Id.* at 142.

74 *Id.; see also* PRIDGEN & ALDERMAN, *supra* note 17, at § 2:10.

any act prohibited by the relevant language the State opted for when that injunction would be in the public interest.[75] The UTPCPL, like the consumer fraud acts, permitted the Attorney General to seek disgorgement of any property gained by defrauding consumers, and allowed for restitution to victims of forbidden acts.[76] The UTPCPL also authorized State Attorneys General to seek civil monetary penalties against knowing violators.[77]

Where the UTPCPL truly changed consumer protection law, however, was its treatment of private suits and private remedies.[78] Early State CPAs evinced some hesitation against consumer suits for money damages, either by limiting consumer suits altogether, entrusting the State Attorney General with enforcement discretion, or granting private rights of action with only equitable or injunctive remedies.[79] The UTPCPL radically expanded potential vehicles for suit and available damages, shifting the FTC Act balance away from restraint and towards much greater enforcement. The UTPCPL authorized class actions for consumer protection violations, granted an individual right of action for the greater of actual damages suffered or $200, and provided attorneys' fees at the court's discretion against any violator, not merely knowing violators.[80]

But though the UTPCPL was by far the most aggressive consumer protection law to date, State approaches to even this model act recognized a need for restraint to prevent lawsuits that would harm consumers. The UTPCPL contained provisions harmonizing State interpretations of the FTC Act's "unfair or deceptive" language with the federal Commission: the Commission's interpretations were to be given "due consideration and great weight."[81] The National Association of Attorneys General warned that private class actions would "provide too great an opportunity for frivolous suits," and many states proved slow to adopt the UTPCPL's class action provision.[82] Many states also continued to require proof of actual injury to recover under these acts, even while relaxing other requirements from the common-law fraud standard.

---

75 PRIDGEN & ALDERMAN, *supra* note 17, at § 2:10; *see also* 29 COUNCIL OF STATE GOV'TS, *supra* note 61, at 145.

76 Butler & Wright, *supra* note 2, at 172; *see also* 29 COUNCIL OF STATE GOV'TS, *supra* note 61, at 148.

77 29 COUNCIL OF STATE GOV'TS, *supra* note 61, at 152.

78 *Id.* at 148–49.

79 *Id.* (listing section 8(a) as allowing for such private rights of action for only equitable or injunctive remedies).

80 *Id.* at 149.

81 *Id.* at 147.

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

These relatively modest restraints meant that State CPAs provided a robust, even aggressive medium for consumers, while still remaining conscious of the potential consumer harms from abusive or frivolous State CPA lawsuits. But in something of historical irony, as federal consumer protection law grew more sophisticated and economical, State legislatures began to strip away even these modest restraints. As a result, as federal enforcers developed a cogent body of consumer protection law, States developed a troubling body of consumer litigation laws.

C. Federal Consumer Law Reformed; State Consumer Law Deformed

Federal and State consumer protection law diverged substantially in the later decades of the twentieth century and the first decade of the twenty-first century, largely as a consequence of State CPA expansion. The FTC retains a variety of structural precautions that most States have abandoned: for example, the Commission may still only bring suits that it considers in the "public interest," and the FTC Act still limits the Commission to largely equitable relief, including injunctions, cease and desist orders, and disgorgement of profits from prohibited practices.[83] Further, the Commission's 1980s and 1990s economics-driven approach to unfairness and deception led to substantial and sensible guidelines on the meaning of both terms. By 1984, the Commission published a statement defining a practice as "unfair" when it

- "[s]ubstantial[ly]" injured consumers, as opposed to "trivial or merely speculative harms," typically involving either "monetary harm" or an "unwarranted health [or] safety risk,"
- injured consumers without being "outweighed by any offsetting consumer or competitive benefit[] that the . . . practice also produces[,]" because most practices "entail a mixture of economic and other costs and benefits for purchasers," and
- caused an "injury . . . which consumers could not reasonably have avoided."[84]

[83] 15 U.S.C. § 45 (2006). Note that disgorgement is itself a traditionally equitable remedy. *See, e.g.*, SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991) ("The disgorgement remedy [the district court judge] approved in this case is, by its very nature, an equitable remedy . . . ."); *see also* Russell G. Ryan, *The Equity Façade of SEC Disgorgement,* Harv. Bus. L. Rev. Online, http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Fa%C3%A7ade-of-SEC-Disgorgement.pdf.

[84] FTC Policy Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949,

Similarly, the Commission declared in a 1984 policy statement that it considered a practice "deceptive" under the FTC Act only if

- it consisted of a "representation" that is "likely to mislead the consumer,"
- the consumer's misunderstanding arose "from the perspective of a consumer acting reasonably in the circumstances,"
- the representation was a "material" one—that is, it is "likely to affect the consumer's conduct or decision with regard to a product or service," and the misrepresentation caused the consumer some "detriment."[85]

The 1984 policy statement reintroduced restrictions on consumer protection claims that many aggressive State proposals, and some model acts, sought to abolish. These restrictions tracked some of State legislatures' early hesitation in removing all barriers to recovery without proof of harm, reliance, or reasonable conduct. These policy statements required proof of actual injury for both unfairness and deception, included a demonstration of materiality for deception (and substantiality for unfairness), and applied a "reasonableness" inquiry for both. The Commission recognized, as States did in the 1960s and 1970s—and Congress before them—that powerful, open-ended consumer protection laws required meaningful ties to actual consumer harms in order to protect against frivolous consumer litigation.[86]

Meanwhile, State CPAs slowly drifted from consumer protection statutes to consumer litigation statutes. Advocates for increased consumer litigation convinced legislatures to arm consumers with a "credible threat" against misbehaving businesses instead of shaping CPA laws to inquire whether consumers behaved reasonably or whether a practice actually inflicted harm.[87] Under this rationale, State CPAs had to offer a sufficiently lucrative remedy at a sufficiently low cost to encourage *enough* lawsuits to deter harmful business conduct.[88] This approach misunderstands what the drafters of the FTC Act, and original State CPAs, understood well: that more litigation does not necessarily mean more consumer protection.

1070 (1984), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness; see 15 U.S.C. § 45(n) (2006).

85 FTC Policy Statement on Deception, Appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/ftc-policy-statement-on-deception.

86 *See generally* Butler & Johnston, *supra* note 11, at 2–3.

87 Butler & Wright, *supra* note 2, at 177 (citing Norstrand, *supra* note 3, at 175.)

88 Butler & Johnston, *supra* note 39, at 36 (citing Juarez v. Arcadia Fin., Ltd., 61 Cal. Rptr. 3d 382, 400 (2007)).

Unfortunately, this approach gained widespread traction at the State level just as federal consumer protection law grew more disciplined and thoughtful. Gradually, many State consumer protection acts, through legislative and judicial interventions

- eliminated the requirement, or greatly relaxed the burden of proof, that a consumer show any actual or economic injury;[89]
- enhanced statutory damage awards, including providing for punitive or treble damages;[90]
- standardized awarding attorneys' fees in most or all circumstances, rather than against only knowing violators;[91]
- incorporated general, unrestricted provisions for class actions (which States typically initially resisted under the UTPCPL);[92]
- examined consumer conduct from the perspective of the "least sophisticated consumer" rather than a reasonable consumer;[93] and
- greatly expanded the applicable statute of limitations for a consumer protection claim.[94]

For perspective as to how drastic these and other similar changes incrementally distorted State CPAs from their original restrictions—for fear of frivolous or unnecessary suits—Table 1 compares the number of State CPAs implementing various remedies with the FTC Act and the UDTPA, the first uniform model consumer protection act.

---

89 David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 Iowa L. Rev. 307, 307 (1969); see also Norstrand, *supra* note 3, at 175.

90 *See* Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, National Consumer Law Inc. 20, 23 (Feb. 2009), *available at* http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

91 *Id.* at 6, 19. "Forty-five states and the District of Columbia allow the court to order the business to reimburse the consumer for attorney fees if the consumer wins the case." *Id.* at 21.

92 Butler & Wright, *supra* note 2, at 177. Section 8(b) of the UTPCPL allowed individuals to bring suits on behalf of those "similarly situated." *Id.* at 173 (citing 29 Council of State Gov'ts, *supra* note 61, at 149).

93 Pridgen & Alderman, *supra* note 17, at § 3:25 (citing Luskin's, Inc. v. Consumer Prot. Div., 353 Md. 335, 345–46, 726 A.2d 702, 707 (stating that the Court of Appeals of Maryland relied on the "un-sophisticated consumer" standard when reading its State CPA, assuming that that the "ordinary consumer" is not expected to extensively research an advertisement).

94 *See, e.g.*, S.D. Codified Laws § 37-24-33 (SL 2008, ch. 206, § 1, effective Feb. 11, 2008) (expanding the statute of limitations from two to four years); Tenn. Code Ann. § 47-18-110 (2002 Pub. Acts, ch. 617, § 1, effective Jan., 1 2003) (expanding the statute of limitations from four to five years).

Table 1: Remedies Available to Consumers in State CPA Statutes as of 2009 Compared with FTC Act and UDTPA			
	State CPAs (Number)*	**FTC Act**	**UDTPA**
Private Action	51	No	Injunctions only
Class Action	38	No	No
No Injury Requirement	11	No	Yes (but injunction only)
Actual Damages	51	No	No
Minimum Statutory Damages	22	No	No
Attorneys' Fees (to Consumer)	48	No	Occasionally**

Note: Washington D.C. is included in the State numbers.
Source: Searle Civil Justice Institute, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation* (2009) (unpublished data upon which study was based) (on file with author).
* If the state has more than one State CPA statute, if there is at least one State CPA statute allowing for each remedy available to the consumer, this table includes that state as providing for that remedy.
** The UDTPA provided for attorneys' fees only against knowing violators and against plaintiffs advancing frivolous claims.

Though initially celebrated as empowering consumers, this modern trend eventually drew criticism for inspiring abusive and socially harmful litigation.[95] Both small businesses and academics began to observe that the more aggressive State CPAs engendered professional consumer protection litigators: consumers and attorneys who aggressively sought out potential advertisements, labels, and products to sue.[96] Where consumer advocates under the common-law system worried about the perils of *caveat emptor* and under-incentivized consumers unable to bring claims, a wave of literature suggested the modern consumer protection landscape was something like *caveat venditor*: "let the seller beware." If the *caveat emptor* landscape assumed consumers with relationships to merchants but little fiscal incentive to sue, *caveat venditor* consumer litigation acts enable suits by citizens with no relationship to a merchant over literally hypothetical misunderstandings.

[95] Butler & Johnston, *supra* note 11, at 4, 7. *See also* American Tort Reform Association , *Private Consumer Protection Lawsuit Abuse: When Claims are Driven by Profit-driven Lawyers And Interest-Group Agendas, Not The Benefit of Consumers* (2006) [hereinafter ATRA 2006].

[96] *See generally* ATRA (2006), *supra* note 95.

Subsequent empirical evidence reveals the accuracy of these concerns. This gradual but consistent devolution of consumer protection acts into consumer litigation acts carries serious social costs. As I next discuss, empirical evidence shows that this devolution has accompanied a drastic increase in consumer protection litigation. Experience, the academic literature, and common sense demonstrate that this increase does not consist of downtrodden consumers finally vindicating economically-small but significant claims against uncaring businesses. Rather, sophisticated litigants predictably exploit low burdens of proof and generous remedial provisions to extract rents from businesses, raising prices and ultimately harming local consumers.

III. THE PREVENTABLE CONSEQUENCES OF STATE CPA DEVOLUTION

As the above suggests, the devolution of State CPAs from statutes designed to protect consumers into statutes designed to maximize consumer lawsuits has harmed consumers and the civil justice system. Consumer protection acts' radical devolution into consumer litigation acts greatly increases the amount of State CPA litigation. Empirical analysis demonstrates that provisions which artificially increase damages or reduce proof of consumer harm increase State CPA claims, and both data and theory prove that this leads directly to consumer harms, including higher product prices. But these harms are neither isolated nor chance. As I explain next, the substantial increases in State CPA litigation are both easily observed and theoretically predictable as a consequence of the perverse incentives these laws now create.

A. <u>The Subsequent Flood of Consumer Protection Litigation</u>

It is both theoretically obvious and empirically clear that the State CPAs' extension beyond their original purposes has driven a surge of consumer protection litigation. Though State CPA litigation has increased steadily since adoption of these acts in the 1960s to 1970s, this increase began to garner widespread attention in the early 1990s.[97] A 2009 study by the

[97] Wayne E. Green, *Lawyers Give Deceptive-Trade Statutes New Day in Court, Wider Interpretation*, WALL ST. J., Jan. 2, 1990, at B1 (quoting Jonathan Sheldon, a lawyer at the National Consumer Law Center in Boston as stating "[t]here's no question that the laws are being used a lot more than they used to be . . . and it's increasing more each year" and that the number of appeals-court decisions involving State CPAs went from just a few in the mid-1980s to over 250 a year by the late 1980s).

Northwestern University Searle Civil Justice Institute (the "Searle Study") reveals that this trend continues apace in the era of consumer litigation acts. The Searle Study found that the number of reported CPA decisions increased by 119 percent from 2000 to 2007.[98] Decisions increased in both federal and state appellate courts over this period; decisions increased by 44 percent in state appellate courts and by 189 percent in federal district courts.[99] These increases in CPA litigation far exceed increases in either tort or general litigation over this same period.[100]

The increases in CPA decisions take place across a variety of dissimilar States. These States have each expanded their State CPAs in ways that distorted these laws from the original purpose of consumer protection laws—typically by awarding attorneys' fees without proof of scienter, awarding punitive damages without proof of harm, and so on. California, notoriously solicitous of plaintiffs' suits, has experienced the fastest growth with reported decisions increasing by 441 percent from 2000 to 2007.[101] And although California's State CPA growth outpaces the other States, according to the Searle Study this growth represents a broad national upward trend in CPA litigation. Indeed, the number of reported CPA decisions in federal district court has increased in 41 states over this period; the number of decisions in state appellate courts has increased in 27 states.[102]

Much of the interstate variation in CPA litigation is explained by subtle variations in State CPA laws, in part due to these laws' multiple historical origins, as discussed above. CPA statutes with vague definitions of prohibited conduct—such as those employing little FTC Act language—tend to invite more CPA litigation than statutes with a specific list of illegal actions.[103] Similarly, and as discussed below, the expected value of recovery under a State's CPA law explains some of the variation in the litigation.[104] Consumers respond rationally to litigation incentives, and States which invite additional consumer protection litigation through more generous awards and incredibly scarce burdens of proof ought not be surprised when enterprising lawyers accept that invitation through more litigation.

---

[98] The Study uses reported decisions as a proxy for total litigation levels. Searle Study, *supra* note 19, at 19.

[99] *Id.* at 20.

[100] *Id.*

[101] *Id.* at 20–21.

[102] *Id.* at 24.

[103] *Id.* at xii.

[104] *Id.*

B. Excessive Consumer Protection Litigation Perversely Harms Consumers

Reliable and well-understood economic theory explains why an increase in CPA claims would, on balance, harm consumers. As I explain next, these additional State CPA claims inflict certain costs in exchange for speculative benefits. Modern experiences with State CPAs also suggest that new cases brought under more expansive State CPA provisions are of dubious social value. But as I also explain, this is not an isolated problem or the result of idiosyncratic actors. Divergent litigation incentives between public and private entities mean that rent-seeking consumers and lawyers will take advantage of overly generous remedial schemes and exceptionally low burdens of proof as long as these devices remain available.

Modern, ultra-expansive State CPAs encourage additional suits that impose definite costs but offer only speculative benefits. Threatened consumer litigation either inflicts protracted adversarial litigation, often resulting in expensive attorneys' fees, or otherwise often induces a quick but expensive settlement. Though indulgent State CPAs offset these attorneys' fees for plaintiffs, businesses must foot the costs of defending against, settling, and paying these claims, whether meritorious or not. Moreover, litigation and the threat of litigation impose time costs that are not so easily shifted, and which all parties must bear.[105] Consumers bear these costs through increased prices, fewer innovations, lower product quality, lower wages, and lower employment. New CPA cases therefore increase these social costs imposed on the public. Economic research, to the extent available, confirms this theoretical understanding; a 2011 study, for example, confirms that State CPA statutes inflict substantial economic harm on consumers through increased prices, especially when State CPAs assign broad liability with indulgent damages provisions.[106]

Increased litigation levels also generally slow state and federal dockets in all other cases as well, increasing the delay and cost of unrelated litigation.[107]

---

[105] *See generally* Butler & Johnston, *supra* note 39.

[106] Searle Civil Justice Institute Task Force on State Consumer Protection Acts and Consumer Welfare, State Consumer Protection Acts and Costs to Consumers: The Impact of State Consumer Acts on Automobile Insurance Premiums (Preliminary Report) 4 (2011), *available at* http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf. In looking at automobile insurance cases and insurance premiums in general, the Task Force found that the expanding liability of State CPAs led to higher automobile insurance premiums.

[107] *See, e.g.,* Judicial Council of California, *2013 Court Statistics Report* 40–42, *available at* www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf. In California State Superior Courts, as the general trend in filing of Civil Unlimited (driven mostly by civil complaints) and Civil Limited cases has been increasing from Fiscal Year 2003 ("FY03") to Fiscal Year 2012 ("FY12"), the percentage

These delays impose a cost-increasing, rent-seeking cycle: an increase in filings increases court dockets, which leads to lengthier times to disposition, which increases the value of the threat of a frivolous lawsuit, which encourages additional filing.[108] The additional value from frivolous lawsuits encourages additional frivolous threats, and the cycle begins itself anew. Only legislative intervention can interrupt this vicious pattern.

We can safely infer that this pattern has encouraged, and continues to encourage, socially harmful and financially expensive frivolous consumer protection lawsuits. And though we cannot accurately establish at what rate State CPA filings include frivolous suits, the data compel several troubling conclusions. First, State CPA reported decisions are regularly increasing.[109] Second, bench and jury trials have steadily declined for more than twenty years.[110] This suggests that not only are more State CPA claims being filed, but a greater proportion of those cases are settled without a reported decision. In other words, the Searle Study's estimate of a 119 percent increase between 2000 and 2007 probably understates the growth of State CPA litigation. Furthermore, if one expects that weak State CPA claims are likely to be overrepresented in settled claims, as opposed to actually litigated claims, even this extraordinary number probably understates the amount of unproductive rent-seeking taking place under the guise of consumer protection legislation. This gristly fact also understates the sweeping, *in terrorem* effect of class action lawsuits, which undoubtedly magnify the problem further.[111]

Yet the potential benefits from this additional litigation are deeply speculative; one proxy for determining whether the relaxing of State CPA standards is socially beneficial is by evaluating the marginal cases enabled only under these relaxed regimes. By this measure, many recent cases appear deeply problematic. If these marginal cases under expansive CPA liability offer little or no social benefits at tangible social costs, then expansive CPA liability harms consumers instead of helping them as intended.[112] Socially-

of cases disposed of within 24 months has been decreasing.

108 *Id.* at 41. Until Fiscal Year 2011 ("FY11"), the clearance of dispositions to filings was less than 100 percent, indicating that more cases were being filed than disposed of. At the end of FY12, the clearance rate was once again sliding towards a sub-100 percent value.

109 *See generally* Searle Study, *supra* note 19.

110 National Center for State Courts, *Examining the Work of State Courts,* 11 Caseload Highlights 1, 3 (2012) (showing that while total dispositions increased by about 46 percent from 1984 through 2002, that the rate of jury or bench trials has been decreasing by about 49 percent across 22 states.)

111 Butler & Johnston, *supra* note 11, at 66 (suggesting that the economic harms caused by class actions are even more magnified than those presented by private lawsuits, and that therefore there should be separate rules for consumer class actions under State CPAs to help mitigate these additional costs, such as removal of statutory damages, damage multipliers, and punitive damages).

112 *See* Butler & Johnston, *supra* note 11, at 65 (suggesting through an empirical analysis of case law

valueless cases each derive from a common problem: abolition of common-sense limitations on consumer protection liability. These cases are far from rare, arising from changes such as lengthening the statute of limitations,[113] limiting the requirement of proving actual harm,[114] expanding litigation to include cases brought by private parties,[115] expanding remedies (including attorneys' fees),[116] and allowing for class action suits—a device notorious for its own economic, agency, and policy problems.[117]

These problematic cases cover too wide a swath of consumer protection claims in too many jurisdictions to be fairly characterized as remote or isolated. They include a notorious lawsuit by a D.C. resident suing for $54 million dollars after a dry cleaner lost his pants,[118] but also lesser-known ignominies, such as a dog owner suing a heartworm medication manufacturer for failure to disclose a risk that posed neither injury to the owner nor medical risk to the dog.[119] Another consumer filed a State

---

brought under State CPAs that the State CPAs are actually harming consumers, and decreasing consumer welfare).

113 *See, e.g.*, Tenn. Code Ann. § 47-18-110 (2002 Pub. Acts, c. 617, § 1, effective Jan., 1 2003) (amending the Tennessee Consumer Protection Act of 1977 to expand the statute of limitations from four years to five years); S.D. Codified Laws § 37-24-33 (SL 2008, ch. 206, § 1, effective Feb. 11, 2008) (amending the South Dakota Deceptive Trade Practices and Consumer Protection Act to expand the statute of limitations from two years to four years).

114 *See* Butler & Johnston, *supra* note 11, at 11 (citing Aspinall v. Philip Morris, 813 N.E.2d 476, 486 (Mass. 2005)) (holding that a plaintiff's reliance on a misrepresentation without actual proof of injury is sufficient to demonstrate consumer harm); *see also* Varacallo v. Mass. Mut. Life. Ins. Co., 332 N.J. Super. 31, 752 A.2d 807 (App. Div. 2000) (holding that under the New Jersey Fraud Act a consumer must only show a "causal nexus" between the alleged deceptive practice and the harm to the consumer, which leads to the possibility of class certification without demonstrating any actual individualized reliance or harm); Pelman *ex. rel* Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005) (holding that New York's General Business Law § 349 only requires a showing of injury "by reason of" a misleading or deceptive practice and no actual reliance—or harm); Johnson v. Body Solutions of Commack, LLC, 19 Misc. 3d 1131(A), 866 N.Y.S.2d 92 (Dist. Ct. 2008) (holding that the New York General Business Law § 349 only requires that a deceptive practice be "likely to mislead a reasonable consumer acting reasonably").

115 N.J. Stat. Ann. § 56:8-2 (L. 1971, ch. 247, § 1, effective June 29, 1971) (amending the New Jersey consumer fraud statute to include not only actions brought by Attorneys General on behalf of private individuals, but to allow for "any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method or act declared unlawful under this act . . .[to] bring an action")

116 *See, e.g.*, Alaska Stat. Ann. § 45.50.537 (SLA 1998, ch. 96, § 5, effective Sept. 10, 1998) (amending the Alaska Unfair Trade Practices and Consumer Protection Act to allow for the awarding of attorneys' fees to the prevailing party); Ark. Code. Ann. § 4-88-113 (Acts of 1999, Act 990, § 1, effective July 30, 1999) (amending the Arkansas Deceptive Trade Practices Act to allow for the awarding of actual damages and reasonable attorneys' fees for suffering of actual damage or injury); Mont. Code Ann. § 30-14-131 (Laws 2005, ch. 280, § 3) (amending the Montana Unfair Trade Practices and Consumer Protection Act to allow for attorneys' fees to the prevailing party).

117 Attorney General Report, *supra* note 2, at 395.

118 Pearson v. Chung, 961 A.2d 1067 (D.C. Cir. 2008) (This case dragged on for three years before the defendant dry cleaners was free of this particularly frivolous litigation).

119 Rule v. Fort Dodge Animal Health, Inc., 607 F.3d 250, Prod. Liab. Rep. (CCH) P 18418 (1st Cir. 2010).

CPA claim against a computer seller for failure to disclose a purported design defect for a software's theoretical (and undocumented) side effect of shortening a computer's expected lifespan—even where the software worked precisely as warranted.[120] These thoroughly frivolous lawsuits filed by plaintiffs on behalf of themselves or of a class are each allowed their respective days in court, regardless of the underlying economic merits or even the legal sufficiency of the suit; thus even the most frivolous suits carry serious litigation costs.[121] These examples are admittedly anecdotal. It is possible to quantify litigation levels, which have clearly increased, but it is difficult to empirically establish the percentage of State CPA cases that are "frivolous." The definition of "frivolous" is precisely in dispute: to most approaches, especially economic ones, the above-described actions are certainly frivolous. But legislators can transcend this dispute in terms by simply inquiring seriously into the proof of consumer benefits from expansive CPA provisions in light of their definite and demonstrable costs.

One of the central common-sense observations Congress recognized in the FTC Act is that an individual's incentive to file suit in a case differs from the public's interest at large; hence the Act's requirement that the Commission only sue in the "public interest."[122] The differences between public and private parties' incentives largely derive from the externalized costs that litigation imposes. All lawsuits generally impose some costs on non-parties, through discovery, costs passed on through ordinary business, deterred beneficial conduct, delays in the justice system, and so on.[123] An individual plaintiff generally only bears a very small proportion of the total costs of this suit. Defendants, the justice system, witnesses, and the general public collectively pay a large share of these costs.[124] Public agencies, at least in theory, must account for these costs as part of their internal deliberations for determining whether a suit satisfies the "public interest" requirement.[125]

---

120 Oestreicher v. Alienware Corp., 544 F. Supp. 2d 964 (N.D. Cal. 2008).

121 But see ALASKA STAT. ANN. § 45.50.537 (stating that if an action is found to be frivolous, then a prevailing defendant shall be awarded reasonable attorneys' fees at the prevailing reasonable rate instead of just attorneys' fees and costs as provided by court rules); TEX. BUS. & COM. CODE ANN. § 17.50(c) (where the Texas Deceptive Trade Practices-Consumer Protection Act allows the award of attorneys' fees for a finding that the case was without standing, brought in bad faith, or brought for the purpose of harassment).

122 Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System,* 11 J. LEGAL STUD. 333, 333–34 (1982).

123 *Id.*

124 *Id.* at 333.

125 *See* Butler & Johnston, *supra* note 11, at 16.

But a private plaintiff typically only weighs his own costs against his own prospective benefits when determining whether to file suit; typically, these costs are significant enough that they discourage plaintiffs from needlessly exposing the public to the negative externalities accompanying frivolous litigation.[126] However, regular attorneys' fees awards in State CPA suits reduce plaintiffs' costs to bring suit, subsidizing additional, often frivolous, claims. Moreover, where State CPAs artificially increase rewards for suits by including treble or punitive damages, these laws further increase marginal claims. In fact, the "credible threat" rationale relies on threatening asymmetrical costs against businesses as a force to extract concessions through excessive settlements.[127] But predictably, these costs must be paid somehow: one expects they are shared by both consumers and the defendant, in part dependent on the defendant business's ability to pass on these litigation costs through increased prices and lower wages.[128]

These absurd results and adverse incentives hint at the true beneficiaries of transforming consumer protection legislation to consumer litigation legislation—professional consumer litigators. Many such suits come at the behest of professional trial lawyers pressuring or pursuing individual clients to file suits, especially when class actions are available under a State CPA. These attorneys seek a large payday through court-ordered attorneys' fees provided by statute, settlements, or both.[129] These actors are merely rationally responding to perverse incentives; the true problem is not rent-seeking attorneys and plaintiffs of convenience, but a legal regime that encourages plaintiffs to create (or imagine) harmless misunderstandings in order to financially benefit from litigation.

These perverse incentives are unfortunately why the problems attending modern consumer protection acts are so intransigent and so predictable.

---

[126] Shavell, *supra* note 122, at 333.

[127] *See* Butler & Johnston, *supra* note 39, at 36.

[128] Frank Furedi & Jennie Bristow, *The Social Cost of Litigation*, Centre for Policy Studies (2012), *available at* http://www.frankfuredi.com/images/uploads/120905122753-thesocialcostoflitigation.pdf. While this study specifically looks at the costs of medical services as a result of increasing litigation, the analyses drawn from increased litigation to increased costs in services carry over to other fields of consumer protection as well. *See also* Jeff Sovern, *Toward a New Model of Consumer Protection Statutes: The Problem of Increased Transaction Costs*, 47 Wm. & Mary L. Rev. 1635, 1705–09 (2006) (stating that State CPAs may increase transaction costs that firms may then pass onto consumers, and arguing for regulation that would prevent such a result).

[129] Brian P. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, J. 7 Emp. L. Stud. 4 (2010) (stating that prior empirical studies have found that the average attorneys' fee award is between 25 and 30 percent for class action settlements, and that the percentage is often highly and inversely associated with the size of the settlement and the duration of the case).

Frivolous consumer litigation derives directly and sensibly from the costs and benefits to filing these cases; there are little costs to plaintiffs and their attorneys, but substantial costs to defendant businesses—and society at large. As I explain next, though, that these suits grow from identifiable and predictable perverse incentives means that legislators have the power to remedy them if they wish to do so. In fact, at least one State legislature has already begun the process of refocusing its State CPA to consumers'—rather than litigators'—benefit.

IV. CONCLUSIONS AND MOVING FORWARD

The history of consumer protection law reveals that current problems surrounding consumer protection litigation are not new, but very old. Congress contemplated the inevitability of socially valueless litigation under the guise of "consumer protection" almost a century ago. The difficulty in pre-defining consumer harms in the post-war era has only grown with the rise of new financial products and new communications technologies; the importance of a flexible consumer protection standard is greater than ever. But this flexibility invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation. Fighting these potential abuses is key to ensuring that consumers at large, rather than merely litigants in specific, benefit from consumer protection acts.

But recent State developments suggest that this devolution is potentially reversible. The Tennessee General Assembly has taken prudent steps to curtail the most extreme provisions in the Tennessee Consumer Protection Act (TCPA) since 2011.[130] There, the legislature limited the scope of private right of action, including removing the ability for a plaintiff to file suit under what has been considered the most "open-ended" provision, a prohibition against "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person."[131] This action is now enforceable only by the Tennessee Attorney General, reserving its broad remedial power, like the federal FTC Act, to a state entity that can fully consider the public interest.[132] And despite claims that this (modest) correction has harmed Tennessee consumers, there is yet no empirical evidence to suggest, much less demonstrate, that Tennessee has harmed any consumers with

130 James Davis, *Less Protection: Revisions Narrow Scope of Tennessee Consumer Protection Act*, Tenn. Bar Ass'n (Feb. 1, 2013), http://www.tba.org/journal/less-protection-revisions-narrow-scope-of-tennessee-consumer-protection-act.

131 *Id.; see also* Tenn. Code Ann. § 104(b)(27).

132 *Id.*

its restraint—and ample theoretical reason to believe that it has instead guarded prudently against numerous frivolous lawsuits.[133]

Empirical scholarship, economic theory, and common sense suggest further potential straightforward steps in reversing State CPAs' devolution. The Federal Trade Commission's policies on unfairness and deception indicate several, and experience suggests several more. These include the following:

- Including a "reasonableness" inquiry for any consumer protection act claims. Consumers should be able to minimally demonstrate that they actually acted reasonably given the circumstances. By necessity, requiring reasonableness will discourage speculative claims by consumers attempting to simply ground a rent-seeking lawsuit.

- Reserving attorneys' fees for knowing violations of state laws will drive aggressive, litigation-conscious attorneys toward cases where punishing such a practice is likely socially beneficial: those where businesses are clearly making active efforts to deceive customers.

- Requiring an actual injury will similarly discourage "plaintiff-seeking" attorneys from abusing consumer protection acts by formulating a theory of misrepresentation and finding a client. Conversely, as opposed to the common-law requirement of showing intent to deceive, proving an actual injury should be within a consumer's ability to efficiently demonstrate.

- Limiting class-action remedies, including attorneys' fee awards and statutory damages will prevent many of the most frivolous and socially harmful suits. Allowing statutory damages for small individual harms can be justified by reference to misrepresentations that are not caught. But the class-action device operates on the fiction that it represents all parties in a similar situation to begin with, eliminating the need for this sort of theoretical "over-punishment" to deter unknown harms. Worse still, many class actions prove vehicles for lawyer enrichment with minimal benefit to class members: lawyers earn millions in fees, while class members earn dollars, or even cents, in rebates.[134]

---

[133] *Id.* (citing Butler & Wright, *supra* note 2, at 175–76; Schwartz & Silverman, *supra* note 7, at 3; Butler & Johnston, *supra* note 39, at 83.

[134] Schwartz & Silverman, *supra* note 7, at 44.

State consumer protection laws serve a vital purpose in ensuring that consumers can enjoy some effective bargaining power with distant and sometimes impersonal businesses. These laws have helped to modernize commercial transactions in the United States and encouraged a national marketplace for goods; consumers do not need to confine their transactions to familiar parties when they know they have some legal recourse for misleading or unfair practices. But these laws can themselves be used to harm consumers, employers, and businesses through excessive and socially unproductive lawsuits that enrich a few consumers and many lawyers at the expense of higher prices and slower judicial dockets. Fortunately, a solution is simple: restoring the original purpose of consumer protection acts is as easy as restoring a handful of restrictions that those acts' authors even found eminently sensible. With these protections, lawmakers can be confident that consumer protection acts will not remain mere consumer litigation acts.

ATR FOUNDATION
AMERICAN TORT REFORM FOUNDATION
1101 Connecticut Avenue, NW Suite 400, Washington, DC 20036
Telephone: 202 682 1163 • Fax: 202 682 1022 • www.atra.org