ARE STATE CONSUMER PROTECTION ACTS REALLY MINI-FTC ACTS?

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ABSTRACT: *State Consumer Protection Acts (CPAs) were designed to supplement the Federal Trade Commission's mission of protecting consumers and are often referred to as "mini-FTC Acts." There is growing concern that enforcement under these acts is not only qualitatively different than FTC enforcement, but may 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 even more would not warrant FTC enforcement. Even among CPA cases where the plaintiff prevailed, nearly half do not include illegal conduct under the FTC standard, and over three-quarters would not invoke FTC enforcement. The results clearly suggest private litigation under mini-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.[1] In post World War II America, there was the perception that the market had become impersonal,[2] and the balance of power between consumers and merchants in the marketplace had shifted in favor of merchants.[3] Increased legal protection for consumers was often viewed as necessary to restore the former balance.[4] Traditional common law protection was thought to be inadequate.[5] State Attorneys General attempted to respond to the 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.[6] The state legislatures' responses came in the form of a diverse collection of legislation commonly called Consumer Protection Acts (CPAs).

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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. PRESIDENT JOHN F. KENNEDY, H.R. DOC. NO. 364, 87TH Congress, 2d Sess. (March 15, 1962).

[2] William A. Lovett, *Louisiana Civil Code of 1808: 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. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUMS 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* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 395 (1971).

[3] H. Peter Norstrand, *Treble Damage Actions for Victims of Unfair and Deceptive Trade Practices: A New Approach*, 4 NEW ENG. LAW REV. 171, 175 (1969) ("[T]he 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, *Part III: Implementing the Washington Consumer Protection Act*, 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 proved 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. As a consequence, they were thought to be insufficient to protect the consumer. 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. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts,* 54 KAN. L. REV. 1, 7 (2005). 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] NATIONAL ASSOCIATION OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 2, at 396.

Most CPAs were originally designed to supplement the Federal Trade Commission's (FTC's) mission of protecting consumers from "unfair or deceptive acts or practices"[7] and are referred to as "mini-FTC Acts." A primary means of achieving this goal was the private action that empowered consumer attorneys to act as private attorneys general. In contrast to the FTC,[8] private litigants under CPAs are not limited by political pressure, public duty, or even financial constraints as many CPAs mandate the award of multiplied damages and attorneys' fees to successful plaintiffs.[9] As such, there may be support for the theory that CPAs allow private litigants to bring smaller scale. These cases may approximate FTC enforcement actions, but due to their size may not warrant allocation of FTC resources or meet the FTC requirement that consumer protection actions be in the public interest.[10] The consumer is free, even incentivized, to pursue any case on which they might expect to prevail.

State CPAs have become controversial.[11] There is growing concern that CPA enforcement and litigation are not only qualitatively different than FTC enforcement, but 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. Critics suggest that the broader set of enforcement options offered by CPAs are placing significant strains on the civil justice system without offsetting gains in consumer protection.[12] 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.[13] 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 litigation under state CPAs to FTC enforcement.

This article closely 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. These experts evaluate a sample of CPA claims under the FTC standard. These two studies generate data that is critical to informing policy debates on the appropriate role of CPAs in the civil justice system.

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

[7] 42 U.S.C. § 45(a)(1) (2006).

[8] The FTC and private litigants face different incentives and constraints that affect the nature of actions pursued. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC as Rule Model*, 52 OHIO ST. L.J. 437, 437 (1991). 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*.

[9] Schwartz & Silverman, *supra* note 5, at 3.

[10] Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence* 48 GEO. WASH. L. REV. 521, 554 (1980).

[11] *Compare* Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statues as Persuasive Authority in the Common Law of Fraud*, 48 Ariz. L. Rev. 829, (2006), *with* Schwartz & Silverman, *supra* note 5, *and* Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155 (2004).

[12] *See, e.g.*, Henry N. Butler and Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. (forthcoming 2010), *available at H*http://ssrn.com/abstract=1125305H; Greve, *supra* note 11; Schwarz & Silverman, *supra* note 5.

[13] *See, e.g.*, Braucher, *supra* note 11, at 832.

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

I. Background and History of Consumer Protection Acts

A. Criticism of Existing 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.[14] It was the perceived inadequacies of each of these institutions that lead 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,"[15] the American Bar Association,[16] and Professor Richard Posner.[17] This criticism addressed a range of perceived problems at the FTC,[18] including those offered by prior critics:[19] poor leadership,[20] insufficient and misallocated resources,[21] political favoritism and regulatory capture,[22] and protection of producers in the name of consumer protection.[23]

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

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[14] *See* Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy* (George Mason University School of Law, Law and Economics Working Paper Series, 2004) available at Hhttp://ssrn.com/abstract_id=545182H (describing the institutions of consumer protection, yet neglecting the role of state consumer protection laws).

[15] Edward R. Cox, Robert C. Fellmeth & John E. Schulz, "The Nader Report" On the Federal Trade Commission (1969).

[16] Am. Bar Ass'n Comm'n to Study the Fed. Trade Comm'n, Report of the Commission to Study the Federal Trade Commission (1969).

[17] Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 48, 48 (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* Am. Bar Ass'n Comm'n to Study the Fed. Trade Comm'n, *supra* note 16.

[18] Posner, *supra* note 17, at 48 ("The Commission is rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent."); Am. Bar Ass'n Comm'n to Study the Fed. Trade Comm'n, *supra* note 16, 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 15, 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.").

[19] Posner, *supra* note 17, at 47 ("What is remarkable about these studies, which span a period of 45 years, is the sameness of their conclusions.").

[20] *Id.* at 87 ("[T]he Commission today is probably more poorly managed than other federal agencies."); Am. Bar Ass'n Comm'n to Study the Fed. Trade Comm'n, *supra* note 16, at 35-36; Cox et al., *supra* note 15, at 169-171.

[21] Am. Bar Ass'n Comm'n to Study the Fed. Trade Comm'n, *supra* note 16, at 26-28.

[22] Cox et al., *supra* note 15, at 130-140.

[23] Posner, *supra* note 17, 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.").

War II economy had undercut consumers' power to protect themselves through market-based and reputation-based mechanisms.[24] Consumer protection advocates also pointed to the increasing complexity of credit arrangements, marketing schemes,[25] and warranty disclaimers as evidence of the breakdown of the traditional, "arm's-length bargain" approach to consumer transactions.[26] 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. There was widespread support for greater legal protection for consumers in order to restore the former balance.[27]

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.[28] 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 require actual injury to mature; this requirement precludes 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.[29] Actions for breach of contract or warranty were seldom more effective than actions in tort as merchants could make false claims without entering into contracts.[30] Even where there was a contract, contractual defenses such as reliance and privity requirements could impede consumer recovery.[31] 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 criticism of the FTC, 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.[32]

B. Consumer Fraud Acts and Early Model Acts

By 1962, six states had responded to the call for consumer protection and passed some act aimed at protecting consumers.[33] 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 which became the model for several states' initial CPAs.[34] The act

[24] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 2, at 395; 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.").

[25] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 395.

[26] Lovett, *supra* note 2, at 725.

[27] 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 proved ineffective in providing the aggrieved consumer adequate relief."); Norstrand *supra* note 3, at 175 ("[T]he 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.").

[28] Robert Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 NEW ENG. REV. 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.").

[29] Schwartz & Silverman, *supra* note 5, at 7.

[30] *Id.*

[31] Sovern, *supra* note 8, at 439-40.

[32] MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW, §2:10 (2008).

[33] *Id.* at App 3A.

[34] 1960 NJ. LAWS ch. 39, §§1-12.

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.[35] While several states passed similar acts, others, such as Washington, enacted legislation modeled on the FTC Act and the Clayton Act.[36]

Several uniform and model statutes appeared in the late 1960s.[37] 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[38] and rewritten in 1966.[39] 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.[40] The final listed practice was a general prohibition of "any other conduct which similarly creates a likelihood of confusion or misunderstanding."[41] The twelve deceptive trade practices prohibited by the UDTPA, including the final, more general prohibition of other unfair conduct, were intended primarily to prevent unfair business competition, not to protect consumers.[42]

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. 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.[43] Most of the states that initially adopted the UDTPA in some form later amended their consumer protection law to allow monetary relief to consumers.[44]

The Model Unfair Trade Practices and Consumer Protection Law (UTPCPL) is the model statute most commonly associated with modern CPA laws. 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.[45] 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.

The 1970 version of the UTPCPL offered a choice of three forms of unlawful practices.[46] The first alternative form of unlawful practices used essentially the same language as Section 5 of the FTC Act: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade

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[35] *Id.* §5.

[36] Consumer Protection-Unfair Competition and Acts, 1961 Wash. Sess. Law, ch. 216. 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 of commerce are hereby declared unlawful."

[37] *See* NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 400.

[38] UNIF. DECEPTIVE TRADE PRACTICES ACT (1964).

[39] Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 145 (2006); NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 400 .

[40] 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 (1964).

[41] *Id.* at 253.

[42] Bauer, *supra* note 39, at 145; PRIDGEN, *supra* note 32, §2:10.

[43] COMM'RS ON UNIF. STATE LAWS, *supra* note 40, at 299,

[44] PRIDGEN, *supra* note 32, §2:10.

[45] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 399.

[46] COUNCIL OF STATE GOV'TS, 1970 Suggested State Legislation, 142 (1970).

or commerce are hereby declared unlawful."[47] This language has led many commentators to refer to CPAs in this vein as "Little FTC Acts."[48] Twenty states initially adopted such acts.[49]

The second alternative form of unlawful action 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.[50] This alternative defined as unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce."[51] This definition does not prohibit the broad category of "unfair practices."[52] Although a number of states had adopted similar consumer fraud acts earlier in the 1960s, no state adopted this language based upon the UTPCPL.[53]

The third alternative offered by the UTPCPL, known as the "laundry list approach," included the twelve competition-focused prohibitions enumerated in the UDTPA.[54] It added an additional thirteenth provision focused more directly on consumers.[55] This thirteenth provision prohibited any act or practice that was "unfair or deceptive to the consumer."[56] Twenty-six jurisdictions adopted this language.[57] 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.[58]

The UTPCPL gave state Attorneys General the same basic powers as did the UDTPA.[59] Section 5 authorized the Attorney General to act to enforce the prohibition of acts and practices defined in § 2:

> Whenever the [A]ttorney [G]eneral 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

[47] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (Council of State Gov'ts 1970). The first version of the UTPCPL in 1967 used only this language to define the prohibited acts. COUNCIL OF STATE GOV'TS, *supra* note 46, at 142.

[48] PRIDGEN, *supra* note 32, §2:10.

[49] *Id.* §2:10.

[50] COUNCIL OF STATE GOV'TS, *supra* note 46, at 142.

[51] *Id.*

[52] PRIDGEN, *supra* note 32, §2:10.

[53] *Id.*

[54] COUNCIL OF STATE GOV'TS, *supra* note 46, at 142.

[55] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW §2 (Council of State Gov'ts 1970) ("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 qualities 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 that 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 consumer.")

[56] *Id.*

[57] PRIDGEN, *supra* note 32, §2:10 (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).

[58] *Id.* (Colorado, District of Columbia, Indiana, Mississippi, and New York have 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.).

[59] The UTPCPL gave the Attorney General powers similar to those granted in the earlier consumer fraud acts. Sections 11 through 14 granted the Attorney General broad investigatory powers, the power to issue subpoenas, and the power to enforce the investigatory demands.

> 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. . . .[60]

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[61] and civil penalties for a knowing violation of the UTPCPL.[62]

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.[63] Private individuals could recover the greater of "actual damages or $200," with punitive damages and equitable relief available at the court's discretion.[64] 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 attorney's fees and costs."[65]

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."[66] 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.[67]

Twenty-eight states currently reference the FTC in their CPA.[68]

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.

The FTC Act does not include a private enforcement mechanism, yet every CPA grants consumers a private right of action.[69] 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 effective prosecution of

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[60] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (Council of State Gov'ts 1970).

[61] *Id.* § 6.

[62] *Id.* §15.

[63] *Id.* § 8 (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. . . .").

[64] *Id.*

[65] *Id.*

[66] *Id.* § 3.

[67] *Id.*

[68] PRIDGEN, *supra* note 32, app. 3B (Most states' statutes provide that the courts should be guided by FTC interpretations, but that such interpretations are not dispositive.).

[69] 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 Ann. Code §714H (West 2009).

consumer complaints.[70] 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 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.[71]

A second difference between CPAs and FTC consumer protection is that they confer different remedies.[72] Remedies available under the FTC Act include injunctions, cease and desist orders, consent decrees, and disgorgement of profits. At least a dozen CPAs limit plaintiffs to actual damages, restitution, or equitable relief,[73] but the majority of statutes provide additional remedies, including statutory damages, treble damages,[74] and punitive damages. Nearly all states authorize the discretionary award of attorney's fees.[75]

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 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,[76] while the FTC requires *reasonable* reliance in its definitions of both unfair and deceptive practices.[77] 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.[78] Some state courts have held that defenses such as the statute of frauds,[79] warranty

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[70] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 408.

[71] *See, e.g.,* Hall v. Walter, 969 P.2d 224, 234, (Colo. 1998) (the practice challenged by an individual under COLO. REV. STATE. § 6-1-113 (1998) must significantly impact the public as actual or potential consumers); Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 915 (1980) (stating that unless the defendant's actions had or has potential harm for the consumer public they are not directly regulated by the FBPA, O.C.G.A. § 10-1-3-0 et. seq.); Ly v. Nystrom, 615 N.W.2d 314 (Minn. 2000) (public interest must be demonstrated to state a claim under the private A.G. statute – relating to the CFA, MINN. STAT. § 325F.68 et. seq.); Nelson v. Lusterstone Surfacing Co., 258 Neb. 678, 605 N.W.2d 136 (2000) (to be actionable under the CPA the unfair/deception act must have impact on the public interest); Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21, 1994 S.C. App. Lexis 139 (S.C. Ct. App. 1994) (to be actionable under SCUPTA, S.C. CODE § 39-5-20, unfair or deceptive practices must adversely affect the public interest); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) (private litigant must establish a public interest impact to establish a prima facie case under the CPA, REV. CODE WASH. § 19.86.010 et. seq.).

[72] *See* Butler and Johnston, *supra* note 12.

[73] *E.g.* ARK. CODE ANN. § 4-88-113 (2001); FLA. STAT. § 501.211(2) (2002); IND. CODE ANN. § 24-5-0.5-4(b) (1996); ME. REV. STAT. ANN. tit. 10, § 1213 (1997); MD. CODE ANN., COM. LAW § 13-408 2000); MISS. CODE ANN. § 75-24-15(1) (1999); NEB. REV. STAT. ANN. § 59-1609 (2004); S.D. CODIFIED LAWS § 37-24-31 (2004); TEX. BUS. & COM. CODE § 17.50(b)(1) (2002); WIS. STAT. ANN. § 100.18(11)(b)(2) (2004); WYO. STAT. ANN. § 40-12-108(b) (2005).

[74] *See*, Schwartz & Silverman, *supra* note 5. In some cases, damages are doubled or trebled regardless of the egregiousness of the defendant's conduct. *E.g.,* ALASKA STAT. § 45.50.531(a) (2004); D.C. CODE ANN. § 28-3905(k) (2001); HAW. REV. STAT. ANN. § 480-13 (2004); N.J. STAT. ANN. § 56:8-19 (2001); N.C. GEN. STAT. § 75-16 (2003); WIS. STAT. § 100.20(5) (2004). Nine states treble damages if the defendant acted intentionally, willfully, knowingly, or in bad faith. *See* COLO. REV. STAT. § 6-1-113(2)(a)(III); GA. CODE ANN. § 10-1-399(c) (2000); MASS. GEN. LAWS, ch. 93A, § 9(3); N.H. REV. STAT. ANN. § 358-A:10 (1995); N.M. STAT. ANN. § 57-12-10(B); N.Y. GEN. BUS. LAW § 349(h); S.C. CODE ANN. § 39-5-140(a) (1985); TENN. CODE ANN. § 47-18-109(a)(3) (2001); VA. CODE ANN. § 59.1-204(A); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (2002).

[75] Schwartz & Silverman, *supra* note 5, at 25.

[76] For detailed analysis and citations, *see* Schwartz & Silverman, *supra* note 5.

[77] Letter from James C. Miller III, Chairman, Federal Trade Commission, to John Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983), *available at* Hwww.ftc.gov/bcp/policystmt/ad-decpet.htmH; Letter from Michael Pertschuk, Chairman, Federal Trade Commission, and Paul Rand Dixon, David A. Clanton, Robert Pitofsky, and Patricia P. Bailey, Commissioners, Federal Trade Commission, to Wendell H. Ford, Chairman, Committee on Commerce, Science, and Transportation, and John C. Danforth, Ranking Minority Member, Committee on Commerce, Science, and Transportation (Dec. 17, 1980), *available at* Hwww.ftc.gov/bcp/policystmt/ad-unfair.htmH.

[78] Aspinall v. Philip Morris, 813 N.E.2d 476, 486 (Mass. 2005).

[79] *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).

disclaimers,[80] the doctrine of substantial performance,[81] the parol evidence rule,[82] the common law merger doctrine,[83] contractual limitations on liability or remedies,[84] and privity of contract requirements[85] are not available to defendants in consumer protection cases.

The attractive private right of action provided by CPAs, 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 not protect, but harm consumers.[86]

D. Expanding and Amending CPAs

Amendments and judicial interpretation of CPAs have tended to expand rather than contract the rights of consumers.[87] 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[88] and, in the interest of the public, bring an action seeking injunctive relief and civil penalties up to $10,000.[89] 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.[90] In 1969, the CPA was amended to give a private right of action by adopting language similar to Section 8 of the UTPCPL.[91] The amendment allowed consumers to receive the greater of treble damages or $25 upon proof of injury by an unfair or deceptive practice.[92]

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 difficulty of establishing damages. CPAs circumvent these issues by providing causes of action which 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

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[80] *See, e.g.,* Attaway v. Tom's Auto Sales, Inc., 144 Ga. App. 813, 242 S.E.2d 740 (1978).

[81] *See, e.g.,* Smith v. Baldwin, 611 S.W.2d 611, 614 (Tex. 1980). The court explained 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.

[82] *See, e.g.,* Teague Motor Co. v. Rowton, 84 Or. App. 72, 733 P.2d 93 (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); Capp Homes v. Duarto, 617 F.2d 900, 902 n.1 (1st Cir. 1980) (holding that parol evidence may be used in Massachusetts consumer protection cases).

[83] *See generally* Raren 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 (1989). [Maybe cite directly to the case then have a parenthetical for the see generally to the article]

[84] *See, e.g.,* International Nickel Co. v. Trammel Crow Distrib., 803 F.2d 150, 155-56 (5th Cir. 1986) (holding that contractual limitations inapplicable in suit under Texas "Little FTC Act"); Corral v. Rolling Protective Serv. Co., 240 Kan. 678, 732 P.2d 1260 (1987) (holding similarly under Kansas law); Reliance Universal, Inc. v. Sparks Indus., 688 S.W.2d 890 (Tex. Ct. App. 1985) (holding similarly under Texas law).

[85] *See generally* Note, *The DTPA and Privity: Let the Buyer Beware Becomes Let the Buyer Recover*, 39 BAYLOR L. REV. 787 (1987).

[86] *See, e.g.*, Butler and Johnston, *supra* note 12.

[87] 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 Mutual Auto. Ins. Co., N.E.2d 801, 881 (Ill. 2005) at 863-64 (limiting class actions brought under the Illinois Consumer Fraud Act to fraudulent transactions that occur within Illinois borders).

[88] MASS GEN. LAWS ANN., ch. 93A, §6 (1967).

[89] *Id.* §4.

[90] Norstrand, *supra* note 3, at 173.

[91] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 408.

[92] *Id.*

to deceive is not required [to receive relief]."[93] CPA expansion has also often involved a reduction in the burden of proof required of consumers.[94]

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 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 not necessary.[95] Others recognize that CPAs give rise to the potential for harassment of legitimate business conduct[96] and that vague consumer fraud statues invite the possibility of abuse.[97]

Amendments to CPAs have also tended to include provisions allowing for 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,[98] but warned that allowing private class action suits would "provide too great an opportunity for frivolous suits."[99] 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 30 day opportunity for the respondent to the potential class action to make restitution.[100] Alaska's class action provision required approval by the Attorney General and a bond before a class action suit could be certified.[101] The Uniform Consumer Sales Practice Act provided fee-shifting in favor of defendants if a class action suit was found to be groundless.[102]

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.[103] 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.[104] Others argued that the low threshold for "unfair and deceptive acts" had gone too far in aiding plaintiffs, encouraging claims that ultimately were not in the public interest[105] 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.[106] 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

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[93] UNIF. DECEPTIVE TRADE PRACTICES ACT §3 (1964).

[94] David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 307 (1969).

[95] 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.").

[96] Lovett, *supra* note 2, at 744.

[97] *E.g.,* Rice, *supra* note 94, at 340.

[98] NAT'L ASS'N OF ATT'YS GEN. COMM. ON THE OFFICE OF ATT'Y GEN., *supra* note 2, at 409.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 409-10.

[102] *Id.* at 409.

[103] Wayne E. Green, *Lawyers Give Deceptive-Trade Statutes New Day in Court, Wider Interpretations*, Wall St. J., Jan. 2, 1990, at B1..

[104] Perry A. Craft, *State Consumer Protection Enforcement: Recent Trends and Developments*, 59 ANTITRUST L.J. 991, 997 (1991) (Throughout the 1980s states' Attorneys General were active in enforcement of their states CPAs, without substantial criticism.).

[105] Sovern, *supra* note 8, at 437.

[106] Schwartz & Silverman, *supra* note 5, at 3; Jon Mize, *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).

claims.[107] 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.[108] 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 FTC Section 5 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—this is an important area for future study.

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 ("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 answered questions on whether they believed these cases would likely contain illegal conduct and/or be enforced under the FTC standard given the information available. The Shadow FTC's responses allow identification of important differences 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 had served in the FTC during Democratic administrations and two who had served in the FTC during Republican administrations. The fifth Shadow Commissioner, who had not served at the FTC under an administration of either party, was not a political appointee and, therefore, is considered to be unaffiliated.

B. Case Summaries

The Shadow Commissioners reviewed 110 one-page case scenarios excerpted from actual CPA case decisions in two rounds. After reading the scenarios, each Shadow Commissioner determined whether he or she believed the practice was deceptive or unfair according to FTC standards and whether he or she believed the FTC would initiate an enforcement action. The Shadow Commissioners were

[107] Schwartz & Silverman, *supra* note 5, at 3-4.
[108] *See* Butler and Johnston, *supra* note 12. Actual and potential defendant merchants may pass the costs of CPA litigation on to consumers through higher prices. *Id.*

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.

Shadow Commissioners were not told that the case scenarios were derived from litigated consumer protection cases until after completing all questions. Further, the Shadow Commissioners did not know the identity of the other Shadow Commissioners, did not collaborate in answering the questions, and could not consult any outside sources. The Shadow Commissioners were also not allowed to return to previous scenarios once they had answered a question. Shadow Commissioners were compensated for their participation. See Appendix A and B for examples from the two rounds of scenarios.

C. Round 1 Sample Selection and Questionnaire

A key feature of the Shadow FTC study is the inclusion of actual litigated cases that generated substantive decisions under CPAs. The cases used for both questionnaires were obtained from a database of approximately 17,000 CPA decisions.[109] To construct the scenarios for the first round, 500 reported CPA decisions were randomly selected from the original population database. From these, 86 contained sufficient case facts to develop one-page scenarios, and 50 of these 86 were randomly chosen. These decisions included cases that settled, went to trial, and are ongoing. Actual party names and identifying case characteristics were removed so that Shadow Commissioners could not directly identify the cases. To provide a control group of cases, 8 decisions were randomly selected, each representing a case the FTC brought in court containing sufficient case facts.[110] Two cases which the FTC investigated but ultimately dismissed the complaint were separately chosen.[111]

After selecting the cases and developing the case scenarios, but before distributing the questionnaires to the Shadow Commissioners, an additional expert in FTC consumer protection actions who is not included on 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 60 scenarios in three hours or less. After testing the questionnaire, the questions in Figure 1 were used for each scenario.[112]

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[109] For a description of the database, see SEARLE CIVIL JUSTICE INSTITUTE, STATE CONSUMER PROTECTION ACTS, AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION (2009), *available at* http://www.law.northwestern.edu/searlecenter/issues/index.cfm?ID=86.

[110] The set of FTC cases from which we drew the 8 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.

[111] 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.

[112] 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 ordering by drawing the 60 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.

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 ____

D. Round 2 Sample Selection and Questionnaire

Round 1 examines a randomly generated set of actual CPA cases to assess how those cases would fare under the FTC standard. The random sample allows inferences to be drawn concerning the nature of CPA claims distributed throughout the civil justice system. Round 2 is more focused. Rather than testing a random selection of actual CPA cases, Round 2 uses 50 CPA cases that contained a successful CPA claim that was either never challenged or never overturned on appeal (and met the basic requirement of a decision with sufficient case facts to develop a one-page scenario).

Round 2 examines how a sample of successful CPA claims would fare under the FTC standard. Round 2 scenarios were drawn from reported CPA decisions in state appellate and supreme courts but not federal district courts because the former were more likely to have reached final disposition and less likely to have remaining appeals. 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."[113] 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. SCJI researchers 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 50 Round 2 case scenarios in an identical manner to those generated in Round 1.

The 50 Round 2 scenarios represent situations where the CPA claimant won on the CPA claim at the state trial level court (either in trial, or in two cases on summary judgment) and the judgment on the CPA claim was either never appealed or appealed and not overturned in the state appellate or supreme courts.[114] 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

[113] The search string used for the term "damage awards" was "damage! w/s award!".

[114] We note that in a few cases the court overturned punitive damages or attorney's fee awards but upheld the violation of the CPA.

Commissioners answered the same questions in three hours or less under the same parameters as Round 1, with the exception that the Shadow Commissioners were aware that the case scenarios were derived from litigated consumer protection actions but they did not know the cases all represented CPA claimant wins.[115]

III. EMPIRICAL RESULTS

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.[116] Question 3a goes a step further to ask Shadow Commissioners whether, relying on their own expertise and experience with FTC consumer protection enforcement, they believe the FTC would initiate an enforcement action in the particular case.

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 (3 or more) of the Shadow Commissioners. 2-3 split votes were a minority occurrence. In Round 1, out of the 50 non-FTC cases, the Shadow Commissioners were split in 30 times in 17 case scenarios: 8 times over deceptive conduct, 13 times over unfair conduct, and 9 times over the likelihood of enforcement. Similarly in the 50 Round 2 scenarios, out of 50 non-FTC cases, the Shadow Commissioners were split 30 times in 19 case scenarios: 16 times over deceptive conduct, 9 times over unfair conduct, and 5 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—in Round 1 the Shadow Commissioners split across party lines 6 times, in Round 2, 11 times. Unanimous votes were much more common, making up between 24.0% and 62.0% of responses depending on question and round.

A. Round 1 Results and Analysis

The Shadow Commission found that most cases did not meet FTC illegality standards, and that even fewer cases would likely be enforced by the FTC. A majority of Shadow Commissioners believed that the alleged practice was illegal, either deceptive or unfair under the relevant FTC Policy Statement in 11 out of 50 (22.0%) of case scenarios. Further, a majority of the Shadow Commissioners believed that the FTC would have initiated a consumer protection enforcement action based on the case facts in 6 out of 50 cases (12.0%). Thus, about half of the cases for which the Shadow Commissioners determined that the case facts described illegal conduct under the FTC standards were also cases where the Shadow Commission thought the FTC might initiate an enforcement action. These results change only slightly if federal district and state appellate court cases are analyzed separately. Out of 29 federal district cases, a majority of Shadow Commissioners indicated that the scenarios showed some form of illegal conduct under the FTC standards in 6 cases (20.7%) and thought the FTC might initiate an enforcement action in 3 cases (10.3%). In the 21 state appellate cases, a majority of the Shadow Commission determined that the case facts showed illegal conduct under the FTC standards in 5 cases (23.8%) and believed the FTC

[115] 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 ordering by drawing the 50 numbers three separate times. We then coded the results with the Shadow Commissioners identified only by a new study code number.

[116] Letter from James C. Miller III, *supra* note 77; Letter from Michael Pertschuk, *supra* note 77.

would initiate an enforcement action in 3 cases (14.3%). The differences between the federal district cases and the state appellate cases are not statistically significant.[117]

Because some of the claims litigated under CPAs from 2000 through 2007 remain pending on appeal, data on the ultimate resolution of those claims are unavailable. Accordingly, our results are presented for a large subsample (n = 44) of "resolved" general CPA claims. When considering resolved cases, Shadow Commissioners determined that similar proportions of the case scenarios presented illegal and enforceable activity. A majority of Shadow Commissioners identified illegal conduct in 7 out of 44 cases (15.9%) and supported an enforcement action in 3 out of 44 cases (6.8%). Again, the percentages differ if we consider federal district cases separately from state appellate cases. In the federal district cases, a majority of Shadow Commissioners believed the case facts showed illegal conduct under the FTC standards in 3 out of 25 cases (12.0%) and concluded the FTC would likely initiate an enforcement action in these scenarios in 1 out of 25 cases (4.0%). In contrast, for the state appellate cases, a majority of the Shadow Commission believed the case facts showed illegal conduct under the FTC standards in 4 out of 19 cases (21.1%) and believed the FTC would initiate an enforcement action in these scenarios in 2 out of 19 cases (10.5%). Again, none of these differences are statistically significant.[118]

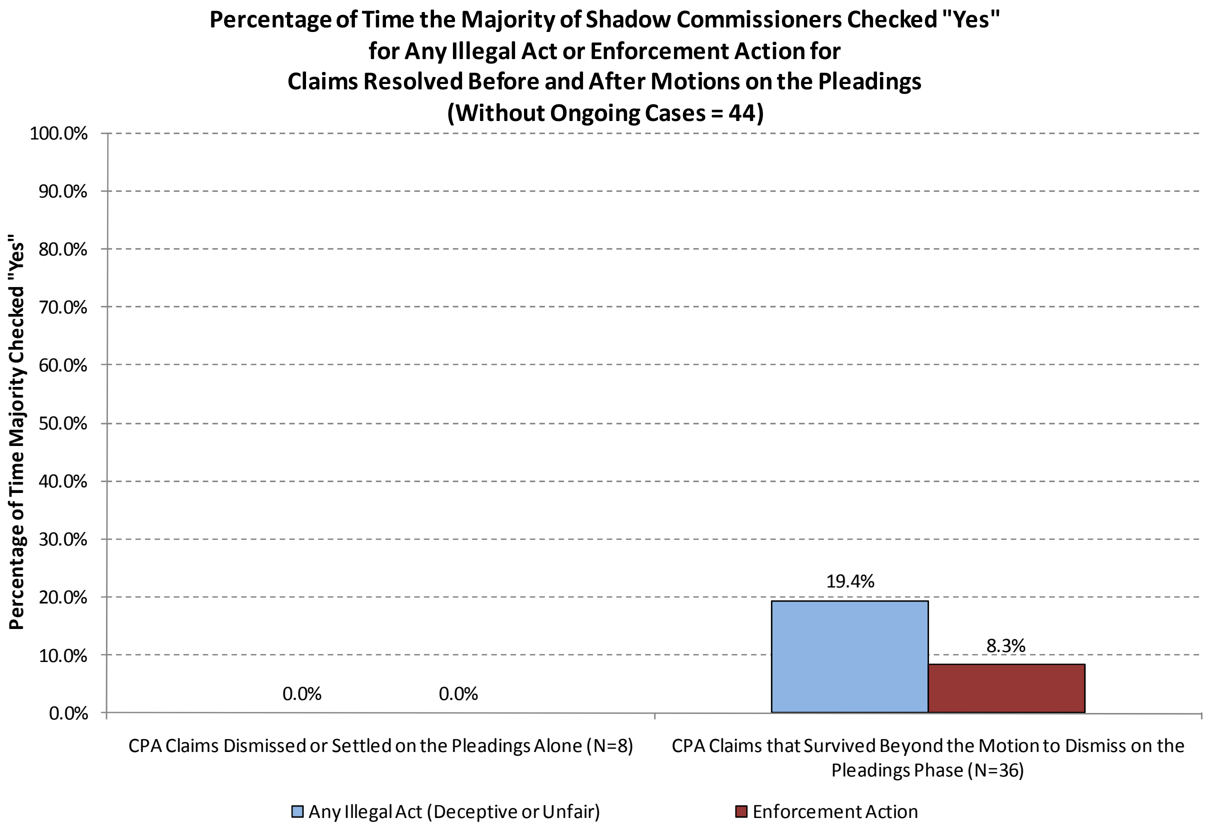
Since the case excerpts arise from actual CPA claims from 2000 through 2007, the outcomes of these cases provide valuable information about the likely merits of these claims. Many of these claims are evaluated by a judge through motions testing the sufficiency of the pleadings. One might hypothesize, for example, that the Shadow Commission would be more likely to identify illegal conduct in case scenarios derived from CPA claims which had progressed further procedurally—a CPA claim surviving summary judgment might be more likely to involve illegal conduct under the FTC standard than one that had been dismissed at that stage, and a case that went to trial might be more likely to involve illegal conduct than one dismissed at an earlier stage.

To test this hypothesis, we report the Shadow Commission's responses by dividing the subsample of cases in two ways: (1) cases that were dismissed or settled on the pleadings alone versus those that survived beyond the motion to dismiss stage, and (2) cases that went to trial versus those that were dismissed or settled prior to trial. Charts 1 and 2 combine the results of questions 1a and 2a, identifying whether a majority of Shadow Commissioners found that any illegal conduct had occurred under the FTC consumer protection standards based on the available facts. The charts also report the results on whether the Shadow Commission believed the FTC would initiate an enforcement action. We begin with Chart 1, which divides the subsample of resolved cases on the basis of whether the underlying claim survived beyond the motion to dismiss on the pleadings phase, or was dismissed or settled on the pleadings alone.

[117] A two-group test of proportions does not allow us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the available case facts showed some illegal conduct under the FTC standards is the same between federal district and state appellate cases (z = -0.263, p = 0.793). Likewise, a two-group test of proportions also does not allow 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 is the same between federal district and state appellate cases (z = -0.423, p = 0.672). We get similar results for the non-parametric Spearman rank correlation.

[118] A two-group test of proportions does not allow us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the available case facts showed some illegal conduct under the FTC standards is the same between federal district and state appellate cases (z = -0.813, p = 0.416). Likewise, a two-group test of proportions also does not allow 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 is the same between federal district and state appellate cases (z = -0.851, p = 0.395). We get similar results for the non-parametric Spearman rank correlation.

CHART 1



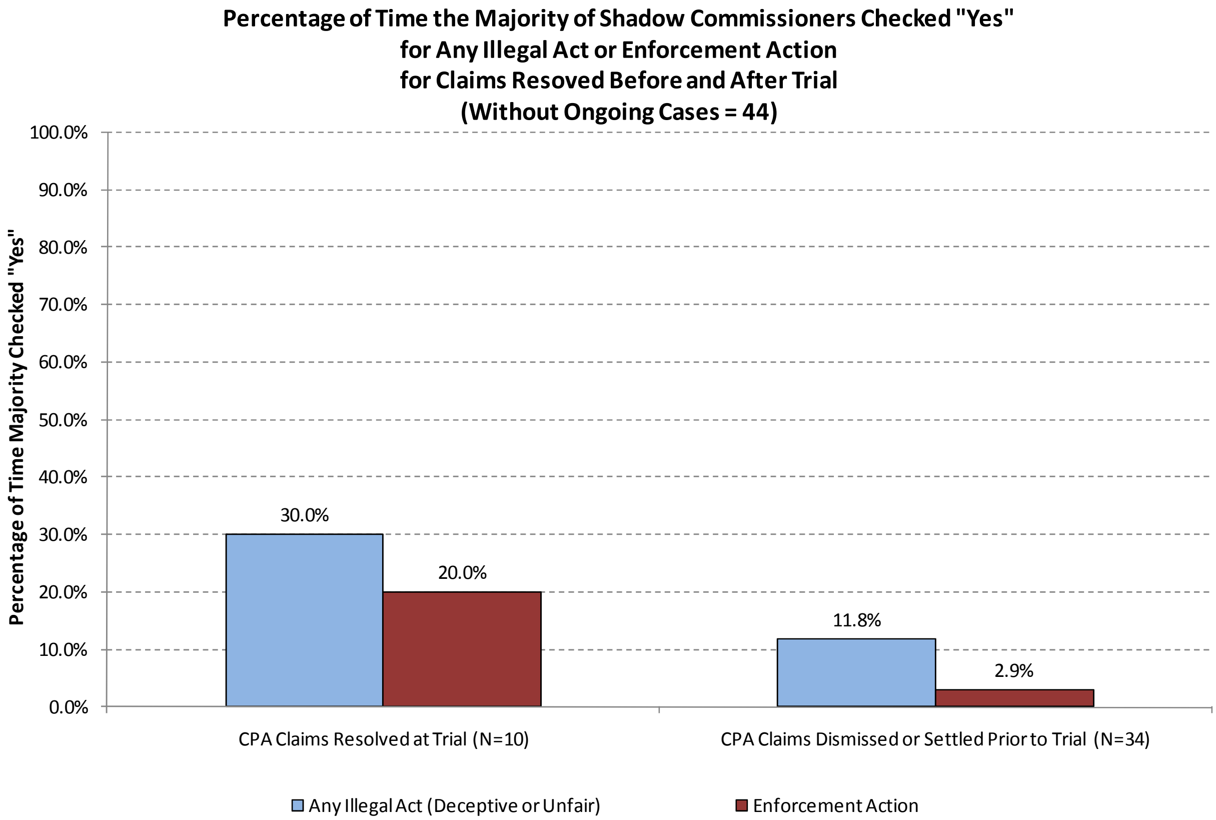
The Shadow FTC indicated that all of the CPA cases that had been dismissed or settled on the pleadings alone do not involve illegal conduct under the FTC standard. Focusing on the subset of cases that survived beyond the pleading stage, the Shadow Commission identified just under 20 percent of the scenarios that presented involved illegal conduct under the FTC standard. The differences in Chart 1 are not statistically significant.[119]

In Chart 2, the subsample is divided on the basis of whether the CPA claim went to trial. The Shadow Commission did not appear to find actions in CPA claims that were resolved on the pleadings to be illegal under FTC standards. For cases that did go to trial the Shadow Commission identified illegal conduct in 30.0% of the CPA claims. In all claims resolved prior to trial, the Shadow Commission identified illegal activity in only 11.8% of cases. Similarly, cases resolved early on are less likely to be of the type enforced by the FTC than those that are resolved at trial. The difference in the proportion of cases where the majority of Shadow Commissioners found some illegal conduct under the FTC standards is not statistically significant, but the difference in the proportion of cases where the majority of Shadow Commissioners believed the FTC would initiate an enforcement action based on the available case facts is

[119] A two-group test of proportions does not allow us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the available case facts showed some illegal conduct under the FTC standards is the same between cases that survived a motion to dismiss and those that did not (z = -1.360, p = 0.174). Likewise, a two-group test of proportions also does not allow 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 is the same between those that survived a motion to dismiss and those that did not (z = -0.846, p = 0.398). We get similar results for the non-parametric Spearman rank correlations.

statistically significant at the 10% level.[120] Between Charts 10 and 11, the overall picture is that cases dismissed very early in the judicial process may be less likely to involve an illegal action under FTC standards or be enforced than those that are resolved at trial.

CHART 2



An important finding in Round 1 is the relatively low frequency with which the Shadow FTC believed the conduct in CPA cases would constitute deceptive or unfair conduct under the FTC standards. In the unadjusted sample, a majority of Shadow Commissioners found illegal conduct in 22.0% of the CPA scenarios which include both settlements and cases that went to trial. The results in the various subsample divisions are consistent with this finding. These outcomes suggest at the very least that the CPA claims litigated in state and federal courts differ from those involving illegal conduct under the FTC standard. The Round 1 results indicate, in other words, that a substantial fraction 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 claim required to justify filing on an expected value basis.

Our results should nonetheless 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

[120] A two-group test of proportions does not allow us to reject the null hypothesis that the proportion of cases where the majority of Shadow Commissioners believed the available case facts showed some illegal conduct under the FTC standards is the same between cases that survived to trial and those that did not (z = -1.386, p = 0.166). However, a two-group test of proportions does allow 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 is the same between those that survived to trial and those that did not at the 10% level (z = -1.881, p = 0.060). We get similar results for the non-parametric Spearman rank correlations.

violate federal consumer protection law under FTC standards. One possible explanation is that 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. A second reason could be that in Round 1, while the Shadow Commission found that 3 cases presented illegal actions that the FTC would likely enforce, only 2 cases had a clear CPA claimant win at trial.[121]

B. Round 2 Results and Analysis

A critical empirical challenge in the CPA policy debate is to identify the quality of CPA claims currently working through the civil justice system. Round 1 takes a random sample of cases and uses the Shadow Commission's evaluation of those claims under the FTC standard as a benchmark. While randomization in Round 1 allows the Shadow Commission to evaluate an unbiased slice of actual CPA cases and gives some valuable information about the likely merits of CPA claims, Round 2 compares some of the strongest litigated CPA claims to FTC legality and enforcement standards.

In Round 2, the sample of case scenarios involves "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. Our key finding from Round 2 (50 clear CPA wins) is that the Shadow Commission believed that there was either unfair or deceptive conduct under the FTC standards in 31 cases (or 62.0% 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 24 out of 43 cases (55.8%).

Regarding whether the Shadow Commission believed that the FTC would bring an enforcement action, the number of cases where the majority of Shadow Commissioners believed the FTC would bring an enforcement action depends on how the seven cases where there is no majority are treated. For our purposes, the most reasonable approach may be to drop the seven cases from the dataset as incomplete or non-responsive answers. Taking this approach, the Shadow Commission suggested enforcement rate was 10 of 43 cases (or 23.3%).[122]

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. However, even in these cases, 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 24 cases where the Shadow Commission thought the scenario indicated some illegal conduct under the FTC standards, in 10 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.[123] 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

[121] The 2 cases do not include the ongoing cases of Round 1, and make up only 4.5% of the 44 closed cases.

[122] Alternatively, if we treat ties as decisions that the FTC would likely pursue enforcement, the Shadow Commission would vote that the FTC would bring an enforcement action in 17 out of 50 cases (34.0%). If we treat the ties as Shadow Commission decisions that the FTC would not likely pursue enforcement, then the Shadow Commission would initiate enforcement in 10 of 50 cases (20.0%). If we treat the seven cases as though the Shadow Commission favored enforcement in half of the cases, where all ties are a decision that the FTC would likely pursue enforcement, the Shadow Commission would initiate enforcement in 13 or 14 out of 50 cases (26.0%/28.0%).

[123] For the 43 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 where the majority of Shadow Commissioners believe there was illegal conduct and where 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 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. Comparison of Round 1 and Round 2 Results: Illegality

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.[124] 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.[125]

TABLE 1

Cases where the Shadow FTC Believed the Scenario Contained Illegal Conduct
(All Cases)

	Round 1	Round 2
Cases with Possible Illegal Conduct	11	31
Total Cases	50	50
Percent of Total	**22.0%**	**62.0%**

One possible concern is that the composition of cases across the rounds differed on some 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.[126] Table 2 shows the results.

TABLE 2

Cases where the Shadow Commissioners Believed the Scenario Contained Illegal Conduct
(State Appellate Cases Only)

	Round 1	Round 2
Cases with Possible Illegal Conduct	4	24
Total Cases	19	43
Percent of Total	**21.1%**	**55.8%**

[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] 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.

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.

D. Comparison of Round 1 and Round 2 Results: Enforcement

Turning to the Shadow FTC's aggregate responses to the question on FTC enforcement, the Shadow FTC was less likely to believe the FTC would initiate an enforcement action than they were to believe the scenarios showed some illegal act based on the facts given. Dropping the seven cases with the tied Shadow FTC from the Round 2, but including all non-FTC cases from Round 1, leads to the Shadow FTC believing that the FTC would initiate an enforcement action in 6 of the 50 general CPA cases (or 12.0%) and in 10 of the 43 clear CPA wins (or 23.3%), which can be seen in Table 3. This difference is statistically significant only at slightly above the 15% level.[127]

TABLE 3

Cases Where the Shadow FTC Believed the FTC Would Initiate an Enforcement Action
(All Round 1 Cases)

	Round 1	Round 2
Belief in FTC Enforcement Action	6	10
Total Cases	50	43
Percent of Total	**12.0%**	**23.3%**

The Shadow Commission was more likely to support an enforcement action in the clear CPA wins in Round 2 than the general CPA cases in Round 1, but in both rounds the Shadow Commission support enforcement in less than a quarter of the total scenarios.

E. Control Results—FTC Cases

As discussed, 10 FTC cases were included in Round 1 but were not otherwise designated as FTC cases in any way. The FTC litigated 8 of these cases and issued complaints for the remaining two that it ultimately dismissed. The Shadow Commission agreed in each of the 10 cases that 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 22.0% of the general CPA cases depending on whether ongoing cases are included. The differences are statistically significant regardless of whether we count ongoing cases.[128] Likewise, in all 10 of the FTC cases a majority of Shadow Commissioners thought the FTC might initiate an enforcement action in contrast to the 6.8% or 12.0% of Round 1 general

[127] 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.

[128] 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 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.

CPA cases the Shadow Commissioners agreed might have been enforced (depending on whether the ongoing cases are dropped). Again, these differences are statistically significant.[129]

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 nonetheless may not necessarily be cases the FTC is likely to enforce.

IV. CONCLUSIONS

This Article set out to study whether state mini-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 CPAs decisions and actions that would likely be found to be 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 consumer protection standards. In a sample of CPA claims where 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.

[129] 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 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.

The results presented in this Article may usefully 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 mini-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 him 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 the **Buyers** closed in the following month.

A few months later, the **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 the **Buyers** paid for a full treatment by a different pest control company. The **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

<u>Scenario 1:</u>
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 21, **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____