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The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element

ARTICLE

THE CONSUMER FRAUD CLASS ACTION: REINING IN ABUSE BY REQUIRING PLAINTIFFS TO ALLEGE RELIANCE AS AN ESSENTIAL ELEMENT

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This Article argues that the recent rise in consumer fraud class action lawsuits is tied to the concomitant failure of many state courts to require reliance during class certification. In particular, it contends that the lack of a reliance requirement creates incentives for plaintiffs' attorneys to bring consumer fraud class action suits without ever alleging that the consumers relied on, and hence that they were damaged by, the alleged misrepresentation, all in the hopes of forcing a settlement. The Article also provides a detailed history of the FTC, the subsequent rise in state consumer fraud statutes, and the early failure of both federal and state government agencies to adequately pursue violations of these laws. It then asserts that this failure and the subsequent rise of public law tort theory led state courts to slowly chip away at the element of reliance in a misguided attempt to provide adequate deterrence. However, now that both the FTC and state attorneys general enforce these consumer protection laws with more vigor, the Article concludes that requiring reliance for the resolution of private suits, while not requiring it in cases of public enforcement, creates the correct balance of individual justice and deterrence.

If you buy a jar of jam labeled "Simply 100% Fruit," do you really expect the jam to contain nothing but fruit? Apparently, today's consumer class action plaintiffs or, more accurately, their lawyers do. In *Smith v. J.M. Smucker Co.*,[1] the plaintiffs filed a class action consumer fraud lawsuit in Illinois state court, alleging that Smucker's "Simply 100% Fruit"

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[1] No. 03CH08522 (Ill. Cir. Ct. filed May 16, 2003), *noted in* J.M. Smucker Co. v. Rudge, 877 So. 2d 820, 821 (Fla. Dist. Ct. App. 2004).

jams do not contain 100% fruit.[2] Twenty-one identical "100% Fruit" class actions have been filed against Smucker's in twelve other states.[3]

Increasingly, plaintiffs' lawyers[4] are using consumer fraud statutes to pursue class actions based on manufacturers' alleged misrepresentations[5] about their products. By themselves, these lawsuits are not troubling. But when the consumers themselves have never relied on a manufacturer's misrepresentation, have never independently sought redress, and likely will never receive meaningful benefit from a suit (although their lawyers stand to make millions of dollars), these class actions become more akin to corporate blackmail than to consumer protection.

What prompted this trend? A significant factor in the rise of consumer fraud class action suits[6] is the emerging practice of allowing these claims to proceed through the process of class certification without any allegation of reliance—the traditional causal element of a common law misrepresentation claim that requires an injured party to allege that the manufacturer's misrepresentation induced the consumer to purchase the

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[2] *Rudge*, 877 So. 2d at 821 (describing allegations of claim in *Smith*). Notably, the ingredients label on the Smucker's strawberry "Simply 100% Fruit" product indicates that the jam is, in fact, made entirely from fruit products: fruit syrup, strawberries, lemon juice concentrate, fruit pectin, red grape juice concentrate, and natural flavors. Howard Fischer, *Smucker's Mislabels Its Spread, Suit Claims*, ARIZ. DAILY STAR, July 24, 2004, at D, *available at* 2004 WLNR 11612584. Other Smucker's products, by contrast, contain high fructose corn syrup, corn syrup, sugar, and citric acid (in addition to strawberries and fruit pectin). *Id.*

[3] *See Rudge*, 877 So. 2d at 821 & n.1 (discussing Florida and Illinois cases and noting eighteen state class actions in eleven states); Fischer, *supra* note 2 (noting three additional suits in Arizona, California, and Wisconsin).

[4] Commentators have noted that class action suits often are not initiated by an injured party seeking redress but rather are created by lawyers. Whereas the typical lawsuit begins with a client seeking representation from a particular attorney, class action "attorneys use regulatory, media, and other electronic databases to identify instances of possible corporate wrongdoing." DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 72 (2000). Thus, these suits generally are seen as "lawyer-driven," not "client-driven." *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 384 (2000) ("[I]n the class action, the class representative is usually a token figure, with the class counsel being the real party in interest."); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 492 (2000) ("[M]any [class actions] arise simply as a result of the creativity of entrepreneurial contingency fee lawyers."). *Cf.* HENSLER ET AL., *supra*, at 402 (noting that although plaintiff class action attorneys play a critical role in driving class action litigation, consumers, regulators, journalists, and ordinary lawyers also play a part).

[5] As used in this Article, "misrepresentation" refers to all methods of conveying untrue information to consumers that might induce a consumer to buy a product, including mislabeling, false advertising, and other deceptive sales promotion techniques. *See* RESTATEMENT (SECOND) OF TORTS § 525 cmt. b (1977) (stating that "misrepresentation" denotes not only "words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth"); JOHN MICKLEBURGH, CONSUMER PROTECTION 171 (1979) (noting that a "misrepresentation" means "an untrue statement of fact, made by one party to the contract (the 'misrepresentor') to the other (the 'misrepresentee'), before or at the time of contracting").

[6] *See infra* notes 18–20 and accompanying text.

product.[7] Because "a host of individual factors could have influenced a class member's decision to purchase the product," reliance-causation presents an individual issue for each class member.[8] The individualized nature of establishing reliance-causation makes class certification under Federal Rule 23(b)(3)[9] more difficult.[10] Perhaps to facilitate class actions, however, courts recently have softened the underlying substantive law, eliminating reliance as a required element.[11] This reduced standard, in turn, has helped propel the growing trend of consumer fraud class action lawsuits in which the plaintiffs never relied on an alleged misrepresentation—a trend that has affected numerous industries, including cigarette manufacturers,[12] fast food companies,[13] gasoline producers,[14] and the telecommunications sector.[15] Yet, despite recent billion-dollar verdicts[16] and million-dollar settlements,[17] and the fact that roughly one-third of class

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[7] *See* discussion *infra* Part III.B.

[8] Hazelhurst v. Brita Prods. Co., 744 N.Y.S.2d 31, 33 (N.Y. App. Div. 2002).

[9] Federal Rule of Civil Procedure 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In addition, the plaintiff also must show that "the class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). Finally, a class must satisfy the four threshold requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. FED. R. CIV. P. 23(a). Most state systems employ similar requirements for class certification. 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 13:1, at 399 (4th ed. 2002) (noting that Federal Rule of Civil Procedure 23 is the "most prevalent model" for state class action rules). Most importantly, the majority of states follow the federal predominance and commonality requirements. *See id.* §§ 13:9, 13:10, 13:16, at 404–06, 410–13 (noting that although specific language varies, state class action rules require commonality).

[10] *Cf., e.g., Hazelhurst*, 744 N.Y.S.2d at 33 (refusing to certify class under New York statute requiring individual reliance).

[11] *See* discussion *infra* Part III.B.2. Some scholars have argued that class certification is appropriate even where reliance is a required element, contending that reliance can be proven statistically or based on an objective standard. *E.g.*, Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1654 (2000) (arguing for an objective standard of reliance). Such evidentiary questions, however, are beyond the scope of this Article.

[12] *E.g.*, Aspinall v. Philip Morris Cos., 813 N.E.2d 476 (Mass. 2004).

[13] *E.g.*, Pelman v. McDonald's Corp., No. 02 Civ. 7821 (RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003), *vacated in part*, 396 F.3d 508 (2d Cir. 2005); *cf.* Michelle Morgante, *Mother Sues Cereal Makers for Recent Low-Sugar Claims*, CHARLESTON GAZETTE (W. Va.), Mar. 29, 2005, at 5C, *available at* 2005 WLNR 4922627 (discussing newly filed class action against cereal manufacturers based on allegations that the "low sugar" labeling misleadingly suggests that the cereals are healthier).

[14] *E.g.*, Weinberg v. Sun Co., 777 A.2d 442 (Pa. 2001).

[15] *E.g.*, Davis v. Powertel, Inc., 776 So. 2d 971 (Fla. Dist. Ct. App. 2000).

[16] *E.g.*, Price v. Philip Morris Inc., No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. Mar. 21, 2003) (awarding $10.1 billion judgment based on alleged misrepresentation of the "healthiness" of "light" cigarettes). This case is pending on appeal before the Illinois Supreme Court. *See* Supreme Court of Illinois, Docket, September Term of 2005, at 3 (2005), http://www.state.il.us/court/SupremeCourt/Docket/2005/Pdf/0905_Docket.pdf (listing Price v. Philip Morris Inc., No. 96236 on advisement docket of Sept. 2005 term) (last visited Nov. 4, 2005).

[17] *See, e.g.*, Bart Jansen, *Senate OKs Curb on Class Action: The Bill Aims to Steer Class-Action Lawsuits, Such as One Involving Poland Spring Water, into Federal Courts*,

actions brought against business defendants each year involve consumer claims,[18] these cases have received little attention in the tort reform debate. Indeed, during the 1995–1996 period, "[c]onsumer cases accounted for half of all reported state judicial decisions in class actions against business defendants,"[19] and within this category, "fraud cases comprised the largest fraction of reported federal judicial decisions."[20]

Recent attempts at reform, such as the Class Action Fairness Act of 2005,[21] which principally addresses the appropriate forum for class litigation and imposes limits on types of settlements, will do little to stem the tide of such suits. Before the Class Action Fairness Act became law, for instance, Yale law professor George Priest explained to President Bush that the bill was "not going to solve the problem."[22] Rather, the solution, according to Priest, required tighter application of the liability standards underlying a proposed class.[23] This Article attempts to fill the gap identified by Professor Priest by offering substantive guidance on how to fix the underlying liability rules in misrepresentation class actions: courts should treat fraud like fraud and require plaintiffs to allege "reliance" as an essential element of a consumer misrepresentation case.

Part I of this Article describes the new "misrepresentation" action and explains why state consumer fraud statutes have become attractive class action vehicles. Part II examines the origins of the misrepresenta-

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PORTLAND PRESS HERALD (Me.), Feb. 11, 2005, at A1, *available at* 2005 WLNR 1944456 (noting settlement of $9.35 million in class action against Poland Spring water company based on advertising that product was "spring water" when water was pumped from spring source).

[18] *See* HENSLER ET AL., *supra* note 4, at 53–54. In 2000, the RAND Institute for Civil Justice ("ICJ") published a study of class action litigation. *Id.* Given the absence of any comprehensive class action database, the ICJ used LEXIS/NEXIS to develop its data. *Id.* at 52. The ICJ surveyed three sources for the 1995–96 period, including reported judicial decisions. Consumer cases represented thirty-five percent of reported judicial decisions. *Id.* at 54 fig.3.2. Within this category of consumer claims, roughly one-third were fraud-related, which encompassed deceptive sales practices, false advertising, and deceptive labeling. *Id.* at 55.

[19] *Id.* at 57 & 57 fig.3.5; *see also* FTC, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY ES-2 (2004) (finding that nearly 25 million Americans were victims of consumer fraud in 2003), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraud.pdf.

[20] HENSLER ET AL., *supra* note 4, at 57 & 57 fig.3.5; *see also* James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 402 (2004) ("[A]ll things considered, the consumer class action will further evolve into the single most widespread tool for the class action."); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y. 143, 156 (noting 340% increase in federal class actions and 1315% increase in state class actions over past decade).

[21] Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711–1715 (West 2005).

[22] Press Release, White House, *President Discusses Lawsuit Abuse at White House Economy Conference* (Dec. 15, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/12/20041215-11.html.

[23] *Id.* (stating that "the most fundamental reforms have to come from the courts. It's the courts that created this problem and it has to come from the courts in redefining liability rules.").

tion class action and describes how the forces that drove the creation of the consumer protection laws in the 1960s still serve as the backdrop for the current interpretation of the private damages action.

Part III examines modern consumer fraud suits brought by the government and contrasts the standards applicable to government suits with those applicable to private actions. It explains how courts have embraced the public purpose of a government suit—deterrence and punishment—in interpreting private consumer fraud statutes and have abandoned the traditional tort requirement of reliance-causation.

Part IV describes the "public tort law" theory that has contributed, in large part, to the abandonment of reliance-causation by state courts. It contrasts "public law" theory with the traditional understanding of the tort system as a means of providing redress and shows how public law theory provides an interpretative foundation for understanding the relaxation of reliance-causation requirements in misrepresentation class action suits.

Finally, Part V argues that the historical forces that led to the creation of the consumer class action—and the "public law" approach to these statutes—should no longer provide the interpretative framework for misrepresentation cases. Requiring reliance for private suits achieves the proper balance of public and private resources: allowing government agencies to seek restitution and injunctive relief where there is no consumer reliance and letting private litigants seek damages where reliance provides a causal connection between the defendant's conduct and the injury. Part V concludes that reinstating the traditional reliance requirement is an appropriate and simple fix that would restore the balance between public enforcement and private litigation.

I. The New Class Action: Statutory Misrepresentation Cases

Pelman v. McDonald's Corp.[24] is typical of the new misrepresentation cases in which the plaintiffs claim to have been defrauded but did not rely on any specific misrepresentation by the defendant. In *Pelman*, the plaintiffs filed a putative class action against McDonald's, alleging that McDonald's misrepresented that its products were nutritious and could be consumed as part of a healthy lifestyle on a daily basis.[25]

The plaintiffs were minor children whose parents purchased McDonald's for them three to five times a week.[26] The suit did not allege that the parents of these children actually relied on any false advertisement by

[24] No. 02 Civ. 7821 (RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003), *rev'd in part*, 396 F.3d 508 (2d Cir. 2005).

[25] *Id.* at *2. The plaintiffs based these allegations on a variety of McDonald's advertisements, such as an ad describing McDonald's beef as "nutritious" and "leaner than you think." *Id.*

[26] *Pelman*, 396 F.3d at 510.

McDonald's, nor could they even point to a specific false advertisement.[27] Rather, the plaintiffs claimed that their own "misconceptions" about the healthiness of a McDonald's diet generally resulted from McDonald's "long-term deceptive campaign."[28] Plaintiffs brought suit under two of New York's consumer fraud statutes: New York General Business Law Section 349[29] and New York General Business Law Section 350.[30]

The district court found that only the Section 350 claim required actual reliance,[31] even though both statutes used identical causation language.[32] The district court held that the plaintiffs' vague allegations of reliance on a "long-term deceptive campaign" did not satisfy Section 350's reliance requirement.[33] Rather, the court concluded that the plaintiffs must claim that they saw the allegedly false advertisement and "relied to their detriment" on the specific advertisement.[34]

Although the district court dismissed the suit in part for lack of causation,[35] the Second Circuit reversed, finding that the bare assertions in the complaint were sufficient to state a claim.[36] To date, plaintiffs still have not identified the particular advertisements that deceived them or even demonstrated that they ever saw or heard any particular advertisement.[37]

Under common law theories, a consumer would not be able to pursue a claim against McDonald's unless she had justifiably relied on the manufacturer's misrepresentations.[38] The reliance requirement would en-

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[27] *Pelman*, 2003 WL 22052778, at *7.

[28] *Id.*

[29] Section 349-a prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. GEN. BUS. LAW § 349-a (McKinney 2004).

[30] Section 350 prohibits false advertising. N.Y. GEN. BUS. LAW § 350 (McKinney 2004).

[31] *Pelman*, 2003 WL 22052778, at *7.

[32] Section 349-h allows "any person who has been injured by reason of any violation of this section" to bring a damages action. N.Y. GEN. BUS. LAW § 349-h (McKinney 2004). Likewise, Section 350(e) provides that "[a]ny person who has been injured by reason of any violation of [this] section" may bring a damages action. *Id.* at § 350-e.

[33] *Pelman*, 2003 WL 22052778, at *8.

[34] *Id.*

[35] *Id.* at *11–*12, *14.

[36] *Pelman*, 396 F.3d at 511–12.

[37] *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for a More Definite Statement, Pelman v. McDonald's Corp., No. 02 Civ. 7821 (RWS), 2005 WL 1276744 (S.D.N.Y. May 22, 2005) (arguing that plaintiffs are not required to identify specific advertisements); Reply Memorandum of Law in Support of Defendant's Motion for a More Definite Statement, *Pelman*, No. 02 Civ. 7821 (RWS), 2005 WL 1276745 (S.D.N.Y. May 4, 2005) (arguing that plaintiffs have failed to identify particular McDonald's advertisements that caused them injury).

[38] To state a claim for common law fraud, a plaintiff must allege a false representation by the defendant; the defendant's knowledge or belief that the representation is false; the defendant's intent to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation; the plaintiff's justifiable reliance upon the misrepresentation in taking action or refraining from it; and damage to the plaintiff resulting from such reliance. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (stating that misrepresen-

sure that the defendant's misrepresentation had, in fact, caused the alleged harm.

Consumer class actions like the *Pelman* suit, however, have pushed the law in a new direction that dilutes the reliance requirement. The *Pelman* case is just one high-profile example. Other cases include claims by smokers alleging that "light" cigarettes were deceptively labeled;[39] claims by cell phone consumers that the manufacturer misrepresented the phone's coverage area;[40] and claims by parents that baby food was not "pure and natural," as advertised.[41] Not one of these cases required the class members to plead that the manufacturer's allegedly false statement made any difference in their decision to buy the product. Thus, many courts have abandoned reliance—a crucial link between a defendant's misrepresentation and a plaintiff's injury—and have thereby significantly reduced the showing necessary to certify a case as a class action.[42]

Although some courts ultimately require proof of reliance to establish causation at trial,[43] certification places significant pressure on a defendant. Given the enormous amount of money at stake, certification becomes "the decisive point in a class action. Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."[44] Regardless of the amount of actual damages, if any,

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tation claim requires "pecuniary loss" and "justifiable reliance upon the misrepresentation").

[39] *E.g.*, Aspinall v. Philip Morris Cos., 813 N.E.2d 476 (Mass. 2004). *Aspinall* was a misrepresentation class action on behalf of Massachusetts purchasers of Marlboro Lights cigarettes. *Id.* at 485. The plaintiffs alleged that tobacco manufacturer Philip Morris deceptively marketed these cigarettes as "light," creating the impression that these cigarettes were "healthier" than other cigarettes. *Id.* at 480–82. On interlocutory appeal, the Massachusetts Supreme Court held that the plaintiffs were not required to prove that they relied on the label "light" when deciding to purchase that particular brand of cigarettes. *Id.* at 487–89. The court reached this conclusion even though the court found that, to be deceptive, an advertisement must induce consumers to "act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Id.* at 488.

[40] *E.g.*, Davis v. Powertel, Inc., 776 So. 2d 971 (Fla. Dist. Ct. App. 2000). In *Davis*, the Florida District Court of Appeal approved a misrepresentation class action based on a cell phone manufacturer's failure to disclose that the phone had been modified and would work only with its own wireless system. *Id.* at 972, 974–75. The court found that reliance on the manufacturer's statement was unnecessary. *Id.* at 974–75.

[41] *E.g.*, Tylka v. Gerber Products Co., 178 F.R.D. 493 (N.D. Ill. 1998). Because reliance was not required under Illinois' consumer fraud act, *id.* at 499, even those consumers who still bought Gerber baby food despite knowledge of the allegedly false advertising could be part of the class. *See id.* at 498, 502.

[42] *See, e.g.*, *Aspinall*, 813 N.E.2d at 486–87 (finding certification of consumer class action was warranted where reliance was not required). *But see* Philip Morris Inc. v. Angeletti, 752 A.2d 200, 239–40 (Md. 2000) (reversing certification of consumer class action based on individual issues of reliance).

[43] *E.g.*, Group Health Plan Inc. v. Philip Morris Inc., 621 N.W.2d 2, 13 (Minn. 2001); *see also* discussion *infra* Part III.B.1.

[44] Bruce Hoffman, Remarks, Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits, 18 GEO.

many states allow recovery of a statutory minimum ranging from $100 to $2,000 per plaintiff.[45] Moreover, many statutes authorize multiple or punitive damages,[46] and four states even *require* an award of treble damages to a victorious plaintiff.[47]

Thus, certification can create enormous pressure on a defendant to settle, regardless of the merits of a case. As Judge Posner has explained, certification of a class action, even one without merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability . . . ."[48] Judge Posner is not alone in his view. The Judiciary Committee of the United States House of Representatives recently concluded that a corporation faces enormous pressure to settle a case once a class is certified, even when the case lacks merit:

J. LEGAL ETHICS 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the FTC's Bureau of Competition). A glaring example of the coercive effect of certification can be found under federal law. In Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 926, 928–29 (E.D. Tex. 1999), the plaintiffs alleged that the defendant's computers would corrupt data under certain conditions and sought relief under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000). The court certified a class consisting not only of current owners of Toshiba computers or even future owners, but also of "potential purchasers." *Id.* at 938. Incredibly, the court found, "it is not necessary for someone to actually own a defective computer in order to experience continuing, adverse effects from it." *Id.* As noted in the Congressional Record, not a single customer had reported any problem to Toshiba regarding this alleged defect. 149 CONG. REC. S12423 (daily ed. Oct. 3, 2003) (statement of Sen. Sessions). But now that the class was certified, Toshiba faced potential liability of $10 billion and felt forced to settle. *Id.* Thus, following certification, Toshiba settled the case for $2.1 billion. Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 953, 959 (E.D. Tex. 2000) (approving settlement class, though settlement class was limited to current owners). On top of the $2.1 billion award, Toshiba also agreed to pay $147.5 million in attorneys' fees to the plaintiffs. *Id.* at 961.

[45] *E.g.*, ALA. CODE § 8-19-10(a)(1) (LexisNexis 2002) (statutory minimum of $100); D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2001) ($1,500); UTAH CODE ANN. § 13-11-19 (2001) ($2,000). Massachusetts has the lowest statutory minimum at $25. MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West 2005).

[46] Several states require a multiple award where the defendant willfully engaged in a deceptive act. *E.g.*, COLO. REV. STAT. § 6-1-113(2) (2004); LA. REV. STAT. ANN. § 51:1409 (2003); MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 2005); N.H. REV. STAT. ANN. § 358-A:10 (1995); S.C. CODE ANN. § 39-5-140 (1985). Other states leave the award of multiple or punitive damages to the court's discretion. *E.g.*, ALA. CODE § 8-19-10(a)(2) (LexisNexis 2002); CONN. GEN. STAT. ANN. § 42-110g (West 2000 & Supp. 2005); D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2001); IDAHO CODE ANN. § 48-608(1) (1997); 815 ILL. COMP. STAT. ANN. 505/10a (West 1999 & Supp. 2005); KY. REV. STAT. ANN. § 367.220 (West 2002); MO. ANN. STAT. § 407.025 (West 2001); MONT. CODE ANN. § 30-14-133 (2003); OR. REV. STAT. ANN. § 646.638 (West 1988 & Supp. 1998); R.I. GEN. LAWS § 6-13.1-5.2 (2001); TENN. CODE ANN. § 47-18-109 (2001).

[47] Hawaii, New Jersey, and North Carolina mandate treble damages by statute, while Texas imposes treble damages by judicial interpretation. HAW. REV. STAT. ANN. § 480-13 (LexisNexis 2002 & Supp. 2004); N.J. STAT. ANN. § 56:8-19 (West 2001); N.C. GEN. STAT. § 75-16 (2003); Woods v. Littleton, 554 S.W.2d 662, 668–69 (Tex. 1977) (finding that treble damages are mandatory even though statutory language suggests discretionary standard).

[48] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

> [T]he perverse result [is] that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.[49]

Moreover, these settlements do not necessarily benefit consumers. Many take the form of a "coupon settlement," where the consumer plaintiffs receive coupons from the defendant-manufacturer.[50] For example, a class sued bottled water company Poland Spring, alleging that it misrepresented that its product was "spring water."[51] In the settlement, class members simply received coupons for more bottled water—a product the class purportedly did not want in the first place.[52] The plaintiffs' lawyers meanwhile received a $1.35 million fee.[53] Moreover, even where a consumer class action settles with a monetary award to the plaintiffs, few individual plaintiffs will submit the necessary claims forms and ultimately share in these proceeds.[54]

The ease of certification and its coercive settlement pressure are not the only reasons plaintiffs' counsel have chosen to pursue these consumer protection claims. In many states, a prevailing plaintiff automatically recovers attorneys' fees.[55] Probably the most notorious attorneys' fee award

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[49] H.R. REP. No. 106-320, at 8 (1999); *accord* S. REP. No. 109-14, at 20–21 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 21.

[50] For a thorough analysis of coupon settlements, see Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) [hereinafter Leslie, *A Market-Based Approach to Coupon Settlements*]. The Class Action Fairness Act now provides some limits on coupon settlements. *See infra* notes 302–304 and accompanying text.

[51] Jansen, *supra* note 17; *accord* Marguerite Higgins, *Class Members Get Little in Suits, Lawyers' Fees Spur Legislation*, WASH. TIMES (D.C.), July 8, 2004, at A12, *available at* 2004 WLNR 811926.

[52] Jansen, *supra* note 17.

[53] *Id.*

[54] *See* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 747 (1988) (noting that settlement "claims procedures are ill-suited to consumer class actions in which the class size is very large and the amount of damages per class member is relatively small. These cases are characterized by very low claims rates.").

[55] At least seventeen states automatically award attorneys' fees to a prevailing plaintiff. ALA. CODE § 8-19-10(a) (LexisNexis 2002); COLO. REV. STAT. § 6-1-113(2) (2004); GA. CODE ANN. § 10-1-399(d) (2000); HAW. REV. STAT. ANN. § 480-13(b) (LexisNexis 2002 & Supp. 2004); IDAHO CODE ANN. § 48-608(4) (1997); LA. REV. STAT. ANN. § 51:1409 (2003); ME. REV. STAT. ANN. tit. 5, § 213 (2002); MASS. GEN. LAWS ANN. ch. 93A, § 9(4) (West 2005); NEV. REV. STAT. ANN. § 41.600 (LexisNexis 2002); N.H. REV. STAT. ANN. § 358-A:10 (1995); N.J. STAT. ANN. § 56:8-19 (West 2001); N.M. STAT. ANN. § 57-12-10 (LexisNexis 2000); OKLA. STAT. ANN. tit. 15, § 761.1 (West 1993 & Supp. 2005); S.C. CODE ANN. § 39-5-140(a) (1985); TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon

in recent years stands at $1.75 *billion*, awarded in *Price v. Philip Morris, Inc.*, a misrepresentation class action based on the alleged false impression created by labeling cigarettes "light."[56]

By not requiring reliance, courts have fueled class action abuse, providing additional incentives to bring claims that stand to benefit lawyers far more than consumers. The obvious question, then, is have courts been inclined to interpret these statutes as eliminating any reliance requirement? The answer lies in the origins of consumer fraud statutes and a misapplication of public law theory.

II. ORIGINS OF THE CONSUMER FRAUD CLASS ACTION

The enlargement of consumer remedies for false statements hardly has followed a straight path. Rather, various factors have converged in a piecemeal and disjointed fashion to facilitate these claims. Many of these trends first developed in the 1960s when the consumer protection movement reemerged.[57] Decades later, these changes still form the backdrop for modern interpretation of consumer fraud statutes.[58] Two main events

2002); WIS. STAT. ANN. § 100.20(5) (West 2004 & Supp. 2004); WYO. STAT. ANN. § 40-12-108(b) (2005). In addition, six states award attorneys' fees where the defendant acted willfully. DEL. CODE ANN. tit. 6, § 2533 (1999); GA. CODE ANN. § 10-1-373 (2000); HAW. REV. STAT. ANN. § 481A-4(b) (LexisNexis 2002); ME. REV. STAT. ANN. tit. 10, § 1213 (1997); NEB. REV. STAT. § 87-303(b) (1999); OKLA. STAT. ANN. tit. 78, § 54 (West 2002). Finally, at least eighteen states allow attorneys' fees at the court's discretion. CONN. GEN. STAT. ANN. § 42-110g(d) (West 2000 & Supp. 2005); FLA. STAT. ANN. § 501.211 (West 2002); IND. CODE ANN. § 24-5-0.5-4(a) (West 1980 & Supp. 2004); KAN. STAT. ANN. § 50-634(e) (1994); KY. REV. STAT. ANN. § 367.220(3) (West 2002); MD. CODE ANN., COM. LAW § 13-408(b) (LexisNexis 2000 & Supp. 2003); MINN. STAT. ANN. § 325D.45 (West 2004 & Supp. 2005); MO. ANN. STAT. § 407.025 (West 2001); MONT. CODE ANN. § 30-14-133(3) (2003); N.Y. GEN. BUS. LAW § 349(h), 350-e (McKinney 2004); N.C. GEN. STAT. § 75-16.1 (2003); OHIO REV. CODE ANN. § 1345.09(F) (LexisNexis 2002); OKLA. STAT. ANN. tit. 78, § 54 (West 2002); OR. REV. STAT. ANN. § 646.638(3) (West 1988 & Supp. 1998); 73 PA. STAT. ANN. § 201-9.2(a) (West 1993 & Supp. 2005); R.I. GEN. LAWS § 6-13.1-5.2(d) (2001); TENN. CODE ANN. § 47-18-109(e)(1) (2001); UTAH CODE ANN. § 13-11-19(5) (2001).

[56] No. 00-L-112, 2003 WL 22597608, at *29 (Ill. Cir. Ct. Mar. 21, 2003) (awarding attorney's fees in the amount of twenty-five percent of a $7.1005 billion compensatory award), *appeal docketed*, No. 96236 (Ill. argued Nov. 10, 2004).

[57] The consumer movement did not originate in the 1960s. Rather, the movement began thirty years earlier in the 1930s; proposals to create a federal "consumer counsel" were even floated in the late 1920s. STANLEY MORGANSTERN, LEGAL PROTECTION FOR THE CONSUMER 5 (Irving J. Sloan ed., 2d ed. 1978); *see also* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1070–76 (2005) (describing growth of consumer protection movement in the 1930s). However, in March 1962, President John F. Kennedy issued a presidential message to Congress addressing consumer issues. MORGANSTERN, *supra*, at 5. The next year, President Kennedy adopted a "Consumer Bill of Rights," which caused a flurry of new federal legislation and efforts to obtain stronger enforcement. PRACTISING LAW INST., CONSUMER PROTECTION 17 (1972). At the same time, the 1960s saw the rise of Ralph Nader and his consumerism movement. *See* discussion *infra* notes 76–78 and accompanying text.

[58] *See* discussion *infra* notes 196–200 and accompanying text.

during the 1960s produced the modern misrepresentation class action: (1) the harsh criticism resulting from the failure of federal government enforcement, and (2) the corresponding rise of state consumer fraud statutes.

A. Failings of the Public Enforcement

The Federal Trade Commission ("FTC")[59] was created in 1914.[60] Originally, however, the FTC was aimed at curbing the monopoly power of big business, not protecting consumers.[61] Indeed, the original Federal Trade Commission Act ("FTC Act") banned only "unfair methods of competition,"[62] which required that the "unfair methods" injure the business of a competitor. Thus, the original FTC Act did not cover false statements that affected only the public.[63] Although a few early FTC cases did involve deceptive advertising[64] or labeling,[65] these early cases also usually included an injury to competition, not just an injury to the consuming public.[66] As the Third Circuit pointed out, the FTC was "helpless" to remedy deceptive marketing where all members of an industry used the same deceptive practices or where competition did not exist for a particular product.[67]

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[59] The FTC is headed by a panel of five Commissioners. Federal Trade Commission for the Consumer, Commissioners, http://www.ftc.gov/bios/commissioners.htm (last visited Nov. 4, 2005). The President, with the advice and consent of the Senate, appoints each Commissioner for a seven-year term. *Id.* The President also selects one Commissioner to serve as Chairman. *Id.* No more than three Commissioners may be from the same political party. *Id.*

[60] Act of Sept. 26, 1914, c. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. § 45 (2000)).

[61] *See* FTC v. Raladam Co., 283 U.S. 643, 647 (1931) (stating object of FTC was to stop unfair competition); Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 524 (1980) (noting original antitrust purpose of FTC Act); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 728 n.8 (1971) [hereinafter Lovett, *State Deceptive Trade Practice Legislation*] (noting FTC Act was intended to complement the Clayton Act).

[62] *Raladam Co.*, 283 U.S. at 644 n.1 (emphasis added).

[63] *Id.* at 649–51.

[64] *See, e.g.*, Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919) (sugar advertisements).

[65] *See, e.g.*, FTC v. Winsted Hosiery Co., 258 F. 483 (1922) (labels on woolen clothing).

[66] *See Winsted Hosiery Co.*, 258 U.S. at 493 (explaining that mislabeled goods diverted trade from honest manufacturers); *Sears, Roebuck & Co.*, 258 F. at 309 (discussing how Sears's advertisements suggested that competitors were "unfair dealers in sugar").

[67] Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941); *see also* H.R. REP. No. 75-1613, at 3 (1937) (noting that the FTC was "powerless to act for consumer's protection" where all competitors engage in same unfair method or where no competition existed).

In 1938,[68] Congress finally gave the FTC the authority to protect consumers from "unfair and deceptive trade practices."[69] Indeed, Congress intended the FTC Act[70] to reach "every case from that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement."[71]

Although the FTC was armed with the authority to proscribe false advertising that injured the public,[72] the FTC did little to stop manufacturer misrepresentations. At the end of the 1960s, two scathing reports—one by a group of students led by Ralph Nader[73] and the other by the American Bar Association[74]—ruthlessly criticized the FTC's performance.[75]

In 1968, Ralph Nader recruited a group of law students who spent the summer investigating the FTC.[76] The final report, issued in January

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[68] In 1938, Congress superseded *Raladam* with the Wheeler-Lea Amendment, which added a prohibition against "unfair or deceptive [trade] acts or practices." Wheeler-Lea Act of March 21, 1938, Pub. L. No. 75-447, 52 Stat. 111 (1939) (codified as amended at 15 U.S.C. § 45 (2000)); *see also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (noting that Wheeler-Lea Amendment reversed *Raladam*); United States v. J.B. Williams Co., No. 73-1624, 1973 WL 3183, at *8 (2d Cir. May 2, 1974) (discussing history of Wheeler-Lea Amendment). Congress first attempted to remedy the *Raladam* decision in 1935, but the bill died in the Senate. *J. B. Williams Co.*, 1973 WL 3183, at *8. It took Congress three years to pass the proposed changes. *Id.* For a compilation of the Wheeler-Lea Amendment's legislative history, see CHARLES WESLEY DUNN, WHEELER-LEA ACT: A STATEMENT OF ITS LEGISLATIVE RECORD (1938).

[69] 15 U.S.C. § 45 (2000). For a discussion of the Federal Trade Commission Act's legislative history from 1914 to 1938, see generally Holloway v. Bristol-Myers Corp., 485 F.2d 986, 990–96 (D.C. Cir. 1973).

[70] 15 U.S.C. § 45.

[71] H.R. REP. No. 75-1613, at 5 (1937).

[72] *See Pep Boys*, 122 F.2d at 160 (finding procedure in FTC Act is "prescribed in the public interest"); *see also Sperry & Hutchinson Co.*, 405 U.S. at 239–44 (holding FTC has authority to proscribe unfair or deceptive practices regardless of any effect on competition).

[73] EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter NADER REPORT].

[74] *Report of the ABA Commission to Study the Federal Trade Commission* [July–Sept.], Antitrust & Trade Reg. Rep. (BNA Spec. Supp.) No. 427 (Sept. 16, 1969) [hereinafter *ABA Report*]. In a separate statement attached to the ABA Report, then-Professor Richard Posner criticized the FTC's very existence and argued that the FTC served a "useful purpose" only in a "bare handful of cases." *Id.* at 112. Professor Posner urged "greater reliance on market processes and on the system of judicial rights and remedies" as a better alternative to the FTC. *Id.* at 118. Professor Posner later expanded his critique in a law review article, Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969) [hereinafter Posner, *The Federal Trade Commission*], and a book, RICHARD A. POSNER, REGULATION OF ADVERTISING BY THE FTC (1973) [hereinafter POSNER, REGULATION OF ADVERTISING].

[75] *See infra* notes 76–81 and accompanying text. Although catalysts for great change, the *ABA Report* and the NADER REPORT were not the first reports to evaluate and criticize the FTC's performance. *ABA Report*, *supra* note 74, at 9. As early as the 1940s, critics charged that the FTC failed to prioritize its goals and focus on interests of public importance. *See id.* at 9–11 (discussing early criticisms of the FTC).

[76] NADER REPORT, *supra* note 73, at 3. Dubbed "Nader's Raiders" by the press, the group was comprised of six volunteer law students or recent law school graduates from Harvard and Yale and an architecture student from Princeton. *Id.* at 2. The students gathered information by conducting interviews of FTC employees and reviewing internal FTC

1969,[77] colorfully concluded that the FTC was "a self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, [and] impervious to governmental and citizen monitoring."[78]

The government's immediate response to the Nader Report was the commission of the ABA Report.[79] Though more polite, the ABA Report was no less critical. The ABA charged that the FTC's consumer protection efforts were "inadequate" and "piecemeal."[80] The ABA found that the FTC "was preoccupied with technical labeling and advertising practices of the most inconsequential sort."[81]

As an illustrative example of the FTC's failure to address consumer fraud, and specifically false advertising, both the Nader Report and the ABA Report discussed the much publicized Geritol investigation of the 1960s.[82] In the 1950s, J. B. Williams Company manufactured Geritol, a vitamin and mineral supplement, and advertised the product as a remedy for fatigue and tiredness.[83] After more than three years of investigation, the FTC issued a complaint in December 1962, alleging that the statements misrepresented Geritol's efficacy.[84] But, not until 1965—nearly three years later—did the FTC finally order the company to stop making these statements.[85] Even though this order was affirmed by the Court of Appeals,[86] Geritol's TV advertisements changed little.[87] In an unusual proceeding, the FTC held public hearings in 1968 to determine whether Geritol's current advertising campaign complied with the 1965 order.[88] Following this hearing, the FTC concluded that the new Geritol advertisements "not only failed to comply with the order, but . . . are no less objectionable" than the original banned advertisements.[89] Instead of seeking civil penalties, however, the FTC simply ordered J. B. Williams to file another report.[90] Thus, "almost 10 years to the day after the beginning of the investigation,

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documents. *Id.* at 6–7.

[77] *Id.* at 10.

[78] *Id.* at vii.

[79] *Id.* at xiii. Newly elected President Richard M. Nixon asked the American Bar Association to review "the 'present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the antitrust laws, and of the allocation of its resources between these two areas.'" *ABA Report*, *supra* note 74, at 4.

[80] *ABA Report*, *supra* note 74, at 37.

[81] *Id.* at 2.

[82] NADER REPORT, *supra* note 73, at 65–67; *ABA Report*, *supra* note 74, at 43–44.

[83] NADER REPORT, *supra* note 73, at 66; *ABA Report*, *supra* note 74, at 43.

[84] *ABA Report*, *supra* note 74, at 43.

[85] *ABA Report*, *supra* note 74, at 43; *see also* J.B. Williams Co. v. FTC, 381 F.2d 884, 886–87 (6th Cir. 1967) (discussing procedural history of Geritol case).

[86] *J.B. Williams Co.*, 381 F.2d at 891 (affirming order with slight modification).

[87] NADER REPORT, *supra* note 73, at 66; *ABA Report*, *supra* note 74, at 43.

[88] NADER REPORT, *supra* note 73, at 66; *ABA Report*, *supra* note 74, at 43.

[89] NADER REPORT, *supra* note 73, at 66 (quoting FTC News Release, Dec. 13, 1968) (internal quotations omitted); *accord ABA Report*, *supra* note 74, at 43.

[90] NADER REPORT, *supra* note 73, at 66; *ABA Report*, *supra* note 74, at 43.

the FTC found that certain of Geritol's commercials *still* violated the cease and desist order, but again it did not seek civil enforcement penalties."[91]

In short, the two reports highlighted the FTC's "utter lack of effectiveness."[92] As then-Professor Posner described the 1960s FTC, "[t]he Commission is rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent."[93]

B. Rise of State Consumer Fraud Statutes

Not coincidentally, at the same time the FTC was being thrashed for its ineffectiveness, state legislatures enacted a tidal wave of consumer protection legislation. Three separate "model statute" movements emerged beginning in the 1960s and resulted in the enactment of consumer protection legislation in all fifty states.[94] First, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[95] proposed the Uniform Deceptive Trade Practices Act ("UDTPA").[96] Second, the FTC and the Committee on Legislation of the Council of State Governments proposed the Unfair Trade Practices and Consumer Protection Law ("UTP/CPL").[97] Finally, the NCCUSL proposed a third consumer fraud statute: the Uniform Consumer Sales Practices Act ("UCSPA").[98] Thus, by the mid-1970s, every state would have a consumer fraud statute that allowed private claims for damages.[99]

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[91] *ABA Report*, *supra* note 74, at 43–44; *accord* NADER REPORT, *supra* note 73, at 67. Finally, in November 1969, the FTC certified its findings to the Attorney General. United States v. J.B. Williams Co., 498 F.2d 414, 418 (2d Cir. 1974). Five months later, the Attorney General filed suit against J.B. Williams, seeking a $1 million penalty against J.B. Williams and its advertising company. *Id.* The district court granted summary judgment in favor of the Government. United States v. J.B. Williams Co., 354 F. Supp. 521, 553 (S.D.N.Y. 1973). On appeal, however, the Second Circuit reversed on all but two counts, holding that the case presented triable issues of fact. *J. B. Williams Co.*, 498 F.2d at 421.

[92] NADER REPORT, *supra* note 73, at 95; *accord ABA Report*, *supra* note 74, at 12 (noting ineffective planning and coordination of activities within the agency).

[93] Posner, *The Federal Trade Commission*, *supra* note 74, at 47; *accord* POSNER, REGULATION OF ADVERTISING, *supra* note 74, at 21–23.

[94] *See infra* Parts II.B.1–3.

[95] The National Conference of Commissioners on Uniform State Laws is a non-profit association created in 1892 "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 308 (1964) (citation omitted).

[96] *See infra* Part II.B.1.

[97] *See infra* Part II.B.2.

[98] *See infra* Part II.B.3.

[99] *See infra* notes 134 & 138 and accompanying text.

1. False Advertising Statutes and the UDTPA

The idea for state legislation started in 1964, when the FTC proposed that states enact false advertising statutes, modeled after New York's 1963 statute.[100] The FTC sought to continue its non-enforcement policy by shifting responsibility to "the lowest practicable level of government."[101] The next year, the Council of State Governments drafted a uniform false advertising statute.[102]

At the same time, in 1964, the NCCUSL proposed its own model consumer act: the Uniform Deceptive Trade Practices Act.[103] Although the UDTPA authorized private causes of actions, relief was limited to injunctions.[104] Five states adopted the 1964 version.[105] The FTC, however, believed that the 1964 UDTPA fell short in two respects.[106] First, the UDTPA only authorized private causes of action.[107] The FTC believed that a public official, such as the state's attorney general, should have authority to institute proceedings.[108] Second, the UDTPA contained not only an itemized list of prohibited practices, but also a "catch-all provision," applicable to conduct that "similarly creates a likelihood of confusion."[109] The

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[100] Letter from Paul Rand Dixon, Chairman, FTC, to William D. Carey, Executive Assistant Director, Bureau of the Budget, Executive Office of the President (Apr. 14, 1966) (on file with author); *see also* N.Y. GEN. BUS. LAW § 350 (McKinney 2004) (prohibiting false advertising).

[101] Letter from Paul Rand Dixon, *supra* note 100.

[102] COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 156–57 (1964).

[103] UNIFORM DECEPTIVE TRADE PRACTICES ACT (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 253–64 (1964)). The UDTPA was designed "to bring state [consumer protection] law up to date by removing undue restrictions on the common-law action for deceptive trade practices." *Id.* at 253. For an examination of the 1964 UDTPA, see Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967).

[104] UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3 (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 262 (1964)).

[105] *See* UNIFORM DECEPTIVE TRADE PRACTICES ACT (1966) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 299 (1966)). These states were Connecticut, Delaware, Idaho, Illinois, and Oklahoma. *Id.*; *accord* Dole, *supra* note 103, at 485 & n.4. Determining which model a state followed poses some difficulty as the states enacted—and revised—multiple "model" statutes. Accordingly, some states are categorized "twice" for following more than one model.

[106] Attachment to Letter from Paul Rand Dixon, Chairman, FTC, to William D. Carey, Executive Assistant Director, Bureau of the Budget, Executive Office of the President 4–5 (Apr. 14, 1966) (on file with author) [hereinafter Letter from FTC].

[107] UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3(a) (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 262 (1964)) (authorizing private actions for injunctive relief).

[108] Letter from FTC, *supra* note 106, at 5.

[109] UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2(a)(12) (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 262 (1964)).

FTC believed that the use of the word "similar" left doubt as to the scope of the catch-all provision.[110]

The NCCUSL revised the UDTPA in 1966 but did not address the FTC's concerns.[111] The revised UDTPA directed that the prevailing party be awarded costs and allowed the court to award attorneys' fees to the prevailing party.[112] Another four states adopted the 1966 version.[113] In addition, the UDTPA provides the foundation for consumer fraud statutes in another six states: Colorado, Minnesota, Nebraska, Nevada, New Mexico, and Oregon.[114]

2. *Unfair Trade Practices and Consumer Protection Law*

In 1970, the FTC and the Committee on Suggested State Legislation of the Council of State Governments issued their model statute: the Unfair Trade Practices and Consumer Protection Law.[115] The model UTP/CPL included three alternative versions, giving the states options concerning

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[110] Letter from FTC, *supra* note 106, at 5.

[111] UNIFORM DECEPTIVE TRADE PRACTICES ACT (1966) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 299 (1966)) (drafting history of the revised UDTPA does not reveal why the NCCUSL did not address the FTC's concerns).

[112] *Compare* UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3(b) (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 263 (1964)) (permitting court to award attorneys' fees only in "exceptional cases" and stating costs "may" be assessed), *with* UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3(b) (1966) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 312 (1966)) (permitting court to award attorneys' fees against the plaintiff where action is "groundless," against the defendant where the action was willful, and stating costs "shall" be allowed).

[113] *See* JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 133 & n.174 (6th ed. 2004) (noting that the states adopting the 1966 UDTPA were Georgia, Hawaii, Maine, and Ohio).

[114] *Id.* at 133 & nn.175–76. In 2000, however, the Commissioners withdrew the UDTPA as "obsolete." *Id.*

[115] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 141–52 (1969)). A model UTP/CPL was initially published in SUGGESTED STATE LEGISLATION for 1967 and subsequently adopted by ten states: Arizona, Kansas, Maryland, Massachusetts, Missouri, New Mexico, Pennsylvania, Rhode Island, Texas, and Vermont. *Id.* at 141–42. This proposal limited coverage to eleven specific kinds of deceptive practice and any others that "similarly" created a likelihood of confusion or misunderstanding. COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION, § 1(d), at A-73 (1966). Other states, however, had enacted laws co-extensive with Section 5(a)(1) of the FTC Act, which prohibited all unfair methods of competition and unfair or deceptive acts or practices in trade or commerce. *See id.* As a result, the FTC and others suggested that states should have options in considering the adoption of the UTP/CPL to meet differing state requirements. *Id.* Proposed changes were printed in SUGGESTED STATE LEGISLATION for 1969. *Id.* The final 1970 version of the UTP/CPL was developed jointly by the FTC and the Committee on Suggested State Legislation, and incorporated these changes, as well as several additional modifications. *See id.*

which trade practices to prohibit.[116] For the first time, a model act allowed a private cause of action for damages[117] and authorized class actions where the deceptive practice "caused similar injury to numerous other persons similarly situated."[118] The UTP/CPL also provided for a minimum statutory damages award of $200, regardless of the amount of actual damages.[119]

The states acted quickly. By 1973, forty-four states had enacted consumer protection legislation.[120] Fourteen states adopted the first version of the UTP/CPL.[121] This alternative followed Section 5 of the FTC Act and broadly prohibited all "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade of commerce."[122] Thirteen states originally followed the second UTP/CPL alternative,[123] which prohibited all "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce."[124] Finally, the third version listed twelve specific prohibited practices,[125] plus a "catch-all provision" encom-

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[116] *Id.* at 146; *see also id.* at 142 (discussing three alternatives); Leaffer & Lipson, *supra* note 61, at 521 n.2.

[117] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 8(a) (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 148 (1969)). Notably, the FTC's original 1966 proposal did not allow a private cause of action. *See* Letter from FTC, *supra* note 106, at 5–10.

[118] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 8(b) (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 149 (1969)).

[119] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 8(a) (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 148–49 (1969)) (allowing recovery of actual damages or $200, whichever is greater).

[120] FEDERAL TRADE COMMISSION, FACT SHEET: STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES (1973) [hereinafter FTC FACT SHEET].

[121] SHELDON & CARTER, *supra* note 113, at 132 & n.162. The jurisdictions adopting the first alternative were Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, Nebraska, North Carolina, South Carolina, Vermont, Washington, and West Virginia. *Id.* As of November 1973, the FTC Fact Sheet listed twelve of these states under the first alternative: Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, North Carolina, South Carolina, Vermont, and Washington. FTC FACT SHEET, *supra* note 120. The FTC Fact Sheet also listed Wisconsin. *Id.* Currently, however, Wisconsin only prohibits "unfair methods of competition," WIS. STAT. ANN. § 100.20(1) (West 2004 & Supp. 2004), and thus is not as broad as the first alternative model.

[122] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 146 (1969)).

[123] As of November 1973, these states were Arizona, Arkansas, California, Delaware, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New York, and North Dakota. FTC FACT SHEET, *supra* note 120. Texas also was patterned after this second alternative, SHELDON & CARTER, *supra* note 113, at 132 n.163, as was Illinois, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 142 (1969)). Notably, this second option was limited to fraud-based theories and did not cover "unfair practices." UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 146 (1969)). No state currently uses this second alternative in its exact form. SHELDON & CARTER, *supra* note 113, at 132.

[124] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 146 (1969)).

[125] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 146–47 (1969)). The

passing "any act or practice which is unfair or deceptive to the consumer."[126] Sixteen states followed this model,[127] with some variation in the itemized list of prohibited practices.[128]

3. *Uniform Consumer Sales Practices Act*

Finally, in 1970, the NCCUSL proposed another consumer fraud statute: the Uniform Consumer Sales Practices Act.[129] Like the FTC's third alternative in the UTP/CPL,[130] the UCSPA provided an itemized list of prohibited practices, but it also barred "unconscionable act[s] or practice[s]."[131] Three states have used the UCSPA as a model.[132]

Thus, by the early 1970s, nearly every state had enacted a statute[133] designed to prevent consumer fraud.[134] For the most part, these statutes

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enumerated practices were identical to the NCCUSL's 1964 UDTPA. *Compare* UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2 (1964) (cited in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 258–62 (1964)), *with* UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (alternative form no. 3) (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 146–47 (1969)).

[126] UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (alternative form no. 3) (1970) (cited in COUNCIL OF STATE GOV'TS, 1970 SUGGESTED STATE LEGISLATION 147 (1969)).

[127] As of November 1973, these states were Alaska, Colorado, Idaho, Indiana, Michigan, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Wyoming. FTC FACT SHEET, *supra* note 120. Currently, nine states appear to follow the third version: Alaska, Georgia, Idaho, Maryland, Mississippi, New Hampshire, Pennsylvania, Rhode Island, and Tennessee. SHELDON & CARTER, *supra* note 113, at 133 & n.165.

[128] SHELDON & CARTER, *supra* note 113, at 132–33 & n.165.

[129] UNIF. CONSUMER SALES PRACTICE ACT historical notes (1970) (The Act was amended in 1971.).

[130] *Id.* § 3(b).

[131] *Id.* § 4. *See generally* David A. Rice, *Critique: Uniform Consumer Sales Practices Act—Damages Remedies: The NCCUSL Giveth and Taketh Away*, 67 NW. U. L. REV. 369 (1972) (analyzing provisions of USCPA).

[132] Ohio, Utah, and Kansas followed this model. UNIF. CONSUMER SALES PRACTICE ACT tbl. of jurisdictions (1970) (noting adoption of UCSPA in Kansas in 1973, Ohio in 1972, and Utah in 1973); *accord* SHELDON & CARTER, *supra* note 113, at 133 & n.171; *see also* KAN. STAT. ANN. § 50-627 (1994 & Supp. 2005) (barring unconscionable acts); OHIO REV. CODE ANN. § 1345.03 (LexisNexis 2002 & Supp. 2005) (same); UTAH CODE ANN. § 13-11-5 (2001 & Supp. 2005) (same).

[133] This Article generally refers to these statutes as "consumer fraud statutes."

[134] Deceptive Trade Practices Act, ALA. CODE §§ 8-19-5 to -15 (LexisNexis 2002 & Supp. 2004); ALASKA STAT. §§ 45.50.471-.561 (2004); ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (2003 & Supp. 2004); ARK. CODE ANN. §§ 4-88-101 to -115 (2001 & Supp. 2003); Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750-1785 (West 1998 & Supp. 2005); Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 to 17209 (West 1997 & Supp. 2005); Colorado Consumer Protection Act, COLO. REV. STAT. §§ 6-1-101 to -1001 (2004); CONN. GEN. STAT. ANN. §§ 42-110a to -110q (West 2000 & Supp. 2005); DEL. CODE ANN. tit. 6, §§ 2511-2527 (1999); DEL. CODE ANN. tit. 6, §§ 2531-2536 (1999) (deceptive trade practices); D.C. CODE ANN. §§ 28-3901 to -3911 (LexisNexis 2001 & Supp. 2005); Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. §§ 501.201-.213 (West 2002 & Supp. 2005); Fair Business Practices Act of 1975, GA. CODE ANN.

sought to strengthen public enforcement of consumer protection. Nearly every state placed enforcement authority in the state's attorney general.[135]

§§ 10-1-390 to -407 (2000 & Supp. 2005); Uniform Deceptive Trade Practices Act, GA. CODE ANN. §§ 10-1-371 to -374 (2000 & Supp. 2005); HAW. REV. STAT. ANN. §§ 480-1 to -24 (LexisNexis 2002 & Supp. 2004); Uniform Deceptive Trade Practices Act, HAW. REV. STAT. ANN. § 481A-1 to -5 (LexisNexis 2002); Idaho Consumer Protection Act, IDAHO CODE ANN. §§ 48-601 to -619 (1997); Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505/1-12 (West 1999 & Supp. 2005); Uniform Deceptive Trade Practices Act, 815 ILL. COMP. STAT. ANN. 510/1-7 (West 1999 & Supp. 2005); IND. CODE ANN. §§ 24-5-0.5-1 to -12 (West 1995 & Supp. 2005); IOWA CODE ANN. § 714.16 (West 2003); Kansas Consumer Protection Act, KAN. STAT. ANN. §§ 50-623 (1994 & Supp. 2004); Consumer Protection Act, KY. REV. STAT. ANN. §§ 367.110-.370 (West 2002); Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. §§ 51:1401-1430 (2003 & Supp. 2005); Maine Unfair Trade Practices Act, ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214 (2002 & Supp. 2004); Uniform Deceptive Trade Practices Act, ME. REV. STAT. ANN. tit. 10, §§ 1211-1216 (2002 & Supp. 2004); Maryland Consumer Protection Act, MD. CODE ANN., COM. LAW §§ 13-101 to -501 (LexisNexis 2000 & Supp. 2004); MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 2005); Michigan Consumer Protection Act, MICH. COMP. LAWS ANN. §§ 445.901-922 (West 2002 & Supp. 2005); Unlawful Trade Practices Act, MINN. STAT. ANN. §§ 325D.09-.16 (West 2004 & Supp. 2005); Uniform Deceptive Trade Practices Act, MINN. STAT. ANN. §§ 325D.43-.48 (West 2004 & Supp. 2005); Prevention of Consumer Fraud Act, MINN. STAT. ANN. §§ 325F.68-.70 (West 2004 & Supp. 2005); MISS. CODE ANN. §§ 75-24-1 to -27 (West 1999 & Supp. 2004); MO. ANN. STAT. §§ 407.010-.307 (West 2001 & Supp. 2005); Montana Unfair Trade Practices and Consumer Protection Act of 1973, MONT. CODE ANN. §§ 30-14-101 to -143 (2003); Consumer Protection Act, NEB. REV. STAT. §§ 59-1601 to -1623 (2004); Uniform Deceptive Trade Practices Act, NEB. REV. STAT. §§ 87-301 to -306 (2004); NEV. REV. STAT. ANN. §§ 598.0903-0999 (LexisNexis 2004); N.H. REV. STAT. ANN. §§ 358-A:1-:13 (2004); N.J. STAT. ANN. §§ 56:8-1 to -106 (West 2001 & Supp. 2005); Unfair Practices Act, N.M. STAT. §§ 57-12-1 to -22 (2000 & Supp. 2003); N.Y. GEN. BUS. LAW §§ 349 to 349-c (McKinney 2004); N.C. GEN. STAT. §§ 75-1 to -49 (2003); N.D. CENT. CODE §§ 51-10-01 to -15 (1999); N.D. CENT. CODE §§ 51-15-01 to -11 (1999 & Supp. 2003); OHIO REV. CODE ANN. §§ 1345.01-.13 (LexisNexis 2002 & Supp. 2005); Oklahoma Consumer Protection Act, OKLA. STAT. ANN. tit. 15, §§ 751-789 (West 1993 & Supp. 2005); Oklahoma Deceptive Trade Practices Act, OKLA. STAT. ANN. tit. 78, §§ 51-55 (West 2002 & Supp. 2005); OR. REV. STAT. ANN. §§ 646.605-.656 (West 1983 & Supp. 1998); Unfair Trade Practices and Consumer Protection Law, 73 PA. STAT. ANN. §§ 201-1 to 201-9.2 (West 1993 & Supp. 2005); Unfair Trade Practice and Consumer Protection Act, R.I. GEN. LAWS §§ 6-13.1-1 to -27 (2001); South Carolina Unfair Trade Practices Act, S.C. CODE ANN. §§ 39-5-10 to -160 (1976 & Supp. 2004); S.D. CODIFIED LAWS §§ 37-24-1 to -35 (2000); Tennessee Consumer Protection Act of 1977, TENN. CODE ANN. §§ 47-18-101 to -125 (2001 & Supp. 2004); Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 2002 & Supp. 2005); Utah Consumer Sales Practices Act, UTAH CODE ANN. §§ 13-11-1 to -23 (2001 & Supp. 2004); VT. STAT. ANN. tit. 9, §§ 2451-2480m (1993 & Supp. 2004); Virginia Consumer Protection Act of 1977, VA. CODE ANN. §§ 59.1-196 to -207 (2001 & Supp. 2005); Consumer Protection Act, WASH. REV. CODE ANN. §§ 19.86.010 to -.86.920 (West 1999 & Supp. 2005); West Virginia Consumer Credit and Protection Act, W. VA. CODE ANN. §§ 46A-6-101 to -110 (LexisNexis 1999); WIS. STAT. ANN. § 100.18 to 100.183, 100.20 (West 2004 & Supp. 2004); Wyoming Consumer Protection Act, WYO. STAT. ANN. §§ 40-12-101 to -114 (2005).

In addition to these general deceptive practices statutes, several states also have specific false advertising statutes. CAL. BUS. & PROF. CODE §§ 17500-17594 (West 1997 & Supp. 2005); GA. CODE ANN. §§ 10-1-420 to -427 (2000 & Supp. 2005); MINN. STAT. ANN. § 325F.67 (West 2004); N.M. STAT. §§ 57-15-1 to -10 (2000); N.Y. GEN. BUS. LAW §§ 350-350-f-1 (McKinney 2004); N.D. CENT. CODE §§ 51-12-01 to -14 (1999); VA. CODE ANN. § 18.2-216 (2004 & Supp. 2005).

[135] FTC FACT SHEET, *supra* note 120. In fifteen states, enforcement authority was

Indeed, several states established official "Consumer Protection Departments" or consumer counsel positions within the attorney general's office.[136] As of 1971, however, only eight states allowed private causes of action for damages.[137] Over the next decade, however, this landscape would change as states slowly amended their consumer fraud statutes to allow private damages actions.[138]

III. RELIANCE AND CAUSATION STANDARDS FOR PUBLIC AND PRIVATE ENFORCEMENT

The history of lax enforcement and the perceived need for new laws to protect consumers created an environment for broad judicial interpretations of consumer fraud statutes. To advance the government's public enforcement role in stopping fraud before the consumer is harmed, courts relaxed traditional fraud requirements for particular types of relief.[139] Thus, where the government sought injunctive relief to stop incipient fraud, courts held that government agencies do not need to prove consumer injury or consumer reliance.[140] The broad interpretation of public enforcement provisions strongly influenced how courts applied consumer fraud statutes to private causes of action. Thus, with little thought given to the different purposes of public and private actions, state courts incorporated the deterrence objective of government suits for injunctions[141] and loosened the traditional reliance-causation requirement in private claims for damages.[142] Thus, today's misrepresentation case—where no one may have been actually misled by the manufacturer's statement—was born.

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shared between the attorney general and a local enforcement agency, such as the district, county or city attorney. *Id.*

[136] Lovett, *State Deceptive Trade Practice Legislation*, *supra* note 61, at 730; *accord* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971) [hereinafter Lovett, *Private Actions*] (noting creation of state consumer protection agencies in several states). Some local jurisdictions, like New York City, even created their own consumer protection divisions. *E.g.*, NEW YORK CITY LAW NO. 83 (1969) (creating Department of Consumer Affairs), *available in* PRACTISING LAW INST., *supra* note 57, at 277–79.

[137] Lovett, *Private Actions*, *supra* note 136, at 275–76 & n.6 (stating that California, Colorado, Hawaii, Massachusetts, North Carolina, Rhode Island, Vermont, and Washington allowed private damages actions); *see also id.* at 282–83 (discussing requirements of these eight private action provisions).

[138] By November 1973, thirty-one states had adopted private cause of action provisions. FTC Fact Sheet, *supra* note 120. Washington, for example, added a private cause of action in 1970. Jennifer Rust Murray, *Proving Cause in Fact Under Washington's Consumer Protection Act: The Case for a Rebuttable Presumption of Reliance*, 80 WASH. L. REV. 245, 245 & n.3 (2005). Illinois added a private cause of action provision in 1973. *E.g.*, Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 160 (Ill. 2002). Pennsylvania did not add a private cause of action provision until 1976. *E.g.*, Weinberg v. Sun Co., 777 A.2d 442, 446 (Pa. 2001).

[139] *See infra* Part III.A.

[140] *See infra* Part III.A.

[141] *See infra* Part III.B.2.

[142] *See infra* Part III.B.2.

A. Government Standards of Reliance and Causation

Government enforcement standards reflect the government's role in preventing incipient fraud. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[143] To establish a violation of Section 5, the FTC does not need to prove consumer reliance or an injury to the consumer.[144] Rather, courts have recognized a lower standard in order to effectuate the public purpose of the FTC Act and to allow the FTC to take preemptive action against deceptive practices.[145] Moreover, the FTC is authorized to seek injunctive relief whenever it "has reason to believe that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," and an injunction "would be in the interest of the public."[146] No reliance-causation—or even injury for that matter—is required. Accordingly, to obtain injunctive relief[147] under the FTC Act, the FTC need only show that the misrepresentation was "likely to mislead" the consumer.[148]

Often overlooked, however, is the higher burden that the FTC faces when seeking consumer redress.[149] In a consumer redress claim, the FTC seeks a monetary award that it then uses to provide refunds to affected

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[143] 15 U.S.C. § 45(a) (2000).

[144] *E.g.*, FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); *see also* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 676–77 (1977) (noting that "issues of . . . causality relating to whether consumers were influenced in purchasing decisions by the false claim are largely avoided by the Commission rules that it need show only capacity to deceive rather than actual deception, and capacity to affect purchasing decisions rather than actual effects").

[145] *See, e.g.*, *Freecom Commc'ns Inc.*, 401 F.3d at 1203; *accord* Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) ("The purpose of the Federal Trade Commission Act is to protect the public . . . and it is in the public interest to stop any deception at its incipiency.") (internal citations omitted).

[146] 15 U.S.C. § 53(b) (2000).

[147] Apart from enjoining the misrepresentations, the FTC also can order corrective advertising. *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 752 (D.C. Cir. 1977) (upholding injunction prohibiting company from representing that Listerine helps prevents colds and sore throats and requiring future advertising to state that "Listerine will not help prevent colds or sore throats or lessen their severity").

[148] *Freecom Commc'ns Inc.*, 401 F.3d at 1203.

[149] The FTC has the authority to seek injunctive relief under Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). Courts have found that this provision authorizes the FTC to seek other equitable remedies such as disgorgement and consumer redress. *See, e.g.*, FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989) ("[T]he statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."); *see also* FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314 (8th Cir. 1991) (finding district court has authority to order consumer redress based on its "inherent equitable powers"); FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (establishing principle that district court's inherent powers authorize ancillary relief under Section 13(b)). In addition, the FTC Act provides explicit authorization for consumer redress when a defendant violates a cease and desist order or FTC rule. 15 U.S.C. § 57b(b) (2000).

consumers.[150] While proof of consumer reliance and injury is not necessary to establish a violation of the FTC Act—and the government's accompanying right to injunctive relief—proof of reliance is required when the FTC seeks a monetary consumer redress award.[151]

Like the FTC, state attorneys general typically do not need to prove consumer reliance when establishing that a practice violates the state deceptive practices act.[152] Indeed, many state statutes provide that a practice may violate the consumer fraud statute, "whether or not any person has in fact been misled, deceived, or damaged thereby."[153] Thus, like the FTC, a state attorney general can establish that a misrepresentation violates a state consumer fraud statute simply by showing that the misrepresentation is likely to mislead consumers. Actual deception or reliance is not required.[154]

State courts, however, have taken different approaches to government claims for restitution. In a minority of jurisdictions, while the state does not need to show reliance to obtain a general restitution order, consumers do have to show reliance to obtain money from the restitution award.[155] Mostly, however, courts have applied the lower "no reliance-causation" standard to government restitution claims.[156] Two main reasons underlie this approach. First, as a matter of statutory construction, the statutory authorizations for equitable relief, including restitution, do not contain any

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[150] *See generally* STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 21:6 (2003) (explaining FTC distribution of redress award).

[151] *Freecom Commc'ns Inc.*, 401 F.3d at 1205. To prove reliance, however, the FTC does not need to show that a particular consumer actually relied on and was injured by the misrepresentation. *Id.*

[152] *E.g.*, Consumer Prot. Div. Office of the Att'y Gen. v. Consumer Publ'g Co., 501 A.2d 48, 68–69 (Md. 1985). *See also* Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155, 174 (2004) (discussing the "strengthen[ed] hand" of state attorneys general and finding that state enforcement typically does not require consumer reliance).

[153] *E.g.*, ARIZ. REV. STAT. ANN. § 44-1522(A) (2003 & Supp. 2004). Eleven states plus the District of Columbia include this or similar language in their consumer fraud statute. ARIZ. REV. STAT. ANN. § 44-1522(A) (2003 & Supp. 2004); DEL. CODE ANN. tit. 6, § 2513 (1999); D.C. CODE ANN. § 28-3904 (LexisNexis 2001 & Supp. 2005); 815 ILL. COMP. STAT. ANN. 505/2 (West 1999); IOWA CODE ANN. § 714.16(2) (West 2003); KAN. STAT. ANN. § 50-626(b) (1994 & Supp. 2004); MD. CODE ANN., COM. LAW § 13-302 (LexisNexis 2000); MINN. STAT. ANN. § 325F.69(subd. 1) (West 2004 & Supp. 2005); N.J. STAT. ANN. § 56:8-2 (West 2001 & Supp. 2005); N.D. CENT. CODE § 51-15-02 (1999 & Supp. 2005); S.D. CODIFIED LAWS § 37-24-6 (2003); W. VA. CODE ANN. § 46A-6-102(7)(M) (LexisNexis 1999 & Supp. 2005).

[154] *E.g.*, *Consumer Prot. Div. Office of the Att'y Gen.*, 501 A.2d at 68 ("In not requiring proof of actual deception or harm to consumers, the [Maryland] Consumer Protection Act follows the practice of the Federal Trade Commission.").

[155] *See, e.g.*, Consumer Prot. Div. v. Morgan, 874 A.2d 919, 943 (Md. 2005); State *ex rel.* Kidwell v. Master Distrib., Inc., 615 P.2d 116, 126 (Idaho 1980) (finding restitution order must include "procedure by which consumer claims may be efficiently and fairly processed").

[156] *See, e.g.*, Telcom Directories, Inc. v. Commonwealth, 833 S.W.2d 848, 850 (Ky. Ct. App. 1992) (noting that "proof of actual deception" not required for state restitution order); People v. Toomey, 203 Cal. Rptr. 642, 658–59 (Cal. Ct. App. 1984) ("[R]eliance and actual damages are not necessary elements to [a restitution] award.").

causal language or injury requirement.[157] More importantly, this approach focuses on the deterrent function of a restitution award: "Restitution is not intended to benefit the tendees by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations."[158]

B. Private Enforcement Standards of Reliance and Causation

By embracing the deterrent function of government actions, some courts took the next step towards the modern misrepresentation class action—the wholesale application of government enforcement standards to private damages actions.[159] This approach, however, ignores the different purpose of a private damages action.

Unlike the FTC Act,[160] nearly every state[161] allows a private damages action for misrepresentation claims.[162] In addition to a deceptive practices

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[157] *E.g.*, *Toomey*, 203 Cal. Rptr. at 658 (noting statute authorizes court to order defendant "to restore . . . any money or property . . . which may have been acquired by means of any [unlawful practice]") (alteration in original).

[158] *Id.* at 658–59.

[159] *See infra* notes 201–208 and accompanying text.

[160] *See, e.g.*, Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926) (refusing to allow private claim under FTC Act); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988–89 (D.C. Cir. 1973) (holding that the FTC Act does not provide express private cause of action and refusing to imply private remedy). *But see* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 586–88 (N.D. Ind. 1976) (recognizing private right of action where alleged conduct was subject to prior cease and desist order issued by FTC). In 1978, the FTC attempted to create a private cause of action under its rules governing franchise disclosure requirements. *See* 16 C.F.R. § 436.1–.3 (2005). In its "Statement of Basis and Purpose" accompanying this rule, the FTC stated its belief that a private cause of action should exist under the franchise disclosure rules. Final Trade Regulation Rule, 43 Fed. Reg. 59,614, 59,723 (Dec. 21, 1978). Still, courts refused to imply a private remedy, holding that the FTC's statement did not provide evidence of changed congressional intent. *See, e.g.*, Freedman v. Meldy's, Inc., 587 F. Supp. 658, 661–62 (E.D. Pa. 1984) (holding that FTC's intent was insufficient to imply a private cause of action).

[161] Iowa and North Dakota are the only two states that do not allow a private damages action. Only the Attorney General can bring suit under Iowa's consumer fraud statute. Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 227–28 (Iowa 1998) (finding no implied private right of action under Iowa Code § 714.16). Iowa does provide a limited private right of action under its Consumer Credit Code. *See* IOWA CODE ANN. § 537.5201 (West 1997 & Supp. 2005) (listing specific violations, such as improper credit charges, that permit civil actions for damages). North Dakota allows a private civil suit, but only for injunctive relief. N.D. CENT. CODE § 51-10-06 (1999) (unfair practices); *id.* at § 51-12-14 (1999) (false advertising). The North Dakota Supreme Court has refused to imply a private right of action for damages. Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 628 N.W.2d 707, 708, 710–12 (N.D. 2001).

[162] ALA. CODE § 8-19-10 (LexisNexis 2002 & Supp. 2004); ALASKA STAT. § 45.50.531(a) (2004); ARK. CODE ANN. § 4-88-113(f) (2001 & Supp. 2005); CAL. CIV. CODE § 1780(a) (West 1998 & Supp. 2005); COLO. REV. STAT. § 6-1-113(1) (2004); CONN. GEN. STAT. ANN. § 42-110g (West 2000 & Supp. 2005); DEL. CODE ANN. tit. 6, § 2525 (1999); D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2001 & Supp. 2005); FLA. STAT. ANN. § 501.211(1) (West 2002 & Supp. 2005); GA. CODE ANN. § 10-1-399(a) (2000 & Supp. 2005); HAW. REV. STAT. ANN. § 480-13(b) (LexisNexis 2002 & Supp. 2004); IDAHO CODE ANN. § 48-608(1) (2000 & Supp. 2005); 815 ILL. COMP. STAT. ANN. 505/10a (West 1999 & Supp.

violation, a private plaintiff must satisfy the requirements of this private cause of action provision.[163] Adopting the deterrence purpose of government enforcement, state courts have loosened the traditional reliance-causation requirement,[164] even though the statutory text leaves no doubt that traditional tort causation principles apply to private damages actions.[165]

New York—the jurisdiction governing the McDonald's case[166]—illustrates this confusion. Under New York law, two statutes govern deceptive advertising: (1) the false advertising statute[167] and (2) the deceptive practices act.[168] To bring a damages claim under the false advertising statute, a private plaintiff must show reliance.[169] But when the plaintiff brings the exact same false advertising claim under the deceptive practices act,[170] courts no longer require reliance.[171] Both statutes contain identical causation requirements—only persons "injured by reason of" a deceptive state-

2005); 815 ILL. COMP. STAT. ANN. 510/3 (West 1999) (limited to injunctive relief); IND. CODE ANN. § 24-5-0.5-4(a) (West 1995 & Supp. 2005); IOWA CODE ANN. § 714.16(7) (West 2003 & Supp. 2005); KAN. STAT. ANN. § 50-634(a) (1994 & Supp. 2004); KY. REV. STAT. ANN. § 367.220(1) (West 2004); LA. REV. STAT. ANN. § 51:1409A (2003 & Supp. 2005); ME. REV. STAT. ANN. tit. 5, § 213 (2002 & Supp. 2005); MD. CODE ANN., COM. LAW § 13-408(a) (LexisNexis 2000 & Supp. 2003); MASS. GEN. LAWS ANN. ch. 93A, § 9(1) (West 2005); MICH. COMP. LAWS ANN. § 445.911(2) (West 2002); MINN. STAT. ANN. § 8.31(3a) (West 2005); MISS. CODE ANN. § 75-24-15(1) (West 1999 & Supp. 2004); MO. ANN. STAT. § 407.025 (West 2001 & Supp. 2005); MONT. CODE ANN. § 30-14-133(1) (2003); NEB. REV. STAT. § 59-1609 (2004); NEV. REV. STAT. ANN. § 41.600 (LexisNexis 2002); N.H. REV. STAT. ANN. § 358-A:10 (1995 & Supp. 2004); N.J. STAT. ANN. § 56:8-19 (West 2001 & Supp. 2005); N.M. STAT. ANN. § 57-12-10 (2000 & Supp. 2003); N.Y. GEN. BUS. LAW § 349(h) (McKinney 2004); N.C. GEN. STAT. § 75-16 (2003); OHIO REV. CODE ANN. § 1345.09 (LexisNexis 2002 & Supp. 2005); OKLA. STAT. ANN. tit. 15, § 761.1 (West 1993 & Supp. 2005); OR. REV. STAT. ANN. § 646.638(1) (West 1983 & Supp. 1998); 73 PA. STAT. ANN. § 201-9.2 (West 1993 & Supp. 2005); R.I. GEN. LAWS § 6-13.1-5.2(a) (2001 & Supp. 2004); S.C. CODE ANN. § 39-5-140(a) (1985 & Supp. 2004); S.D. CODIFIED LAWS § 37-24-31 (2000); TENN. CODE ANN. § 47-18-109(a)(1) (2001 & Supp. 2004); TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 2002 & Supp. 2004); UTAH CODE ANN. § 13-11-19 (2001); VT. STAT. ANN. tit. 9, § 2461(b) (1993 & Supp. 2003); VA. CODE ANN. § 59.1-204 (2001 & Supp. 2005); WASH. REV. CODE ANN. § 19.86.090 (West 1999 & Supp. 2005); W. VA. CODE ANN. § 46A-6-106 (LexisNexis 1999); WIS. STAT. ANN. § 100.20(5) (West 2004 & Supp. 2004); WYO. STAT. ANN. § 40-12-108(a) (2005). In addition, Arizona allows an implied private right of action under its consumer fraud statute. Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119, 1122 (Ariz. 1974) (en banc) (establishing that Arizona's consumer fraud statute implies a private right of action); *accord* Holeman v. Neils, 803 F. Supp. 237, 242 (D. Ariz. 1992) (noting that Arizona consumer fraud statute provides an implied right of action).

[163] *See supra* note 162.

[164] *See infra* notes 193–215 and accompanying text.

[165] *See infra* Part V.D.

[166] *See supra* notes 24–25 and accompanying text.

[167] N.Y. GEN. BUS. LAW § 350 (McKinney 2004).

[168] N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

[169] *E.g.*, Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 599 (N.Y. App. Div. 1998) ("[I]ndividualized proof of reliance is essential to the causes of action for false advertising under [General Business Law] § 350."), *aff'd*, 720 N.E.2d 892 (N.Y. 1999).

[170] *E.g.*, *id.* (discussing false advertising claim brought under deceptive practices statute).

[171] Stutman v. Chem. Bank, 731 N.E.2d 608, 611–12 (N.Y. 2000).

ment can proceed.[172] Yet, one statute requires reliance-causation, while the other does not. This confusion in New York reflects the contradictory approaches taken throughout the nation.

1. Reliance-Causation Is Required

Remarkably, only a few state courts have recognized that, in a misrepresentation case, causation and reliance are essentially the same thing.[173] These courts recognize that, as a practical matter, damages cannot be "caused" by a defendant's misrepresentation without reliance on the statement.[174] In other words, if the defendant's statement did not have some influence on the plaintiff's decision to purchase the product, then it did not cause her any harm. The Minnesota Supreme Court, for example, took this approach in *Group Health Plan, Inc. v. Philip Morris Inc.*[175] While the analysis in that case essentially acknowledged that causality requires reliance, the court faltered in its application of this principle.

In *Group Health Plan, Inc.*, a group of health maintenance organizations brought suit against various tobacco companies under three of Minnesota's consumer fraud statutes.[176] On certification from the federal district court,[177] the Minnesota Supreme Court considered whether reliance was required under the state's consumer fraud statute.[178]

Unlike other courts,[179] the court correctly recognized the distinction between the elements necessary to establish a statutory violation and the additional elements necessary to satisfy the private cause of action provision.[180] Like many states, Minnesota's misrepresentation statute provided that any misrepresentation violated the act "whether or not any person has in fact been misled, deceived, or damaged thereby."[181] The court found that this language established the standard for a statutory violation: a mis-

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[172] N.Y. GEN. BUS. LAW § 349-h (McKinney 2004); N.Y. GEN. BUS. LAW § 350-e (McKinney 2004).

[173] *See infra* notes 175–186, 190–192 and accompanying text.

[174] *See infra* notes 175–186, 190–192 and accompanying text.

[175] 621 N.W.2d 2 (Minn. 2001).

[176] *Id.* at 4. These statutes were: MINN. STAT. ANN. §§ 325D.13 (Unlawful Trade Practices Act), 325F.67 (false statement in advertising provision), 325F.69(1) (prevention of consumer fraud provision) (West 2004 & Supp. 2005). *Id.* at 3.

[177] The HMOs filed suit in the United States District Court for the District of Minnesota. Following motions to dismiss by the tobacco manufacturers, the federal district court certified two questions to the Minnesota Supreme Court concerning the Minnesota statutes: (1) whether a plaintiff must be a purchaser of the defendant's products; and (2) whether a plaintiff must plead and prove reliance on the defendant's statements or conduct. *Group Health Plan, Inc.*, 621 N.W.2d at 4; *see also* Group Health Plan, Inc. v. Philip Morris Inc., 188 F. Supp. 2d 1122, 1125 (D. Minn. 2002) (noting certification followed motions to dismiss).

[178] *Group Health Plan, Inc.*, 621 N.W.2d at 4–5.

[179] *See infra* notes 193–215 and accompanying text.

[180] *Group Health Plan, Inc.*, 621 N.W.2d at 12–13.

[181] MINN. STAT. ANN. § 325F.69(1) (West 2004); *see supra* note 153 (listing states with identical provision).

representation could violate the statute, and subject the manufacturer to government enforcement, without any showing of consumer reliance.[182]

The court then turned to the requirements of the private cause of action provision. The court focused on the provision's causation requirement, which allowed a damages action only by someone "injured by" a violation.[183] The court concluded that the required causal nexus between a defendant's misrepresentation and a plaintiff's injury could be shown only by reliance:

> [W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct . . . , as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes. Therefore, in a case such as this, it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement.[184]

Thus, although allegations of reliance were not necessary to violate the statute,[185] reliance was required to recover damages.[186]

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[182] *See Group Health Plan, Inc.*, 621 N.W.2d at 12. Other states similarly have distinguished between public enforcement of a violation and a private claim for damages. *E.g.*, CitaraManis v. Hallowell, 613 A.2d 964, 969 (Md. 1992). In *CitaraManis*, the Maryland Court of Appeals explained:

> In a public enforcement proceeding "[a]ny practice prohibited by this title is a violation . . . whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice." In contrast, a private enforcement proceeding pursuant to § 13-408(a) expressly only permits a consumer "to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Section 13-408(a), therefore, requires an aggrieved consumer to establish the nature of the actual injury or loss that he or she has allegedly sustained as a result of the prohibited practice. This statutory construction creates a bright line distinction between the public enforcement remedies available under the CPA, and the private remedy available under § 13-408(a).

Id. (citations omitted); *see also* Weinberg v. Sun Co., 777 A.2d 442, 445–46 (Pa. 2001) (noting that "tendency to deceive" language is a "consideration[ ] appropriate for a high public official responsible for protecting public interests").

[183] *Group Health Plan, Inc.*, 621 N.W.2d at 13; *see also* MINN. STAT. ANN. § 8.31(3a) (West 2005).

[184] *Group Health Plan, Inc.*, 621 N.W.2d at 13; *accord, e.g.*, Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303, 308 (M.D.N.C. 1988) ("To prove actual causation, a plaintiff must prove that he or she detrimentally relied on the defendant's deceptive statement or misrepresentation.") (citing Pearce v. Am. Defender Life Ins. Co., 343 S.E.2d 174, 180 (N.C. 1986)); Feitler v. Animation Celection, Inc., 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (holding causal element of misrepresentation claim requires reliance by the consumer); *cf.* Siemer v. Assocs. First Capital Corp., No. CV 97-281 TUC JMR (JCC), 2001 U.S. Dist. LEXIS 12810, at *12 (D. Ariz. Mar. 29, 2001) ("The injury element of the [state consumer protection statute] claim occurs when the consumer relies on the misrepresentations . . . .").

[185] *Group Health Plan, Inc.*, 621 N.W.2d at 12.

[186] *Id.* at 13.

Based on this analysis, however, the Minnesota Supreme Court mistakenly leapt to the conclusion that a private plaintiff was not required to allege reliance as an element.[187] The fact that a defendant can violate the statute (i.e., make a misrepresentation) without any reliance does not mean that a private plaintiff does not need to plead reliance to state a claim for damages. The Minnesota Supreme Court, however, skipped over this step and allowed a plaintiff to state a claim without allegations of reliance.[188] This error has led to easier certification of consumer class actions in Minnesota.[189]

Other states, however, correctly have recognized that reliance-causation is an essential element and do not allow a plaintiff to state a claim without allegations of reliance. In *Campbell v. Beak*,[190] for example, the Georgia Court of Appeals held that the state consumer fraud statute incorporates the "'reliance' element of the common law tort of misrepresentation into the causation element."[191] Likewise, the Pennsylvania Supreme Court has explained that the statute's causation language—"as a result of"—means that a plaintiff must allege reliance.[192]

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[187] *Id.* at 12. The court explained its analysis as follows:

> The tobacco companies argue that, to the extent the legislature eliminated elements of common law fraud from a statutory misrepresentation action, it did so only for claims seeking injunctive relief, not damages. They point out that the express language eliminating the element of reliance is found only in one of the substantive statutes and that statute authorizes only injunctive relief. The tobacco companies argue that, because the statute that authorizes actions for damages, Minn. Stat. § 8.31, subd. 3a, contains no similar express exemption from the reliance requirement, there is therefore no such exemption intended for a damages action . . . . But subdivision 3a authorizes a damages action for a violation of the substantive statutes. As explained, those statutes define what constitutes a violation, and they do so in a manner that indicates that reliance is not a separate element of a violation. We will not read an element into a statutory claim that the legislature has not articulated and, to the contrary, has indicated should be eliminated.

Id.

[188] *Id.*

[189] *See, e.g.*, Curtis v. Philip Morris Cos., No. PI 01-018042, 2004 WL 2776228, at *3–*5 (D. Minn. Nov. 29, 2004). In *Curtis*, the federal district court certified a statewide class action of all Marlboro Lights purchasers. *Id.* at *5. Relying on *Group Health Plan, Inc.*, the court found that plaintiffs' allegation that "the lengthy course of misrepresentations concerning 'light' cigarettes, which affected a large number of Minnesota cigarette consumers, is sufficient evidence of reliance at this stage of the proceedings." *Id.* at *3.

[190] 568 S.E.2d 801 (Ga. Ct. App. 2002).

[191] *Id.* at 805.

[192] *E.g.*, Weinberg v. Sun Co., 777 A.2d 442, 446 (Pa. 2001) (finding that "[n]othing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation"); *see also* Toy v. Metro. Life Ins. Co., 863 A.2d 1, 11 (Pa. Super. Ct. 2004) (holding that *Weinberg* applies to all private actions under Pennsylvania's UTP/CPL).

2. *Reliance-Causation Abandoned by the Courts*

Taking an alternative view, courts in some other states have abandoned any causation requirement by eliminating reliance.[193] These decisions are premised on two underlying assumptions: (1) that the government's historical ineffectiveness justifies a broad private remedy,[194] and (2) that public enforcement standards also apply to a private damages claim.[195]

Underpinning these decisions is the historical context of the private cause of action provision—an era when government enforcement was lax or non-existent.[196] In *Slaney v. Westwood Auto, Inc.*,[197] for example, the Massachusetts Supreme Judicial Court based its decision to abandon the reliance element on the ineffectiveness of government enforcement in the 1960s.[198] The court repeated the same criticisms that had been leveled at the FTC of the 1960s: the state agencies were "understaffed and underfinanced, morassed in a sea of red tape, and unbearably slow acting."[199] Thus, the court justified an expansive private remedy based, in part, on the lack of government resources to obtain relief for the consumer.[200]

Given the perception of lax government enforcement, courts typically have ignored any distinction between the public enforcement provisions of the consumer fraud statute and the private cause of action provisions. Many courts thus blindly relied on the standards for violating the act instead of differentiating the separate requirements of the private cause of action provision.[201] A deceptive practice can violate a consumer fraud statute "whether or not any person has in fact been misled, deceived, or damaged thereby."[202] Courts recognized that this language signaled the legislature's intent to make it easier for the government to sue for statutory consumer fraud than it had been to sue for common law fraud.[203] Many states then applied this language and its lower threshold to the private damages

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[193] *See infra* notes 197–215 and accompanying text.

[194] *See infra* notes 197–200 and accompanying text.

[195] *See infra* notes 201–208 and accompanying text.

[196] *See supra* Part II.A.

[197] 322 N.E.2d 768 (Mass. 1975).

[198] *Id.* at 775–77.

[199] *Id.* at 776 (citation omitted). According to the court, the Consumer Protection Division of the Massachusetts Attorney General spent most of its time responding to consumer complaints instead of pursuing violations of the statute. *Id.*

[200] *Id.*; *see also, e.g.*, Hinchliffe v. Am. Motors Corp., 440 A.2d 810, 815 n.5 (Conn. 1981) (relying on notion that government enforcement is "hampered").

[201] *See, e.g.*, Cole v. Hewlett Packard Co., No. 90,164, 2004 WL 376471, at *6 (Kan. Ct. App. Feb. 27, 2004) (relying on statutory language that act is violated "whether or not the consumer has been misled"); Odom v. Fairbanks Memorial Hosp., 999 P.2d 123, 132 (Alaska 2000) (expressly using state enforcement case law as basis of private action standard); Tallmadge v. Aurora Chrysler-Plymouth, Inc., 605 P.2d 1275, 1277 (Wash. Ct. App. 1979) (same).

[202] *See supra* note 153 and accompanying text.

[203] *E.g.*, State v. Alpine Air Prods., Inc., 500 N.W.2d 788, 790 (Minn. 1993).

claim.[204] Following this reasoning, courts have held that reliance is not required to state a private cause of action.[205]

Other courts have reached the same result by focusing on the FTC Act's standards for public injunctive relief, which do not require reliance.[206] As noted, the FTC need only show that a misrepresentation is "likely to mislead" a consumer and does not have to show causation or even injury.[207] Courts, however, have transposed these public injunctive relief standards to private *damages* actions and have failed to address the causal language present in the private damages provisions.[208]

Still, a few courts have attempted to justify their abandonment of reliance on the ground that reliance is not the same as causation. In *Collora v. R. J. Reynolds Tobacco Co.*,[209] for example, the court admitted that the "as a result of" language in the consumer fraud statute imposes a causation requirement.[210] Recognizing that normally causation would equal reliance, the court took pains to describe the causation requirement as "less strict" than a "proximate cause" requirement but failed to provide any authority for this principle.[211]

In *Varacallo v. Massachusetts Mutual Life Insurance Co.*,[212] the New Jersey Appellate Division similarly stated that there is a "distinction between proof of reliance and proof of causation."[213] At the same time, however, the court explained that plaintiffs could utilize a "presumption or inference of reliance *and* causation, where omissions of material fact are common to the class."[214] The court appeared to recognize that it was equating reliance with causation, stating that "if the plaintiffs in this case establish the core issue of liability, they will be entitled to a presumption of reliance and/or causation."[215]

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[204] *E.g.*, Gennari v. Weichert Co. Realtors, 691 A.2d 350, 366 (N.J. 1997).

[205] *E.g.*, *id.*

[206] *E.g.*, Slaney v. Westwood Auto, Inc., 322 N.E.2d 768, 779 (Mass. 1975).

[207] *See* discussion *supra* Part III.A.

[208] *See, e.g.*, Oswego Laborers' Local 214 v. Marine Midland Bank, N.A., 647 N.E.2d 741, 745 (N.Y. 1995) (mentioning causal element without any discussion of applicable standard).

[209] No. 002-00732, 2003 WL 23139377 (Mo. Cir. Ct. Dec. 31, 2003).

[210] *Id.* at *2.

[211] *See id.* The court determined that causation is satisfied merely by showing purchase and receipt of a "product that would have been worth more if it in fact had truly been as represented." *Id.* The court found that whether or not the plaintiff purchased the product based on the defendant's alleged misrepresentation was "irrelevant." *Id.* The court, however, drew the wrong causal connection. In a misrepresentation case, a manufacturer's misrepresentation must induce purchase to cause an injury. *E.g.*, WILLIAM L. PROSSER, LAW OF TORTS § 108, at 714 (4th ed. 1971). That inducement to purchase provides the causal connection between the manufacturer's false statement and the consumer's resulting harm. *Id.*

[212] 752 A.2d 807 (N.J. Super. Ct. App. Div. 2000).

[213] *Id.* at 817.

[214] *Id.* (emphasis added).

[215] *Id.* at 818; *see also* Stutman v. Chem. Bank, 731 N.E.2d 608, 612 (N.Y. 2000) (stating that reliance and causation are "not identical").

Thus, some courts have relaxed the substantive requirement of reliance-causation and thereby allowed easy certification of misrepresentation class actions.

IV. THE PUBLIC LAW JUSTIFICATION FOR ABANDONING RELIANCE-CAUSATION

Implicit in the decision of these courts to abandon reliance is an acceptance of the "public-law" version of torts.[216] Historically, the tort system—including misrepresentation cases—was viewed as a means of determining whether a certain actor had wronged a certain victim and, if so, the nature of the appropriate remedy.[217] Up to the nineteenth century, "it is fair to characterize Anglo-American tort law as a peace system, a set of rules which provides a nonviolent way of resolving serious interpersonal disputes."[218] Under this "wrongs-based" conception of tort law, the court's function was not to issue public regulations but to resolve conflicts as presented by the parties.[219]

In recent years, however, commentators have championed a "public law" vision of torts.[220] Under this approach, tort law came to be viewed not as a method for resolving personal disputes, but as a social mechanism for maximizing collective welfare and deterring misconduct.[221] While tort law is nominally a system for providing redress to injured parties, public law advocates view it as a public policy tool that uses private disputes to make public rules:[222]

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[216] *See* George L. Priest, *What We Know and What We Don't Know About Modern Class Actions: A Review of the Eisenberg–Miller* Study, 9 CIV. JUST. REP. 1, 7 (2005), *available at* http://www.manhattan-institute.org/pdf/cjr_09.pdf (noting that the class action problem has resulted from, among other reasons, "the expansion of liability standards since the mid-1970s based upon largely simple views about how liability judgments can improve societal welfare"); *see generally* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) [hereinafter Rosenberg, *The Causal Connection*] (describing "public law" vision of torts).

[217] John C. P. Goldberg, *Tort Law for Federalists (And the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 14 (2004) [hereinafter Goldberg, *Tort Law for Federalists*].

[218] John Hasnas, *What's Wrong with a Little Tort Reform?*, 32 IDAHO L. REV. 557, 562 (1996).

[219] Goldberg, *Tort Law for Federalists*, *supra* note 217, at 14.

[220] *E.g.*, Rosenberg, *The Causal Connection*, *supra* note 216, at 859.

[221] Hasnas, *supra* note 218, at 565. Scholars came to believe that "[t]he traditional account—under which tort law was understood as a set of rules and concepts, grounded in ordinary morality, for resolving disputes over alleged wrongs committed by *A* against *B*—was no longer obviously in tune with modern realities . . . ," such as the industrialized economy and the distance between manufacturer and consumer. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 521 (2003) [hereinafter Goldberg, *Twentieth-Century Tort Theory*].

[222] *E.g.*, CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 13–32 (2003) (arguing that tort law should be used to achieve "socially optimal management of accident risk"); *accord* Rosenberg, *The Causal Connection*, *supra* note 216, at 907 (arguing that consumer fraud law should "regulat[e]

This public law vision of torts upholds deterrence as the primary goal of the tort system.[223] Under a deterrence theory, the goal of tort law is to deter the risk of harm in an economically efficient manner.[224] From a deterrence perspective, the reliance-causation requirement of a misrepresentation claim is unnecessary: "[I]f one could show that, by some coincidence, television manufacturers were in the best position to deter future automobile accidents, then economic analysis would call for the imposition of liability on television manufacturers, notwithstanding the absence of any causal connection between their conduct and the accidents being deterred."[225] Because deterrence theorists impose liability on the best risk-avoider, there is no need to establish a single causal connection.[226] In a misrepresentation case, the manufacturer stands as the best entity to avoid making false statements about its product. Thus, there need not be a reliance-causation relationship with a particular plaintiff as long as the size of the damages award reflects the extent of the potential injuries that could have resulted from the misrepresentation. Deterrence analysis focuses on how

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institutional policies or systematic practices that violate external substantive norms"). For a critical discussion of MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT, see MICHAEL S. GREVE, HARM-LESS LAWSUITS? WHAT'S WRONG WITH CONSUMER CLASS ACTIONS 10–13 (AEI Press 2005).

[223] Modern tort scholarship posits three primary functions of tort law: deterrence, corrective justice, and compensation. *See, e.g.*, Jeffery O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 138–39 (1999). For a succinct overview of the historical development of these competing theories, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997).

[224] *See* George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 20–21 (1987) ("[L]iability should be placed on the party that could have prevented the accident most effectively in order to create incentives to take such actions in the future."). *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Not all deterrence theorists embrace an economics approach to tort law. *See, e.g.*, Schwartz, *supra* note 223, at 1829. Rather, some scholars have taken a populist approach that views tort law as deterring big business from harming the "little guy" consumer. *Id.* (discussing work of Joan Claybrook). Others have approached deterrence from a socialist perspective that views tort defendants as capitalists likely to impose injury. *Id.* (discussing work of Richard Abel); *see also* Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 514 (dividing deterrence theory into two approaches: (1) compensation-deterrence theory, and (2) economic deterrence theory).

[225] Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 556 (paraphrasing GUIDO CALABRESI, THE COST OF ACCIDENTS 136 (1970)).

[226] Compensation theory likewise minimizes the necessity of cause:

> [S]uppose *D* drives carelessly down a city street without incident. Five blocks away, *P*, though no fault of her own, breaks her ankle stepping off a curb . . . . [I]f *P* can prove that she has in fact suffered an injury for which she needs compensation and further can prove that *D* has engaged in antisocial conduct, why should it matter that *D*'s conduct did not cause her injury?

Id. at 530. Thus, even when the primary emphasis is placed on the compensatory goal of the tort system, it does not matter whether a particular defendant caused this particular injury. Rather, the critical feature of tort law is that the plaintiff receives payment. *Id.*

to prevent the probable harm likely to result from the misrepresentation; in other words, deterrence theory embraces the FTC's "likely to deceive" standard.[227] The fact that more or less harm than predicted—more or less actual consumer reliance and injury—came to pass is irrelevant.

In short, deterrence theory finds little justification for any causation requirement.[228] At its core, the tension arises because the reliance-causation test calls for an ex post analysis, while public law or deterrence theory takes an ex ante view.[229] An ex ante view looks at an individual's preferences "under conditions of uncertainty, at a point in time before the person knows which of possible alternative fates will come to pass."[230] In the misrepresentation case, this approach analyzes the period prior to any consumer's purchase of a product and asks what harm is likely to flow from a manufacturer's misrepresentation.[231] Conversely, reliance-causation—and the ex post view—asks what harm actually came to pass because of the misrepresentation.[232]

In the consumer fraud context, the public law argument is that the "negative value" of misrepresentation claims—the low value of the claim combined with the high costs of litigation—precludes wronged consumers from vindicating their rights.[233] Public law advocates claim that this lack of enforcement leads to under-deterrence and inefficiency.[234] But eliminating reliance as an element of a statutory misrepresentation claim removes a stumbling block in the road to class certification.[235] Removing the reliance requirement allows misrepresentation claims to more easily satisfy class certification standards by eliminating a potential individual issue.[236]

Thus, from the deterrence theorist's perspective, one should weaken the traditional tort requirements and allow private parties to vindicate public rights in a misrepresentation class action. All that matters is that *someone* has come forward to deter misconduct; it does not matter that this plaintiff's injury has no connection to the defendant's misrepresentation. In-

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[227] *See* discussion *supra* Part III.A.

[228] *See generally* Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 529–32, 556–57.

[229] Schwartz, *supra* note 223, at 1817 n.123 ("The core of the problem is that the actual causation test basically calls for an after-the-fact analysis, while the perspective of the economist is necessarily prospective."); *see also* FRIED & ROSENBERG, *supra* note 222, at 14 (finding that "ex ante and ex post preferences are mutually exclusive"); Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 444 n.18 (1990) (explaining ex ante approach of economic-deterrence theory and ex post approach of causation).

[230] FRIED & ROSENBERG, *supra* note 222, at 14.

[231] GREVE, *supra* note 222, at 19.

[232] *See id.* at 18–19.

[233] *E.g.*, Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 144 (1999).

[234] *See id.*

[235] *See supra* notes 8–10 and accompanying text.

[236] *See supra* notes 8–10 and accompanying text.

tentionally or not, this framework underlies judicial decisions relaxing or eliminating the reliance requirement for consumer fraud class actions.

V. A Simple Fix To Rein In Consumer Class Actions: Require Reliance

As others have noted, the Class Action Fairness Act of 2005 (CAFA) is not going to solve the documented abuses of the consumer class action.[237] The real solution lies in a more reasoned approach to these lawsuits: judicial enforcement of the reliance-causation requirement in state consumer fraud statutes. The interpretative foundations of the misrepresentation class action—historical non-enforcement by government agencies and application of the "public law" theory—no longer hold true.[238] Absent that underpinning, the text of the state statutes provides a clear distinction between the standards for public enforcement and the standards that should govern a private damages claim.[239]

A. Today, Government Enforcement Is Strong

The abandonment of a reliance-causation requirement has been premised, in part, on lax public enforcement.[240] Unlike the days of "Nader's Raiders,"[241] today the FTC and its state counterparts rigorously enforce consumer fraud statutes.[242] These modern enforcement policies support a reliance requirement in private damages actions: allowing individual consumers to sue where there is causation and harm, leaving public agencies to act before the defendant's misrepresentation has caused harm or where the negative value of the claim effectively precludes private enforcement.

Unlike the FTC of the 1960s, today's FTC and state attorneys general take an active role in protecting the public from manufacturers' misrepresentations.[243] Recently, for example, the FTC settled a complaint against Tropicana Products, Inc.[244] The FTC alleged that Tropicana's advertisement

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[237] For example, Professor Priest has characterized CAFA as a "modest reform," which "is not likely to solve the problems created by the modern class action." Priest, *supra* note 224, at 7. Professor Priest contends that the class action problem derives, at least in part, from "the expansion of liability standards since the mid-1970s based upon largely simple views about how liability judgments can improve societal welfare." *Id.* Other scholars contend that CAFA overestimates the superiority of federal adjudication of class actions and ignores the aggregation problems inherent in the class action device itself. *E.g.*, Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 891–93 (2005).

[238] *See infra* Parts V.A–C.

[239] *See infra* Part V.D.

[240] *See supra* notes 196–200 and accompanying text.

[241] *See supra* notes 76–93 and accompanying text.

[242] *See infra* notes 244–261 and accompanying text.

[243] *See infra* notes 244–261 and accompanying text.

[244] Agreement Containing Consent Order, *In re* Tropicana Prods. Inc., No. 042-3154 (FTC June 2, 2005), *available at* http://www.ftc.gov/os/caselist/0423154/050602agree0423154.

suggesting that its orange juice "improve[d] heart health" was misleading to consumers and lacked scientific support.[245] The FTC's settlement satisfied deterrence goals: Tropicana has agreed to stop using these statements and to file compliance reports with the FTC.[246]

Moreover, government relief is not limited to deterrence but also embraces the compensatory goals of the tort system.[247] In June 2005, for example, the FTC obtained a judgment of $4.9 million in consumer redress—a sum equal to the total amount of sales—from a company that deceptively marketed a weight-loss pill.[248] Indeed, from April 2004 to March 2005, the FTC has obtained the return of more than $480 million in consumer redress.[249]

Enforcement at the state level similarly has achieved both deterrence and compensatory goals. For example, the National Association of Attorneys General ("NAAG")[250] recently settled a false advertising claim against Blockbuster, Inc.[251] NAAG alleged that Blockbuster's "no late fee" advertisements were misleading because consumers who kept a rental more than seven days past its due date were charged the sales price of the item.[252] Un-

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pdf. [hereinafter Consent Order]; *see also* Press Release, FTC, FTC Puts the Squeeze on Tropicana's Orange Juice Claims (June 2, 2005), *available at* http://www.ftc.gov/opa/2005/06/tropicana.htm.

[245] Complaint ¶ 5C & Ex. C, *In re* Tropicana Prods. Inc., No. 042-3154 (FTC June 2, 2005), *available at* http://www.ftc.gov/os/caselist/0423154/050602comp0423154.pdf. Other challenged statements included "A new clinical study shows enjoying two glasses of Tropicana Pure Premium every day can lower your blood pressure an average of ten points." *Id.* ¶ 5A & Ex. A.

[246] Consent Order, *supra* note 244, ¶¶ II–V; *see also* Tropicana Prods., Inc.; Analysis of Agreement Containing Consent Order to Aid Public Comment, 70 Fed. Reg. 35,434 (June 20, 2005) (summarizing provisions of consent order).

[247] *See supra* notes 149–151.

[248] Press Release, FTC, Defendants Who Deceptively Marketed the "Himalayan Diet Breakthrough" Settle FTC Charges: Agree to Pay $400,000 in Consumer Redress (June 20, 2005), *available at* http://www.ftc.gov/opa/2005/06/avsmarketing.htm. Upon determining that the defendant was unable to pay the full redress, the judgment was suspended upon payment of $400,000 to the FTC. *Id.* If, however, it is determined that the defendants misrepresented their financial condition, the full $4.9 million becomes due immediately. *Id.*

[249] Deborah Platt Majoras, Chairman, FTC, Keynote Address at the OECD Workshop on Dispute Resolution and Consumer Redress, at 2 (Apr. 19, 2004), *available at* http://www.ftc.gov/speeches/majoras/050419oecdworkshop.pdf; *see also* DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 12:20, at 1045–46 (2004) (discussing representative sample of successful consumer redress claims in the 2002–2004 period, including nearly $13.5 million for several deceptive marketing cases).

[250] Founded in 1907, the National Association of Attorneys General facilitates cooperation among the state attorneys general. *See generally* NAAG, About NAAG, http://www.naag.org/naag/about_naag.php (last visited Nov. 4, 2005). NAAG's members are the attorneys general of all fifty states plus the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands and the territories of American Samoa, Guam, and the Virgin Islands. *Id.*

[251] Press Release, NAAG, Forty-Seven States and District of Columbia Settle With Blockbuster—Settlement Requires Refunds, Credits, Additional Disclosures (Mar. 30, 2005), *available at* http:www.naag.org/news/pr-20050330-blockbuster.php.

[252] *Id.*

der the settlement, customers will receive a one-time full refund or credit.[253] And, in contrast to private litigation,[254] the NAAG settlement achieved its deterrence goal: Blockbuster agreed to modify its advertisements and disclose the "no late fee" limitations.[255]

Similarly, in 2004, attorneys general from thirty-two states settled false advertising charges with three of the nation's largest wireless telephone carriers.[256] Under the settlement, Verizon, Sprint, and Cingular agreed to modify their advertising and provide comprehensive information about the costs and limits of their wireless services.[257] Here, too, state enforcement achieved its deterrence objective.

Individual states likewise are taking effective action. In 2003, New Jersey brought suit against Nutraquest, Inc., a manufacturer of a weight-loss product containing ephedra.[258] New Jersey alleged that the manufacturer falsely claimed that its product produced weight loss without dieting or exercise.[259] In July 2005, the company settled the suit for nearly $1 million.[260] Under the settlement, the company is prohibited from stating that its products can cause weight loss without diet or exercise.[261]

To be sure, public enforcement has its limitations.[262] Public agencies often lack sufficient financial resources and political will to monitor and detect all misrepresentations. But these perceived weaknesses may also be seen as strengths. Political[263] and budgetary restraints[264] limit the gov-

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253 *Id.*

254 *See infra* notes 295–301 and accompanying text.

255 Press Release, NAAG, *supra* note 251.

256 Press Release, NAAG, Settlement: Thirty-two Attorneys General Settle with Verizon, Cingular, and Sprint PCS (July 22, 2004), *available at* http://www.naag.org/issues/20040722-settlement-wireless.php.

257 *Id.*

258 Charles Toutant, Suits & Deals, *$940,000 for Consumer Fraud*, 181 N.J. L.J. 173 (2005).

259 *Id.*

260 *Id.*

261 NutraIngredients-USA, *NutraQuest Settles Over Exaggerated Adverts* (July 13, 2005), http://www.nutraingredients-usa.com/news/ng.asp?n=61258&m=1niu713&c=cgnwsiywfmwgwmf (last visited Nov. 4, 2005).

262 Issacharoff, *supra* note 233, at 137–41. Professor Issacharoff notes five limitations on government enforcement: (1) lack of resources; (2) jurisdictional limits; (3) difficulty of acquiring information regarding consumer fraud; (4) limited consumer accessibility to government centers; and (5) dependence on political will. *Id.*

263 Critics still charge that the FTC's consumer protection ability remains subject to politics. *See generally* Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371 (1997) (examining effect of Congress, industry, and consumer groups on FTC's enforcement activities during the Reagan administration); William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869 (1989) (examining the FTC's relationship with Congress and its exposure to political attacks).

264 In fiscal year 2006, the FTC received a $211 million budget for program outlays. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, 1179 (2005), *available at* http://www.gpoaccess.gov/usbudget/fy06/pdf/appendix/oia.pdf. Of that amount, nearly half—$105 million—was earmarked for consumer protection activities. *Id.*; *see also* Consolidated Appropriations

ernment's ability to pursue potentially frivolous litigation, and thus harmonize public enforcement with public will. These limits encourage government agencies to focus on the most pressing wrongs: misrepresentations that have harmed the greatest number of consumers and misrepresentations that are truly deceptive.

Political accountability further provides a democratic check on misrepresentation suits.[265] Because most attorneys general are elected by the public,[266] a state's enforcement of consumer protection laws becomes accountable to the public.[267] If the electorate disagrees with an attorney general's enforcement decisions, the ballot box can register this disapproval, and the attorney general may be voted out of office. Indeed, consumer advocates often lose sight of the fact that public agencies act on behalf of *all* constituents, including manufacturers in their jurisdiction. Public accountability allows state attorneys general to channel resources to the benefit of the entire public, not just a small class of litigants.[268]

California, for example, provides an example of the public stepping in to limit the reach of the state's consumer fraud statute. Prior to November 2004, California's Unfair Competition Law ("UCL") was sweeping in its breadth.[269] The California UCL could be enforced by anyone. It was unnecessary to allege reliance by or even injury to anyone, never mind the plaintiff.[270] Rather, "'any person acting for the interests of . . . the general public,' [could] bring an action."[271] While a plaintiff could not re-

Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2908 (2004). By contrast, in 2003, the Senate approved double that amount—$210 million—for the State of North Dakota to use on highway and transportation projects. Press Release, Kent Conrad, U.S. Senator, North Dakota, Senate Approves More than $210 Million for North Dakota Highways (Oct. 24, 2003), *available at* http://conrad.senate.gov/~conrad/releases/03/10/2003A24B22.html.

[265] *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 73 (arguing that "modern class action has undermined the foundational precepts of American democracy").

[266] Forty-three states elect their attorneys general by popular vote. NAAG, About NAAG, http://www.naag.org/naag/about_naag.php (last visited Nov. 4, 2005).

[267] *See* Redish, *supra* note 265, at 109–11 (discussing representation and accountability principles).

[268] In the consumer fraud class action, the argument that private parties would have greater incentive to bring suit than would a state attorney general is misplaced. The filing of a consumer fraud action is largely an attorney-driven creation. *See supra* note 4. Moreover, consumers typically receive no meaningful benefit from these suits. *See supra* notes 50–54. In any event, to the extent that a consumer does have individual incentive to sue, such as where damages are particularly large, the consumer remains free to bring her own suit, provided she can establish reliance on the manufacturer's statement.

[269] Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200–17209 (West 1997 & Supp. 2005).

[270] *E.g.*, Blakemore v. Superior Court, 27 Cal. Rptr. 3d 877, 888 (Ct. App. 2005) ("Unlike common law fraud, a [UCL] violation can be shown even without allegations of actual deception, reasonable reliance and damage.").

[271] Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002) (quoting UCL § 17204).

cover damages under the UCL, monetary relief—restitution and disgorgement—was available under equitable principles.[272]

Many Californians, however, ultimately thought the statute went too far. In November 2004, voters enacted Proposition 64, which transformed California's UCL back into a private law statute.[273] Under Proposition 64, a UCL plaintiff now must show that he "has suffered injury in fact and has lost money or property as a result of such unfair competition."[274] Proposition 64 effectively forecloses suits by private plaintiffs who have not suffered a loss in reliance on a manufacturer's misrepresentation.[275]

Public law theorists would argue that limiting private consumer actions to individuals who can show reliance could under-deter misrepresentations that have not yet harmed individual consumers.[276] But these harms are *not* left undeterred. Public agencies remain able to address these quintessentially public harms. Moreover, government enforcement has the comparative advantage in articulating and applying a consumer protection policy that addresses these public harms. Because the government has substantial control over the selection of cases, it can direct a coherent body of law via both regulation and litigation.[277]

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[272] CAL. BUS. & PROF. CODE § 17203 (West 1997); *see also* Bank of the West v. Superior Court, 833 P.2d 545, 557 (Cal. 1992) (holding that compensatory damages are not available under California UCL).

[273] *See* United Investors Life Ins. Co. v. Waddell & Reed, Inc., 23 Cal. Rptr. 3d 387, 388–89 (Ct. App. 2005). For the complete text of Proposition 64 and relevant portions of the Voter's Information Guide, including the statements by proponents and opponents, see Californians for Disability Rights v. Mervyn's, LLC, 24 Cal. Rptr. 3d 301 app. (Ct. App. 2005), *review granted*, 110 P.3d 1216 (Cal. 2005).

[274] CAL. BUS. & PROF. CODE § 17204 (West Supp. 2005); *see also United Investors Life Ins. Co.*, 23 Cal. Rptr. at 389 (noting text of Proposition 64).

[275] *See, e.g., In re* Tobacco Cases II, No. JCCP 4042, 2005 WL 579720, at *6 (Cal. App. Dept. Super. Ct. Mar. 7, 2005) (decertifying class action because individual issues predominated the case, including whether each class member purchased cigarettes "as a result of" defendants' alleged false statements). The Texas legislature similarly amended its UDAP statute in 1995 to require reliance for misrepresentation claims. *See* Alford Chevrolet-Geo v. Murphy, No. 06-02-00059-CV, 2002 WL 31398487, at *1 n.2 (Tex. App. Oct. 25, 2002).

[276] *See supra* Part IV.

[277] For example, a state attorney general can take into account agency regulations and policy decisions when deciding whether to initiate litigation. Plaintiffs' lawyers, however, do not take these factors into account. In *Avery v. State Farm Mutual Automobile Ins. Co.*, for example, plaintiffs' lawyers filed a nationwide class action against State Farm, alleging that the use of non-original equipment manufacturer ("non-OEM") parts during repairs violated the Illinois Consumer Fraud and Deceptive Practices Act, even though at least forty states had enacted regulations or statutes expressly permitting the use of non-OEM parts as a means of reducing insurance premiums. 746 N.E.2d 1242, 1247, 1254 (Ill. App. Ct. 2001), *aff'd in part and rev'd in part*, 835 N.E.2d 801 (Ill. 2005). The plaintiffs' lawyers in *Avery* essentially usurped the roles of the state insurance commissioner and the state attorney general in deciding to sue State Farm for actions it had taken in compliance with state law. The $1.18 billion judgment against State Farm recently was reversed by the Illinois Supreme Court. 835 N.E.2d at 818.

B. Public Law Theory Is Misapplied to Misrepresentation Class Actions

Whatever the merits of the public law vision of tort law in other areas, the theory has taken courts down the wrong path in the consumer law context. In the misrepresentation class action, application of the public law theory has created both over-deterrence and under-deterrence. The absence of reliance-causation means that the damages award itself often is based on conduct that caused no harm, thereby over-deterring the defendant's conduct. Conversely, the ease of class certification can lead to settlements that are actually profitable for the defendant and thus provide insufficient deterrent against future misrepresentations. Moreover, the public law approach ignores the institutional reality of the tort system—someone gets a lot of money—and thus creates the potential for windfalls and incentives for frivolous litigation.[278]

1. Over-deterrence

The absence of reliance-causation eases the road to certification.[279] By eliminating reliance as an element, a misrepresentation class more easily satisfies the predominance inquiry for class certification.[280] This easier burden, however, creates an incentive to settle the case—not because the manufacturer has harmed the plaintiff, but because the case presents the risk of a bankrupting judgment.[281] Considering the recent Class Action Fairness Act of 2005, the Senate Judiciary Committee concluded that "[s]uch leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits."[282] Thus, even though the defendant has done no wrong and there is nothing to deter, punishment is imposed through settlement.

Moreover, ignoring questions of reliance-causation creates an abstract inquiry into whether these particular class members are *entitled* to this money. To address the entitlement question, public law advocates suggest that litigation include subsequent compensation proceedings that resolve reliance questions and determine to what extent class members are entitled to share in the monetary award.[283] Under that system, however, the judge is forced to come up with a hypothetical total award that gives some class members the benefit of a bargain that they already have received. For example, the consumer class in the "light" cigarettes case, *Aspinall*,[284]

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[278] *See infra* notes 283–287 and accompanying text.
[279] *See supra* notes 8–10 and accompanying text.
[280] *See supra* notes 8–10 and accompanying text.
[281] *See supra* notes 48–49 and accompanying text.
[282] S. Rep. No. 109-14, at 20 (2005).
[283] *See* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871, 1885–88 (2002).
[284] 813 N.E.2d 476 (Mass. 2004). For a discussion of this decision, see *supra* note 39.

includes everyone from hypothetical health-conscious cigarette smokers who actually believed that they were purchasing a "safer" product to image-conscious smokers who are under no such illusions that any cigarette is safe as well as those who chose Marlboro Lights because they prefer the taste.[285] Including these knowledgeable class members in calculating the total damages award results in a sum greater than the harm caused by the misrepresentation.[286]

Thus, requiring manufacturers to pay compensation not simply to their actual victims but to all purchasers results in over-deterrence and subjects defendants to excessive liability. Indeed, even proponents of a public law vision of torts concede that "[p]unishing every error in judgment regardless of whether it has caused harm might result in excessive liability and could lead not only to overbearing and discriminatory enforcement, but also to a fearful and overcautious society."[287]

2. *Under-deterrence*

At the same time that it creates over-deterrence, the lack of a reliance-causation requirement creates under-deterrence. First, eliminating reliance-causation as an element of a misrepresentation case minimizes the showing needed to obtain certification[288] and thereby increases the likelihood of an early settlement.[289] This settlement process creates the potential for under-deterrence—true misrepresentations staying on the market with little to no penalty for the manufacturer and no real redress for the consumer. As the Institute for Civil Justice noted, early settlement can avoid full discovery, and the full extent of the defendant's wrongdoing is never exposed.[290]

Aside from avoiding discovery of wrongdoing, the manufacturer may be able to negotiate a settlement amount less than its total profit on the product. Thus, a misrepresentation class action settlement can undervalue the deterrent effect of the suit in order to achieve a quick resolution, tipping the scale on the side of private gain, not public good.[291] For example, a large number of consumer class actions are settled using a coupon method in which a defendant avoids liability by paying class members in

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[285] *See supra* note 39 (discussing *Aspinall* decision).

[286] Thus, in *Aspinall*, the court noted that the potential damages would be measured based on the mere fact of purchase. *See* 813 N.E.2d at 490 n.23 (noting damages for class would be measured based on "difference between value paid and value received").

[287] Rosenberg, *The Causal Connection*, *supra* note 216, at 882.

[288] *See supra* notes 8–10 and accompanying text.

[289] *See supra* notes 48–49 and accompanying text.

[290] HENSLER ET AL., *supra* note 4, at 79–80; *see also id.* at 424 (noting that "class action attorneys were sometimes simply interested in finding a settlement price that defendants would agree to—rather than in finding out what class members had lost [and] what defendants had gained . . .").

[291] Furthermore, the costs of litigation are still passed on to all consumers in the form of higher prices, even though the consumer may not have received any commensurate benefit.

promotional coupons.[292] Even assuming that class members will redeem the coupons, a coupon settlement does not deter future misconduct by a defendant: "[A] class member's redemption of a settlement coupon merely decreases, but does not eliminate, a defendant's profit margin on a given sale. More importantly, from the defendant's perspective, the settlement coupons may encourage additional sales and thereby increase the defendant's net profits."[293] Thus, far from being punishment for a company's misrepresentation, a coupon settlement may benefit the defendant.[294]

Consider the private Blockbuster late fee litigation, a case noted by the Senate Judiciary Committee in its 2003 report on class actions.[295] In that case, Blockbuster settled a state court class action alleging that the company charged excessive late fees.[296] Under the terms of the settlement, class members received a coupon for one dollar off their next rental.[297] However, "[e]xperts . . . predicted that at most, only 20 percent of the class members will redeem the coupons."[298] The low redemption rate—characteristic of most coupon settlements[299]—effectively allowed Blockbuster to escape damages.[300] Moreover, the settlement had no deterrent effect and expressly allowed Blockbuster to continue its fee policy.[301]

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[292] *See* Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395 (2005) [hereinafter Leslie, *The Need to Study Coupon Settlements*] (explaining that defendants avoid liability due to a low redemption rate for the settlement coupons); *see also* Leslie, *A Market-Based Approach to Coupon Settlements*, *supra* note 50, at 996 (noting that "in most cases, coupons are not punishment; they are promotional"). *See generally id.* (discussing coupon settlements and explaining how such settlements are worthless for most class members).

[293] *Id.* at 1014. Professor Leslie further explains that defendants can manipulate the value of a settlement coupon by increasing the price of the product or by lowering its quality. *Id.* at 1030–33.

[294] Professor Leslie also points out that, apart from the financial gain derived from a coupon settlement, coupon settlements reward defendants by "provid[ing] a competitive advantage." *Id.* at 1039. Because coupons generate sales, a settlement coupon can induce a class member to avoid a competing product and instead purchase the defendant's goods. *Id.*

[295] S. REP. NO. 108-123, at 16 (2003).

[296] *Id.*

[297] *Id.* Moreover, customers had to fill out claims forms to receive the one-dollar coupon and return the claim form before the deadline. *See* Cynthia Corzo, *Blockbuster Settles Suits Over Late Fees*, MIAMI HERALD, June 5, 2001, at A1. The plaintiffs' lawyers, however, received $9.25 million. S. REP. NO. 108-123, at 16.

[298] S. REP. NO. 108-123, at 16.

[299] In general, the redemption rate of class action coupons ranges from one to three percent. James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445 (2005). *But see* Leslie, *A Market-Based Approach to Coupon Settlements*, *supra* note 50, at 1035 (noting that consumer class action redemption rates vary from as low as 3% to 13.1%).

[300] *See* Leslie, *A Market-Based Approach to Coupon Settlements*, *supra* note 50, at 1035–37. As Professor Leslie has explained, "[a] low redemption rate . . . is proof positive that the settlement failed. Low redemption rates mean no or low compensation. Similarly, if the redemption rate is low, then there was insufficient disgorgement." Leslie, *The Need to Study Coupon Settlements*, *supra* note 292, at 1402.

[301] S. REP. NO. 108-123, at 16. Indeed, in press reports, Blockbuster stated that it would not change its policy: "We're pleased we can end this litigation and that our rental policy will continue unchanged." Corzo, *supra* note 297 (quoting Ed Stead, executive vice

Although the Class Action Fairness Act of 2005 seeks to reform these coupon settlements, the effects will be limited. Under the new law, if attorneys' fees are based on a percentage of the coupon, fees must be calculated based on *redeemed* coupons, not merely issued coupons.[302] This provision falls short of solving the prroblem because, first, it applies only to actions in federal court[303] and only to settlement agreements that tie attorneys' fees to the coupon value.[304] Second, while tying attorneys' fees to coupon redemption may increase claims rates, nothing in CAFA requires a settling defendant to stop its deceptive practices. Thus, even under CAFA, Blockbuster could continue its deceptive fee practice unchanged.

Even where a consumer class action settles with a monetary award to the plaintiffs, these settlements often impose administrative burdens on class members that limit any actual dispersal of the defendant's money. Few individual plaintiffs will submit the necessary claim forms and ultimately receive compensation.[305] Thus, again, a low claims rate reduces the monetary penalty inflicted upon the defendant and thus lessens any deterrent function of the settlement.[306]

Moreover, allowing misrepresentation claims to proceed without any showing of reliance creates inefficient incentives by allowing the consumer to feign ignorance of information they actually have.[307] As a group, consumers would have less incentive to obtain information about the products they purchase,[308] and manufacturers as a class would have less incentives to inform customers about their products. For instance, does anyone really believe that a daily diet of fast food is healthy? Or do jam purchasers really believe they are buying 100% fruit? Reliance insures that the

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president and general counsel for Blockbuster).

[302] 28 U.S.C.A. § 1712(a) (West 2005). CAFA also requires a settling defendant to notify "the appropriate State official" of a proposed class action settlement. *Id.* § 1715(b).

[303] *Id.* § 1711(2).

[304] *Id.* § 1712(b). *See also* Leslie, *The Need to Study Coupon Settlements*, *supra* note 292, at 1417 (discussing limits on CAFA's effect on coupon settlements).

[305] *See* Hillebrand & Torrence, *supra* note 54, at 747. A cumbersome disbursement process results in a low claims rate:

> Settlements and judgments in class action cases have often required class members to submit claims in order to share in the proceeds of the recovery. Recent cases suggest that claims procedures are ill-suited to consumer class actions in which the class size is very large and the amount of damages per class member is relatively small. These cases are characterized by very low claims rates.

Id.

[306] Similarly, these suits fail to serve any compensatory goal. Low claims rates mean that most consumers do not receive any compensation from these suits.

[307] *See* Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 550–51 (explaining how economic deterrence theory requires both parties to take steps to produce the "smallest sum of precaution costs and accident costs").

[308] As Judge Posner has explained, "the knowledge and the intelligence of the consumer" deter manufacturer misrepresentations. POSNER, REGULATION OF ADVERTISING, *supra* note 74, at 5. Eliminating reliance-causation as an element weakens the deterrent potential of the consumer.

consumer bear her share of responsibility in deciding to purchase a product based on a manufacturer's misrepresentation. By doing so, a reliance requirement screens out the insignificant misrepresentation that has no effect on the consumer's purchasing decision. The element of reliance-causation thus apportions deterrence between the manufacturer and the consumer.

Of course, it is impossible to eliminate all misrepresentation from the market. Rather, the optimal rule "will seek to preserve informational value while screening out the misrepresentations that induce social losses. That, precisely is the point of . . . detrimental reliance."[309]

C. Private Law Theory Provides a Better Controlling Framework for Misrepresentation Class Actions

Where dual public and private enforcement regimes exist side by side, the private law theory of torts should control the interpretation of private damages actions. Historically, tort law was "conceived as a law of personal redress rather than as a law of public regulation or punishment."[310] Thus, tort law allowed an injured person to bring suit against the wrongful party and recover money damages.[311]

The tort system thus serves as a means of achieving justice between the parties.[312] Under this view, a wrong has been done to a victim. Assuming the victim is innocent, the question becomes whether there is a person whose connection to the wrong borne by the victim warrants that the burden be shifted to that person.[313] In other words, is there a person whose connection to the wrong generates a responsibility on his part to fix it? Tort law then "corrects" the injustice by transferring the loss to the wrongdoer via a damages payment.[314]

In a misrepresentation class action, reliance-causation ties the plaintiff's loss[315] to an injustice by the defendant.[316] Reliance-causation thus

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[309] GREVE, *supra* note 222, at 32.

[310] Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 517.

[311] *Id.* For an overview of the origins of the tort system as an alternative to "blood feuds" during the Middle Ages, see Hasnas, *supra* note 218, at 558–61.

[312] *See generally* Schwartz, *supra* note 223 (describing corrective justice theory of torts).

[313] *See* Goldberg, *Twentieth-Century Tort Theory*, *supra* note 221, at 570.

[314] *Id.*

[315] Corrective justice scholars dispute whether tort law responds to "wrongful conduct" or "wrongful loss." *Id.* at 571. Causation, however, is essential under both views. Under the "wrongful loss" view, the victim suffers a loss that she does not deserve to bear. *Id.* To transfer the loss, the victim must show that (1) another person acted wrongfully, and (2) that person caused her loss. *Id.* Critics have argued that this theory draws too sharp a distinction between wrongful conduct and causation. Thus, under the "wrongful conduct" theory, tort law corrects "wrongs" themselves, and looks for a causal connection between the wrong and the injury. *Id.* In either case, causation is essential.

[316] *See* Schwartz, *supra* note 223, at 1815–19 (finding that tort suits impose liability on "party whose tortuous conduct has 'caused' the plaintiff's injury"). *But see* Christopher J.

links "doer and sufferer," or institutionally speaking, the plaintiff and the defendant.[317] In the misrepresentation case, reliance answers the question "[w]hy can *this* plaintiff recover from *this* defendant?"[318] Reliance identifies *this specific* plaintiff as someone entitled to recover for her injury from all the persons who heard or saw the defendant's misrepresentation.[319] Because tort law functions within a litigation system, this understanding forms the basis of the entire structure of the tort system:

> [C]ausation particularizes by singling out this plaintiff from the class of persons whom the defendant has endangered. Through injury the general risk which the wrongdoing has unreasonably created lodges in a particular person. Similarly, wrongdoing serves to single out from among the numerous causal antecedents of the plaintiff's injury the particular cause that is juridically significant. Causation particularizes the plaintiff against the background of the defendant's wrongful risk creation, and wrongdoing particularizes the defendant against the background of the totality of the injury's causes.[320]

By identifying a victim, reliance defines whom the defendant must compensate: "[T]he fact that *A* causes *B* harm is normatively significant because it demonstrates that *B*, not someone else, was harmed by *A*. So if *A* must pay someone, it must be *B*, not *C*, *D*, or *E*, none of whom were harmed by *A*."[321] Indeed, even ardent public law advocates admit that the corrective justice approach "works best for intentional wrongs."[322] Though consumer fraud statutes have eliminated the intent requirement of common

Robinette, *Can There be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 405–07 (2005) (arguing that, in some instances, the causation requirement can undermine corrective justice rationale because the causation element creates litigation hurdles that prevent injured parties from seeking justice); Schroeder, *supra* note 229, at 439 (arguing that liability for risk creation, regardless of whether actual harm is caused, is consistent with corrective justice theory); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. Rev. 113, 137–38 (1990) (applying Professor Schroeder's corrective justice theory to intentional torts).

[317] *See generally* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (arguing that causation both identifies the victim and provides moral reason for requiring wrongdoer to compensate the victim).

[318] *See* Weinrib, *supra* note 317, at 414. For a critique of Professor Weinrib's article, see Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987).

[319] *See* Weinrib, *supra* note 317, at 416 ("Causation, then, has the function of particularizing the plaintiff in relation to the defendant."). Causation likewise identifies the defendant from all other actors who could cover the plaintiff's loss. *Id.* at 417–18. Actual causation ("but for"), however, can stretch back indefinitely. Thus, on the defendant's side, the causal inquiry stops with a wrongful act. *Id.*

[320] *Id.* at 429–30.

[321] Coleman, *supra* note 318, at 452.

[322] FRIED & ROSENBERG, *supra* note 222, at 31.

law misrepresentation claims,[323] these suits are fraud cases at their core and should be treated as such.

To be sure, tort law serves certain public functions. Through the imposition of damages via judgments and settlements, private misrepresentation cases deter manufacturer misrepresentations. But government agencies have been specifically charged with that very objective. Duplicating this public function through the misrepresentation class action is a waste of resources. Simply put, a "public law" vision of torts has no place where true public law—government enforcement—exists.

D. The Language of Consumer Fraud Statutes Establishes a Clear Distinction Between Public and Private Enforcement

Once the flawed theoretical underpinnings of the "no reliance-causation" approach are exposed, a clear distinction between public and private enforcement emerges in the text of these statutes. Nothing in these statutes suggests that the state legislatures intended to eliminate causation as an element of a private damages claim. Moreover, these statutes were enacted against a common law background that equated cause with reliance in misrepresentation cases.

Every jurisdiction, except the District of Columbia, imposes a causation requirement for a private cause of action under its consumer fraud statute.[324] Where a state has decided to abandon causation requirements, it has done so explicitly. For example, the consumer protection act for the District of Columbia contained a causation requirement prior to 2000: "Any consumer who *suffers damages as a result of* the use or employment of any practice by any person of a trade practice" could bring suit.[325] In 2000, however, the District amended the statute to eliminate the causation requirement.[326] The statute now reads "[a] person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter."[327]

Thus, by including a causation requirement,[328] these consumer fraud statutes embrace a reliance requirement:

> The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, takes in cases

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[323] *See infra* note 334 and accompanying text.

[324] *See supra* note 162.

[325] D.C. CODE ANN. § 28-3905 (LexisNexis 2001) (emphasis added).

[326] D.C. Law 13-172, § 1402(d), 47 D.C.R. 6308 (2000); *see also* Wells v. Allstate Ins. Co., 210 F.R.D. 1, 8 (D.D.C. 2002) (noting that the amendment eliminated the injury and causation requirements).

[327] D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2001).

[328] Indeed, some states have acted to make the reliance-causation requirement explicit in the text of the statute. *See supra* notes 270–275 and accompanying text (discussing recent changes in California and Texas).

> of misrepresentation the form of inducement of the plaintiff to act, or to refrain from acting, to his detriment . . . . In order to be influenced by the representation, the plaintiff must of course have relied upon it, and believed it to be true. If it appears that he knew the facts, or believed the statement to be false, or that he was in fact so skeptical as to its truth that he reposed no confidence in it, it cannot be regarded as a substantial cause of his conduct.[329]

Thus, as a practical matter, damages cannot be "caused" by a defendant's misrepresentation without reliance on the statement.[330]

Courts that have rejected this principle have misunderstood the relationship between reliance and causation in a misrepresentation case. In *Smoot v. Physician's Life Insurance Co.*,[331] for example, the New Mexico Court of Appeals contended that "causation and reliance are distinct concepts," explaining, "causation requires a nexus between a defendant's conduct and a plaintiff's loss; reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale."[332] This argument, however, ignores the fact that in a misrepresentation case, the plaintiff's "loss" *is* the "purchase or sale." Consumer classes seek to recover the money spent on the product.[333]

To be sure, consumer fraud statutes have been viewed as lessening the requirements of common law claims. First, even without a reliance requirement, these statutes *do* lower the common law standards. Notably, consumer fraud statutes do not require proof of intent to deceive or scienter,[334] and many common law defenses are not allowed under the consumer fraud statutes.[335] Moreover, the "relaxed" non-common law standard originally was placed in the hands of government enforcement.[336] And government enforcement standards do not require reliance-causation or even injury for that matter—an understandably lower burden given the government's focus on the public interest and desire to deter fraud before any harm occurs.[337] But application of this lower standard to a private dam-

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329 WILLIAM L. PROSSER, LAW OF TORTS § 108, at 714 (4th ed. 1971).

330 *Id.*; *see also supra* notes 183–184, 190–192 and accompanying text.

331 87 P.3d 545 (N.M. Ct. App. 2003).

332 *Id.* at 550 (citation omitted).

333 Typically, these misrepresentation class actions disclaim any personal injury losses and seek only to recover "benefit of the bargain" damages, which award the difference between the actual value of the product at the time of purchase and what its value would have been had the defendant's representations been true. *E.g.*, Price v. Philip Morris Inc., No. 00-L-112, 2003 WL 22597608, at *15 (Ill. Cir. Ct. Mar. 21, 2003); Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 490 (Mass. 2004). Other states specify that the measure of damages is a refund of the purchase price. *E.g.*, N.J. STAT. ANN. § 56:8-2.11 (West 2001 & Supp. 2005).

334 *See* SHELDON & CARTER, *supra* note 113, at 146–49.

335 *See id.* at 179–89 (discussing defenses that do not apply to statutory misrepresentation claims).

336 *See supra* notes 135–137 and accompanying text.

337 *See supra* notes 143–148, 152–154 and accompanying text.

ages claim is unwarranted. By including the causation requirement in the private cause of action provisions, state legislatures signaled their intent that traditional reliance-causation limits apply to private damages actions.[338]

CONCLUSION

The problem of consumer class action abuse has been well documented. While CAFA has provided a modest step in the right direction, it fails to solve the underlying problem: relaxed substantive requirements that allow easy certification of misrepresentation class actions, regardless of the forum. The real remedy lies in enforcement of traditional reliance-causation requirements. Requiring reliance in private misrepresentation cases achieves the desired balance of public and private resources. Government agencies can seek restitution and injunctive relief before any harm occurs or where the negative value of the claim precludes private enforcement. The tort system, however, should be left to "those who have been wronged to seek redress from those who have wronged them."[339]

[338] *See, e.g.*, Weinberg v. Sun Co., 777 A.2d 442, 446 (Pa. 2001) ("Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.").

[339] Goldberg, *Tort Law for Federalists*, *supra* note 217, at 11.