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

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# “That’s Unfair!” Says Who—The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct

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## INTRODUCTION

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

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

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

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

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

4. See *infra* Section IV.B.

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

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

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

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

6. See *infra* Section III.B.

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

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

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

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

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

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

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

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

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

11. An individual bringing a consumer protection action as a breach of contract claim might also have to overcome defenses such as the statute of frauds, the parol evidence rule, and privity of contract requirements. See Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 451-52 (1991) (discussing these various defenses).

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

13. See Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a) (2000)). Congress at the time was concerned about the growth and spread of monopolies, so the Act initially charged the Commission with regulating "unfair methods of competition." *Id.*; see also Federal Trade Commission Act §§ 41-58. Thus, in the beginning, the FTC focused largely on antitrust and other trade regulation violations. After the Supreme Court found that the FTC lacked power to regulate activities that had no effect on competition between businesses, such as false advertising, Congress amended the FTC Act to declare unlawful all "unfair or deceptive acts or practices in commerce." Wheeler-Lea Act § 45(a).

sively debated the definition of “unfair” during consideration of the 1914 FTC Act, and many were concerned that such a broad provision—without clarification—was an unconstitutional delegation of legislative power, which would allow for arbitrary or abusive enforcement.<sup>14</sup> Congress recognized that “it would undertake an endless task” by attempting to provide an exhaustive list of prohibited practices.<sup>15</sup> Therefore, Congress decided, “by a general declaration [to] condemn[] unfair practices [and] leave it to the [FTC] to determine what practices were unfair.”<sup>16</sup> Moreover, Congress feared courts might allow consumers to go directly to court without prior FTC action, which would have allowed judges rather than commissioners to decide whether conduct was fair.<sup>17</sup> Some members of Congress also thought that opening two forums for deciding violations under the Act, the FTC and federal courts, could lead to confusion and conflict.<sup>18</sup> Members expressed concern that “a certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working up such suits,” particularly given a broad right of action for “unfair” conduct.<sup>19</sup> They feared that “[t]he number of these suits. . . no man can estimate.”<sup>20</sup>

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

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

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

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

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

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

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

20. *Id.*

21. See, e.g., *id.* at 11,084-109. Senator Newlands noted that the power to determine unfair practices would be placed in a nonpartisan Commission, composed of “a body of five men, intelligent men, . . . [including] lawyers, economists, publicists, and men experienced in industry, who will . . . be able to determine justly whether the practice is contrary to good morals or not.” *Id.* at 11,109.

22. See *id.* at 13,113. The federal judiciary upheld this view and expressed similar concern over the potential for abuse when, in 1973, it rejected a request that it find an implied private right of action under the FTC Act. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 986 (D.C. Cir. 1973) (“Private enforcement of the Federal Trade Commission Act would pose serious problems to the enforcement activities of the FTC, and is inconsistent with the legislative scheme established by Congress.”). In rejecting a private right of action, the court noted that the FTC was composed of a body of experts and economists that could create policy in a reasoned, orderly, and forward-looking fashion. *Id.* at 998-99. The court found that private lawsuits, on the other hand, created policy in a piecemeal and retroactive manner. *Id.* at 997-98.

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

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

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

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

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23. See generally J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 357 (1992); Patterson v. Beall, 19 P.3d 839 (Okla. 2000) (discussing Council of State Governments, Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law, at C4-C5 (1969)); William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971).

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

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

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

27. *Id.*

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

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

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

### 1. Consistency Between Federal and State Regulatory Goals

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

For that reason, many CPAs include a provision directing state regulators to look to the FTC for guidance in terms of substantive law, encouraging state regulators to emphasize enforcement and remedies, rather than focus on policymaking.<sup>32</sup> Thus, it was understood that the federal government, through the FTC, would continue to have the primary policymaking role in determining unfair and deceptive practices. The sharing of responsibilities in this way promotes consistency and helps assure that federal and state regulators do not work against one another. In addition, it provides guidance upon which businesses can

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

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

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

31. See, e.g., VT. STAT. ANN. tit. 9, § 2451 (1993) (recognizing that the purpose of the Vermont Consumer Fraud Act "is to complement the enforcement of federal statutes and decisions governing unfair methods of competition and unfair or deceptive acts or practices in order to protect the public, and to encourage fair and honest competition"); W. VA. CODE § 46A-6-101(1) (2006) (recognizing the same general purpose in West Virginia).

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



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

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

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

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

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

tion.”<sup>34</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. *FTC Rule of Construction*

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

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

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

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

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

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

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

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

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

### B. Authorized or Permitted Conduct

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

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

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

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

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

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

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

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

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

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

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

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

### 1. Fully Exempting Regulated Industries and Professions

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

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

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

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

54. TENN. CODE ANN. § 47-18-111(a).

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

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

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

the United States.”<sup>58</sup> State and federal courts have interpreted this language to exempt the practices of a number of industries from consumer protection claims. For instance, in 1982, a Georgia appellate court found in *Ferguson v. United Insurance Co. of America*<sup>59</sup> that the statute did not apply to insurance transactions because such conduct is specifically authorized and regulated by the insurance code.<sup>60</sup>

While the *Ferguson* court was brief in its analysis, later court decisions expanded upon its reasoning in finding conduct by other regulated industries did not fall within the scope of the GFBPA. A federal court, in *Taylor v. Bear Stearns & Co.*<sup>61</sup>, has acknowledged that a regulatory compliance exemption, such as that provided by Georgia law, can be interpreted in two different ways.<sup>62</sup> The first interpretation would exempt only those acts “specifically authorized” by a government agency. The second interpretation would exempt any conduct regulated by an administrative agency. The court explained that the latter interpretation is most sound, finding that “specifically authorized” is synonymous with “specifically regulated”:

While in the abstract it is possible to envision a regulatory agency’s permitting of activities which do not conflict with the interests which that agency is charged to protect, with no pretense of concern whether those activities might harm other interests, . . . practically speaking, the court perceives that an interpretation of section 6 that would exempt conduct authorized specifically by an agency as anomalous, for what administrative agency would authorize an unfair trade practice?<sup>63</sup>

The *Taylor* court concluded that there is “no need to fill in a legal gap or create a consumer right” where the practice at issue is already regulated by a government agency.<sup>64</sup>

Courts have applied this interpretation in a variety of contexts involving regulated conduct. A court explained that the Georgia law “does not apply in extensively regulated areas of the marketplace such as investment account transactions, finance charges and required disclosures by lenders, and insurance transactions.”<sup>65</sup> It concluded that because the defendant’s long-term care facilities participated in Medicare and Medicaid programs, allegations of deficient care were “heavily regulated” by state and federal agencies and therefore not subject to the

58. GA. CODE ANN. § 10-1-396(1) (2000).

59. 293 S.E.2d 736 (Ga. Ct. App. 1982).

60. *See id.* at 737; *see also* Patton v. Provident Life & Accident Ins. Co., 2002 WL 32074278, at \*1 (N.D. Ga. Oct. 25, 2002) (unpublished opinion) (applying *Ferguson* to find insurance transactions exempted); Colonial Life & Accident Ins. Co. v. Am. Family Life Assurance Co. of Columbus, 846 F. Supp. 454 (D.S.C. 1994) (applying *Ferguson* to find insurance transactions exempted).

61. 572 F. Supp. 667 (N.D. Ga. 1983).

62. *See id.* at 674-75.

63. *Id.* at 674 (internal quotation and citation omitted) (quoting William Rothschild, *A Guide to Georgia’s Fair Business Practices Act of 1975*, 10 GA. L. REV. 917, 921 (1976)).

64. *Id.* at 675 (addressing an investor’s claims involving conduct falling under the oversight of federal securities regulators).

65. Brogdon *ex rel.* Cline v. Nat’l Healthcare Corp., 103 F. Supp. 2d 1322, 1336 (N.D. Ga. 2000).

state's consumer protection law.<sup>66</sup> Likewise, courts have found that the Georgia law does not cover claims against mortgage brokers who are subject to numerous federal statutes and regulations governing their conduct.<sup>67</sup> In each of these instances, the court found that the state's consumer protection law did not apply because regulations specific to the industry already prohibited deceptive conduct and provided a means for addressing such claims. Courts in Maine<sup>68</sup> and Rhode Island<sup>69</sup> have reached similar conclusions with respect to their own consumer protection statutes.

## 2. Need to Show Affirmative Authorization for Conduct

Some courts, however, have taken a more narrow approach, interpreting general regulatory compliance exemptions to require a defendant to point to a particular agency action, rule, or regulation affirmatively authorizing or requiring the challenged conduct.<sup>70</sup> This course may be appropriate where a government agency has authority to regulate only certain aspects of industry conduct, or does not comprehensively regulate the area at issue. In some instances, however, courts have too narrowly read the statutory exemption to permit private lawsuits even where the conduct is subject to close government regulation.<sup>71</sup> In a few states, courts may feel constrained by explicit statutory lan-

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66. *See id.* at 1337.

67. *See In re Taylor*, 292 B.R. 434, 439-40 (N.D. Ga. 2002).

68. *See* ME. REV. STAT. ANN. tit. 5 § 208(1) (2002) (exempting actions "permitted under" state or federal regulatory authority); *Clark v. Monumental Life Ins. Group*, No. 06-115-B-W, slip op., 2006 WL 3511426, at \*1 (D. Me. Dec. 5, 2006) (insurers were exempted due to comprehensive regulation, provided that defendant has been permitted by superintendent to engage in the practice, but recommending denial of dismissal until established that insurer was permitted to transact insurance in Maine); *Metayer v. PFL Life Ins. Co.*, No. Civ. 98-177-P-C, 1999 WL 33117063, at \*14 (D. Me. July 15, 1999) (unpublished opinion) (applying exemption to dismiss claim against insurer); *Wyman v. Prime Discount Sec.*, 819 F. Supp. 79, 81 (D. Me. 1993) (finding securities brokers exempt); *First of Maine Commodities v. Dube*, 534 A.2d 1298, 1301 (Me. 1987) (finding real estate brokers exempt because the Maine Real Estate Commission extensively regulates brokers' activities); *see also Shapiro v. Haenn*, 190 F. Supp. 2d 64, 69 (D. Me. 2002) (interpreting Maine law to find financial institutions exempt); *Keatinge v. Biddle*, No. Civ. 99-321-P-H, 2000 WL 761015, at \*1 (D. Me. Mar. 20, 2000) (unpublished opinion) (interpreting Maine law to find the profession of law exempt because it is "regulated under the inherent authority of the Maine Supreme Judicial Court and statutory authority").

69. R.I. GEN. LAWS § 6-13.1-4; *State v. Piedmont Funding Corp.*, 382 A.2d 819, 822 (R.I. 1978) (finding that the Rhode Island statute "clearly exempted . . . all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers," and thus, insurance transactions do not fall within its scope); *Lynch v. Conley*, 853 A.2d 1212, 1215 (R.I. 2004) (consumer protection law does not apply to claims related to lead paint and asbestos in apartments subject to Department of Health regulations and enforcement); *Kelley v. Cowesett Hills Assocs.*, 768 A.2d 425, 432 (R.I. 2001) (consumer protection law does not apply).

70. *See, e.g., Edmonds v. John L. Scott Real Estate, Inc.*, 942 P.2d 1072, 1078 (Wash. Ct. App. 1997) (defendant identified specific statutory provision relating to the procedure for disbursement of earnest money in real estate transactions for the court to allow CPA exemption); *Guinn v. Hoskins Chevrolet*, 836 N.E.2d 681, 701 (Ill. App. Ct. 2005) (compliance with the Truth in Lending Act, Regulation Z, and the Motor Vehicle Retail Installment Sales Act operated to exempt car dealership from CPA claims).

71. *See, e.g., infra* notes 92-94 and accompanying text.



guage indicating that the exemption is limited to actions “specifically permitted” or “specifically authorized” by regulatory agencies.<sup>72</sup> Such a narrow construction is unnecessary as shown by decisions of other courts, such as *Taylor*, that have read the same language to more broadly exempt closely regulated conduct.<sup>73</sup>

### 3. Application of CPAs to Industries or Conduct Not Explicitly Exempted

Some courts have placed undue weight on the fact that their state deceptive practices law does not explicitly include a certain industry among its exemptions. For example, although the Colorado Consumer Protection Act (CCPA) exempts conduct in compliance with any state or federal regulation, the state supreme court has found that a private action by an insured against an insurer is not precluded.<sup>74</sup> The court recognized that “the General Assembly could not have possibly enumerated all, or even most, of the practices that the CCPA was intended to cover,” yet it concluded:

If the General Assembly did not see fit to exclude insurance companies from the purview of the CCPA, it is not for this court to do so. Because exemptions in other areas have been explicitly addressed, the omission of an exemption for insurance companies strongly indicates that the General Assembly did not intend such an exemption.<sup>75</sup>

Thus, the court effectively created a private right of action for violations of the insurance code, even though state law governing unfair and deceptive trade practices in the insurance industry provided the In-

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72. Florida and New Mexico law provide two examples. Florida law exempts “[a]n act or practice required or specifically permitted by federal or state law,” while it specifically excludes “[a]ny person or activity regulated under laws administered by” government agencies overseeing insurance, financial practices, or public utilities. FLA. STAT. ANN. § 501.212(1), (4) (West 2006). Florida courts consistently apply this provision to require a party raising a regulatory compliance defense to show that it was “affirmatively authorized [ ] to engage in the conduct” by a federal or state agency. *State v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) (attorney general enforcement action); *see Eirman v. Olde Disc. Corp.*, 697 So. 2d 865 (Fla. Dist. Ct. App. 1997) (conduct did not violate Deceptive and Unfair Trade Practices Act (DUTPA) because it was authorized by the then-existing rules of the SEC); *3B TV Inc. v. State*, 794 So. 2d 744 (Fla. Dist. Ct. App. 2001) (no violation where conduct conformed to game promotion statute). New Mexico’s CPA excludes “actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States,” and states that “all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to the Unfair Practices Act.” N.M. STAT. ANN. § 57-12-7; *see Azar v. Prudential Ins. Co.*, 68 P.3d 909 (N.M. Ct. App. 2003) (exemption did not apply to life insurer’s failure to disclose additional information about dollar amount difference and annual percentage rates for paying insurance premiums in installments, even though the Insurance Division had approved the policies because the Insurance Code and regulations were silent on the subject of modal premiums).

73. *See supra* notes 58-67 and accompanying text.

74. *See Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 57 (Colo. 2001).

75. *Id.* at 54; *see Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998) (finding that “it is significant that the Consumer Protection Act specifically exempts certain entities and transactions from the prohibitions of the Act. . . . Insurance companies are not mentioned in this statute. Because exemptions in other areas have been explicitly addressed, the omission of an exemption for insurance companies strongly indicates that no such exemption was intended.”).

surance Commissioner with authority to investigate consumer complaints and impose penalties, and did not provide a private right of action.<sup>76</sup>

Ordinarily, principles of statutory construction of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) might be applied to weigh against expanding the list of exempted industries beyond those specifically listed by the legislature in the statute. The presence of a general regulatory compliance exemption, in addition to any specifically listed practices or industries, negates such stringent application of this principle. The Nebraska Supreme Court understood this when it found that a general regulatory compliance exemption excludes from coverage institutions governed by the Department of Banking and Finance and the State Real Estate Commission,<sup>77</sup> regardless of the legislature's explicit exclusion of insurers and public utilities from the scope of the CPA.<sup>78</sup>

### C. *Applicability of CPAs to Closely-Regulated Industries or Conduct*

As the previous section demonstrates, some states have lessened doubt over the application of consumer protection laws to certain regulated conduct through an express industry or agency-specific exemption. Legislators often design such exemptions by reference to acts regulated by the state commission or regulatory board overseeing that industry.<sup>79</sup> Generally, these express exemptions are seen in a few, select, heavily regulated industries. In addition, courts have interpreted general regulatory compliance provisions in states lacking an industry-specific provision to exempt highly regulated industries.

#### 1. Case Study: Insurance Practices

Insurance practices provide one of the most compelling areas for exclusion from CPAs. Insurers are subject to detailed statutes and regulations, enforced by state insurance commissions. Insurance regulators typically license insurers, approve rates and policy forms, monitor conduct and claims, and provide administrative supervision under the state's insurance code. Insurance regulators are authorized to receive, investigate, and address consumer complaints when carrying out their

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76. See *Showpiece Homes Corp.*, 38 P.3d at 49.

77. See *Little v. Gillette*, 354 N.W.2d 147, 152 (Neb. 1984); see also *Wrede v. Exch. Bank of Gibbon*, 531 N.W.2d 523, 530 (Neb. 1995) (bank held exempt from CPA); *Hydroflo Corp. v. First Nat'l Bank of Omaha*, 349 N.W.2d 615, 619 (Neb. 1984) (bank exempt); *McCaul v. Am. Sav. Co.*, 331 N.W.2d 795, 798-99 (Neb. 1983) (industrial loan and investment company regulated by the Department of Banking and Finance held exempt); *Kuntzelman v. Avco Fin. Servs. of Nebraska, Inc.*, 291 N.W.2d 705, 708 (Neb. 1980) (licensee making installment loan held exempt).

78. See NEB. REV. STAT. § 59-1617 (2004).

79. See e.g., ARK. CODE ANN. § 4-88-101 (Supp. 2003); DEL. CODE ANN. tit. 6 §2513(b) (2005); LA. REV. STAT. ANN. § 51:1406 (2003); NEB. REV. STAT. § 59-1617.

duties, with respect to marketing and sales representations, policyholder services, coverage issues, claim disputes, premium problems, policy cancellations, and refunds. State insurance commissions have a publicly funded staff of investigators, who may issue subpoenas and compel the production of documents. They may conduct hearings to determine whether insurers engaged in any suspected violations of the state's insurance code. When an insurance commission finds an insurer acted in violation of the state's insurance code, it may impose an administrative penalty on, or suspend, revoke or refuse to renew the license of any insurer who has engaged in a prohibited practice, or violated a cease and desist order issued by the agency. In some states, insurance regulators may order monetary relief for consumers who suffered a loss due to an insurer's illegal conduct. In most cases, the insurance code does not provide a private right of action; however, in a few states, it specifically includes such authorization. This is the paradigm of regulated conduct that should lie beyond CPA claims.

Given the comprehensive state regulation of insurance practices and specific mechanisms for addressing insurer complaints, consumer laws in at least seventeen states expressly exempt insurance activities from their scope.<sup>80</sup> These exemptions apply to insurance transactions subject to oversight by the state insurance commissioner or regulated by the state insurance code. There is little variation in the language or application of insurance exemptions. If the conduct is within the jurisdiction of the state's insurance regulator, then it is not subject to the CPA.<sup>81</sup> Therefore, litigation under such provisions has focused on whether the state insurance commissioner regulates the conduct at issue.<sup>82</sup>

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80. See ALASKA STAT. § 45.50.481(a) (2006); ARK. CODE ANN. § 4-88-101(3); DEL. CODE ANN. tit. 6 § 2513(b)(3); FLA. STAT. ANN. § 501.212(4) (West 2006); IDAHO CODE ANN. § 48-605(3) (2003); IND. CODE ANN. §§ 24-5-0.05-2(1), 24-5-0.5-6 (West 2006); KAN. STAT. ANN. § 50-624(c) (2005); LA. REV. STAT. ANN. § 51:1406; MD. CODE ANN., COM. LAW. § 13-104(1) (LexisNexis 2005); MICH. COMP. LAWS SERV. § 445.904(3) (LexisNexis 2006); MO. ANN. STAT. § 407.020(2) (West 2001); NEB. REV. STAT. § 59-1617(1); N.H. REV. STAT. ANN. § 358-A:3 (1995); S.C. CODE ANN. § 39-5-40(c) (1985); VA. CODE ANN. § 59.1-199(D) (2006); W. VA. CODE ANN. § 46A-1-105 (LexisNexis 2006); see also MONT. CODE ANN. § 30-14-105(1) (2005) (exempting conduct regulated by the state auditor, whose jurisdiction includes insurance practices).

81. See *McLichey v. Bristol West Ins. Co.*, 408 F. Supp. 2d 516, 524 (W.D. Mich. 2006); *Trs. of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 130-31 (D.S.C. 1994); *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 528 (Alaska 1988); *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 833 P.2d 128, 134 (Idaho Ct. App. 1992); *A-1 Nursery Registry, Inc. v. United Teacher Assocs. Ins. Co.*, 682 So. 2d 929, 931 (La. Ct. App. 1996); *Southern Gen. Agency, Inc. v. Safeway Ins. Co. of Louisiana*, 769 So. 2d 606, 608 (La. Ct. App. 2000).

82. See *Lamarque v. Mass. Indem. & Life Ins. Co.*, 794 F.2d 197 (5th Cir. 1986) (holding that claim against insurer was not within jurisdiction of Louisiana Insurance Commissioner and, thus, not barred on theory that Louisiana insurance code empowered Insurance Commissioner to take action against any insurer); *Colonial Life & Accident Ins. Co.*, 846 F. Supp. at 461-63 (finding that alleged false advertising in the insurance industry falls within the exemption); *McTeer v. Provident Life & Accident Ins.*, 712 F. Supp. 512 (D.S.C. 1989) (holding that actions of insurance companies in charging interest on prepayment of mortgage loans extended by them may be evaluated under Unfair Trade Practices Act since regulation by state insurance commission does not cover such activity);

The applicability of CPAs to insurance practices has proven less predictable in states without an explicit insurer exemption. Again, in these situations, the public policy behind regulatory compliance exemption is more important than the precise language of the statute in recognizing an exemption. For instance, at least one court has interpreted New Jersey's Consumer Fraud Act, which lacks an exemption for authorized or permitted conduct, to place insurer conduct outside the statute's coverage.<sup>83</sup> The court understood that allowing such claims would subject insurers to the oversight of multiple state agencies, create risks of contradictory regulations and factual determinations, and subject industry participants to damages that could ultimately place a cost burden on the insureds themselves.<sup>84</sup> The Supreme Court of Vermont reached the same result based on different reasoning.<sup>85</sup> This court found that selling an insurance policy is not an ordinary consumer contract for "goods" or "services" within the meaning of the CPA.<sup>86</sup> It recognized that the state's Insurance Trade Practices Act provides administrative sanctions for unfair and deceptive insurance practices and does not create a private right of action.<sup>87</sup> As discussed earlier, state courts, such as those in Georgia and Maine, interpret their general regulatory compliance exemptions to find insurance transactions completely exempt because insurance commissioners have full power and authority to remedy violations of the state's insurance code.<sup>88</sup> Each of these courts has applied public policy considerations, judicially recognizing the inapplicability of CPAs to insurers. Their reasoning applies to other conduct closely regulated by government agencies.<sup>89</sup>

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W.S. Badcock Corp. v. Myers, 696 So. 2d 776, 782-83 (Fla. Dist. Ct. App. 1996) (holding that company that charged consumers a "nonfiling fee" was not exempt as a person or activity regulated under laws administered by the Department of Insurance because the nonfiling insurance was not actually "insurance" because the company did not have an insurable interest covered by the policy, and insurer assumed no risk of loss because its liability under the agreement was limited to ninety percent of amount collected as premiums); Comeaux v. Penn. Gen. Ins. Co., 490 So. 2d 1191, 1193 (La. App. Ct. 1986) (holding that insured's action against automobile insurer fell within jurisdiction of Insurance Commissioner and thus was beyond scope of CPA).

83. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 975 F. Supp. 584, 619 (D.N.J. 1996) (finding New Jersey's specific regulatory scheme applicable to allegedly deceptive sales practices did not permit policyholders' Consumer Fraud Act claims against life insurer seeking recovery for misrepresentations in selling policies).

84. See *id.*

85. See *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981).

86. See *id.*

87. See *id.*

88. See *supra* notes 58-68 and accompanying text.

89. It is interesting to note that the FTC Act explicitly provides that it is not applicable to the business of insurance to the extent that state law regulates such activities of the insurance industry. See 15 U.S.C. § 1011 (2000). In reliance on this principle, courts have applied a state mandate requiring construction of the state act on congruence with federal policy to dismiss CPA claims involving insurance practices even where the statute does not contain an explicit insurance exemption or general exemption for regulatory compliance. See, e.g., *Britton v. Farmers Ins. Group*, 721 P.2d 303, 323-24 (Mont. 1986) (holding plaintiff was not eligible for an award of attorneys fees and costs under Montana's Unfair Trade Practices and Consumer Protection Act in an action for bad-faith refusal to pay under the insurance code). As the Supreme Court of Montana held, an interpretation of the Act

Not all states exempt insurer conduct from the CPA. The Massachusetts and Texas statutes explicitly authorize consumers to bring CPA actions for insurance code violations.<sup>90</sup> This awkward approach has generated substantial litigation and some pushback from courts and legislatures.<sup>91</sup> Courts in Kentucky and Tennessee consider the purchase of an insurance policy a “service” subject to the CPA in the absence of an explicit statutory exemption, regardless of state regulation.<sup>92</sup> Courts have also ruled that violations of the insurance code may form the basis of a CPA claim in some states, such as Connecticut.<sup>93</sup> Another example is Colorado, which does not allow private rights of action for violations of its state insurance code, yet its courts have allowed private claims under the CPA against insurers despite a regulatory compliance exemption.<sup>94</sup>

Moreover, inclusion of a clear exemption for insurer conduct does not necessarily mean that courts apply it faithfully. Illinois law, for example, exempts the “communication of any false, misleading, or deceptive information by an insurance producer” from consumer protection claims.<sup>95</sup> Yet, an Illinois trial court judge, after a bench trial, certified a nationwide class action against State Farm covering millions of policyholders in forty-eight states, alleging breach of contract and violations of the Illinois Consumer Fraud and Deceptive Trade Practices Act arising out of State Farm’s practice of specifying the use of non-OEM parts in auto repairs.<sup>96</sup> Non-OEM parts are generic repair parts made by companies that are not affiliated with the automobile companies.<sup>97</sup> Specifying non-OEM parts reduces repair costs and allows insurers to hold down the cost of automobile insurance premiums.<sup>98</sup> For that reason,

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consistent with federal law would confine those with complaints regarding insurance practices to such relief as may arise out of the insurance code. *See id.* at 324. The court, therefore, reasoned that regulation by the insurance department already covered the range of potential claims. *Id.*

90. *See* Mass. Ann. Laws ch. 93A, § 9 (LexisNexis 2005); Tex. Bus. & Com. Code Ann. § 17.50(a)(4) (Vernon 2002).

91. *See* Stephen S. Young, *Chapter 93A and the Insurance Industry*, Massachusetts Continuing Legal Education, Inc., ch. 14 (2005) (concluding “recent history of reported decisions suggests that plaintiffs may be reaching too far by including such claims in their cases, and that insurers are finding the courts receptive to their challenges—with 80% of the cases decided in favor of insurers during an eight-year period”); Eve L. Pouliot, *Deceptive Trade Practices and Consumer Protection Act*, 49 SMU L. REV. 871, 893-99 (1996) (examining the public policy underlying the 1995 amendments to the Deceptive Trade Practices Act (DTPA)); Anthony P. Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 449 (1984) (noting that at one point, the Texas DTPA accounted for approximately one half of all deceptive trade practices’ decisions nationwide).

92. *See* *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 820 (Ky. 1988); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 926 (Tenn. 1998).

93. *See* *United Techs. Corp. v. Am. Home Assurance Co.*, 118 F. Supp. 2d 174, 176 (D. Conn. 2000) (holding that violations of Connecticut Unfair Insurances Practices Act can be a basis for violations under Connecticut Unfair Trade Practices Act, and thus for a punitive damages award).

94. *See* *Showpiece Homes Corp. v. Am. Home Assurance Co.*, 38 P.3d 47, 58 (Colo. 2001); COLO. REV. STAT. ANN. § 6-1-106(1)(a) (West 2002).

95. *See* 815 ILL. COMP. STAT. ANN. 505/10b(6) (West 1999).

96. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 810 (Ill. 2005).

97. *Id.* at 810-11.

98. *See* Donna Harris, *Dealers: Ruling Will Wreck-Crash- Part Profits*, AUTO. NEWS, Aug. 29,

many states encourage and may even require insurance companies to specify non-OEM parts, and no state prohibits the specification of these parts.<sup>99</sup> Nevertheless, a judge awarded the plaintiffs \$1.2 billion, including \$600 million in punitive damages, after a bench trial in 1999.<sup>100</sup> Six years later, the Illinois Supreme Court unanimously reversed the verdict. The precise basis of the court's holding was the inappropriateness of certifying a nationwide class and the inability of an individual plaintiff to establish actual damage or proximate causation.<sup>101</sup> In dictum, however, the court also raised a "serious question"—whether State Farm's failure to disclose to its policyholders that non-OEM parts are not as good as OEM parts can be considered a deceptive practice given State Farm's regulatory compliance.<sup>102</sup> State Farm incurred six years of litigation expenses and needed to go to the Illinois Supreme Court related to a practice that is closely regulated by state insurance departments, which demonstrates that regulatory compliance exemptions lose their value if courts do not apply them early and consistently.

## 2. Other Frequently Exempted Industries

Several other industries are subject to a degree of regulation comparable to insurers, including registration and reporting requirements, mandated procedures and consumer protections, and a means for consumers to seek redress, and therefore are subject to similar treatment under consumer protection statutes and case law.<sup>103</sup> Financial institutions, including banks, credit unions, brokerage firms, and securities dealers are subject to specific statutory requirements and close monitoring and regulation by both federal and state government agencies,<sup>104</sup> and thus are explicitly exempted from the CPA in several states.<sup>105</sup> A num-

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2005, Vol. 80, Issue 6163 (reporting that non-operating equipment manufacturers (OEMs) parts can be as much as forty percent cheaper), available at 2005 WLNR 13759312.

99. See Schwartz & Lorber, *supra* note 3, at 1224.

100. *Avery*, 835 N.E.2d at 817.

101. *See id.*

102. *Id.* at 858.

103. The "filed rate doctrine" also effectively exempts aspects of insurance, public utilities, and other regulated industries from the scope of CPAs.

This doctrine, applied in a variety of contexts, is grounded in an agency's exclusive rate-setting authority. "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."

Pub. Util. Dist. No. 1 (Grays Harbor) v. Idacorp, Inc., 379 F.3d 641, 650 (9th Cir. 2004) (quoting Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002)) (holding that forward energy contracts entered pursuant to the market-based rate regime were protected under the "filed rate doctrine"); see *Ting v. AT&T*, 319 F.3d 1126, 1131-34 (9th Cir. 2003) (discussing the doctrine in relation to the telecommunications industry).

104. See, e.g., 12 U.S.C. § 461 (2000) (Federal Reserve System bank reserve requirements); 12 U.S.C. § 1828 (2000) (regulations governing insured depository institutions); 15 U.S.C. § 78a (2000) (establishing the Securities Exchange Commission).

105. See ARK. CODE ANN. § 4-88-101 (Supp. 2001) (exempting any activity regulated by either the state bank commissioner or securities director); FLA. STAT. ANN. § 501.212(4) (West 2006) (exempting banks and savings and loan organizations); IND. CODE ANN. §§ 24-5-0.05-2(1) (West 2006)

ber of courts have interpreted the general regulatory compliance provision of CPAs, where the law does not include an express exemption for financial practices, to apply to some regulated financial transactions, but with no clear or consistent guidelines for seemingly related conduct.<sup>106</sup>

For similar reasons, CPAs in at least nine states clearly exempt public utilities subject to state oversight.<sup>107</sup> State public utility commissions (PUC) typically regulate rates, fees, and terms of service regarding the retail sale of telecommunications, water, electricity, and natural gas to consumers. In some states, PUCs also regulate some passenger and commercial transportation services, which are required to file tariffs with the PUC setting forth their passenger fares and are subject to PUC oversight for compliance with safety rules.<sup>108</sup>

Many states also exempt publishers, broadcasters, printers, or other persons who are engaged in the dissemination of information or reproduction of printed materials from CPAs.<sup>109</sup> The purpose of exempting the media, however, is distinct from regulatory compliance because they recognize that the media publishes and broadcasts advertisements of third parties and should not be held liable for content provided by others.

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(exempting securities only); LA. REV. STAT. ANN. § 51:1406 (2003) (exempting any financial transactions subject to oversight by the commissioner of financial institutions, federal banking regulators or regulators in other states); MO. ANN. STAT. § 407.020(2) (West 2001) (exempting banks and credit unions); N.H. REV. STAT. ANN. § 358-A:3 (LexisNexis Supp. 2006) (exempting any activity regulated by either the state bank commissioner or securities director); VA. CODE ANN. § 59.1-199 (2006) (setting forth a laundry list of exempted financial service providers that includes banks, savings institutions, credit unions, small loan companies, mortgage lenders, and securities broker-dealers); *see also* MONT. CODE ANN. § 30-14-105(1) (2005) (exempting conduct regulated by the state auditor, whose jurisdiction includes regulating securities transactions).

106. For instance, the Supreme Court of Connecticut found that CPA claims may be brought against banks, but not the securities industry. *See* *Normand Josef Enters., Inc. v. Conn. Nat'l Bank*, 646 A.2d 1289, 1304-05 (Conn. 1994); *see also* *Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977 (Conn. 1986) (holding the securities industry exempt). The court explained the distinction on the basis that the banking industry faces comprehensive regulation at both the state and federal level, while securities are predominately federally regulated. *See* *Russell*, 510 A.2d at 977; *see also* *Mead v. Burns*, 509 A.2d 11, 17-19 (Conn. 1986) (holding that the state legislature had manifested an intention to make insurance practices the subject of both a general consumer protection statute as well as a statute regulating unfair insurance practices and that the mere existence of one regulatory statute did not affect the applicability of a broader, non-conflicting statute, particularly when both statutes provided for concurrent coverage of their common subject matter). Distinctions such as this, which are tenuous at best given the considerable banking industry regulation as compared to other industries, including securities, highlight this lack of consistency and predictability of judicial interpretations in the absence of specific exemptions.

107. *See* ARK. CODE ANN. § 4-88-101(4); DEL. CODE ANN. tit. 6 §2513(b) (2005); FLA. STAT. ANN. § 501.212 (5); IDAHO CODE ANN. § 48-605 (2003); LA. REV. STAT. ANN. § 51:1406; MD. CODE ANN., COM. LAW. § 13-104(2) (LexisNexis 2005); MONT. CODE ANN. § 30-14-105(1); NEB. REV. STAT. § 59-1617 (2004); N.H. REV. STAT. ANN. § 358-A:3; UTAH CODE ANN. § 13-11-22(e) (2001); VA. CODE ANN. § 59.1-199; W. VA. CODE ANN. § 46A-1-105(a) (LexisNexis 2006).

108. *See, e.g.*, 52 PA. CODE §§ 23.1, 37.201 (1995). The Federal Energy Regulatory Commission (FERC) also regulates interstate electricity sales, wholesale electric rates, hydroelectric licensing, natural gas pricing, and oil pipeline rates. *See* 42 U.S.C. § 7134 (2000).

109. *See, e.g.*, MISS. CODE ANN. § 75-24-7 (2000); OHIO REV. CODE ANN. § 4165.04(A)(2) (West 2004); UTAH CODE ANN. § 13-11-22(b).

### 3. Treatment of Professional Services

The conduct of members of certain professions is subject to self-regulation or quasi-public oversight. For example, physicians are subject to regulation by state medical boards;<sup>110</sup> lawyers are subject to ethical rules and a disciplinary system established by state bar associations;<sup>111</sup> accountants are subject to licensing, ethical codes, and regulation by state boards of public accountancy;<sup>112</sup> and those who professionally assist in the purchase and sale of property are subject to state real estate commissions.<sup>113</sup> These regulatory agencies and associations typically have the ability to receive consumer complaints, take disciplinary action in the form of a letter of reprimand, suspend or revoke licenses, and impose monetary penalties. They may also provide informal means to resolve consumer complaints, such as mediation services. For this reason, several CPAs explicitly exclude certain professional services from their scope,<sup>114</sup> and, in other states, the applicability of CPAs to professional services is subject to varying judicial interpretation.

Texas's Unfair and Deceptive Trade Practices Act provides an example of a broad express CPA exemption for conduct "based on the rendering of a professional service."<sup>115</sup> This provision excludes activities "the essence of which is the providing of advice, judgment, opinion, or similar professional skill."<sup>116</sup> The exemption, however, does not explicitly apply to material misrepresentations, express warranty breaches, the failure to disclose certain information, or other unconscionable actions not characterized as "advice" or "opinion."<sup>117</sup> Other states, such as Florida, Maryland, and West Virginia, follow a more exacting approach by specifically providing a list of exempted professions, from lawyers and physicians to architects.<sup>118</sup> These exemptions suggest a careful legis-

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110. See Federation of State Medical Boards, <http://www.fsmb.org/mission.html> (last visited Sept. 23, 2007).

111. See American Bar Association, Center for Professional Responsibility, Directory of Lawyer Disciplinary Agencies, <http://www.abanet.org/cpr/regulation/scpd/disciplinary.html> (last visited Sept. 23, 2007).

112. See American Institute of Certified Public Accountants, State Boards of Accountancy, <http://www.aicpa.org/yellow/yppsboa.htm> (last visited Sept. 23, 2007).

113. See Bean Group, Web Sites For All 50 Real Estate Commissions, [http://www.beangroup.com/content/articles/Web\\_Sites\\_For\\_All\\_50\\_Real\\_Estate\\_Commissions/2992/](http://www.beangroup.com/content/articles/Web_Sites_For_All_50_Real_Estate_Commissions/2992/) (last visited Sept. 23, 2007).

114. See D.C. CODE ANN. § 28-3903(c) (LexisNexis 2001) (exempting clergyman, lawyers and Christian Science practitioners); FLA. STAT. ANN. § 501.212(6) (West 2006) (exempting actions of licensed real estate professionals); MD. CODE ANN., COM. LAW. § 13-104(1) (LexisNexis 2005) (exempting extensive list of professional services); TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon 2002) (exempting any service professional); W. VA. CODE ANN. § 46A-1-105 (LexisNexis 2006) (exempting pawnbrokers, mortgage lenders and brokers).

115. See TEX. BUS. & COM. CODE ANN. § 17.49(c).

116. *Id.*

117. *Id.*

118. See, e.g., MD. CODE ANN., COM. LAW. § 13-104(1) (exempting the services of any "certified public accountant, architect, clergyman, professional engineer, lawyer, veterinarian, insurance company authorized to do business in the State, insurance producer licensed by the State, Christian Science practitioner, land surveyor, property line surveyor, chiropractor, optometrist, physical therapist,



lative intent regarding the types of claims that go beyond the ordinary consumer transactions to which CPAs apply. This legislative solution also patterns judicial interpretations in several states recognizing an exemption for certain state-regulated professional groups under a general exemption for authorized conduct or on public policy grounds.<sup>119</sup>

Other courts have found professional services are subject to the CPA.<sup>120</sup> For instance, the Kansas Supreme Court recently ruled that a plaintiff's lawyer, whose failed medical malpractice suit against a physician related to plastic surgery, could pursue a CPA claim.<sup>121</sup> Such rulings may occur because oversight, licensing and ethical obligations imposed by professional organizations may be viewed as less rigorous than regulations imposed by government agencies. It may also be due to criticism of the effectiveness of self-regulation.<sup>122</sup> In addition, some courts have permitted CPA suits against doctors, lawyers, and real estate professionals when the conduct at issue is not in the nature of professional advice, but relates to entrepreneurial aspects of their business, such as advertising and billing practices.<sup>123</sup> As a result of the lack of sufficient action by state bar association disciplinary panels, an advocacy organization has even petitioned the FTC to intervene to more closely regulate deceptive advertising and other sales practices of personal in-

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podiatrist, real estate broker, associate real estate broker, or real estate salesperson, or medical or dental practitioner"); see also FLA. STAT. ANN. § 501.212(6) (exempting licensed real estate professionals); W. VA. CODE ANN. § 46A-1-105 (excluding pawnbrokers, mortgage lenders and brokers).

119. See, e.g., Keatinge v. Biddle, No. Civ. 99-321-P-H, 2000 WL 761015, at \*1 (D. Me. Mar. 20, 2000) (unpublished opinion) (lawyers are not subject to the Act because they are already extensively regulated under Maine law); First of Maine Commodities v. Dube, 534 A.2d 1298, 1301 (Me. 1987) (real estate brokers exempt because the Maine Real Estate Commission extensively regulates brokers' activities); Nelson v. Ho, 564 N.W.2d 482, 487 (Mich. Ct. App. 1997) (holding physicians exempt from CPA application because they are "more appropriately addressed in the context of a timely filed medical malpractice claim"); Macedo v. Dello Russo, 840 A.D.2d 238, 242 (N.J. 2004) (finding that "advertisements by learned professionals in respect of the rendering of professional services are insulated from the C[onsumer] F[raud] A[ct]"); Averill v. Cox, 761 A.2d 1083, 1087-89 (N.H. 2000) (quoting Rousseau v. Eshleman, 519 A.2d 243, 245 (N.H. 1986) and overruling Gilmore v. Bradgate Assocs., Inc., 604 A.2d 555, 557 (N.H. 1992)) (interpreting its CPA, which does not include a regulatory compliance provision, to exempt attorneys because the legal profession "is subject to regulation by the supreme court through its committee on professional conduct [], 'a regulatory board acting under statutory (and constitutional) authority of this State'").

120. See, e.g., Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984) (holding that the practice of law, which includes certain entrepreneurial aspects, falls within the purview of the CPA); Quimby v. Fine, 724 P.2d 403, 405-06 (Wash. Ct. App. 1986) (holding that the practice of medicine falls within the purview of the CPA).

121. See Williamson v. Amrani, 152 P.3d 60, 69-70 (Kan. 2007) (finding physicians subject to the CPA because they are not specifically excluded).

122. See, e.g., Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847, 874 (1998) (examining problems with industry self-regulation regarding online and electronic commercial transactions).

123. See Darviris v. Petros, 812 N.E.2d 1188, 1193 (Mass. 2004) (finding the CPA inapplicable to medical malpractice claim, noting that statute may apply to entrepreneurial and business aspects of providing medical services, and citing other jurisdictions in accord); Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 974 (Conn. 1997) (stating that the consumer protection claim against health care provider must concern entrepreneurial or business aspect of provision of medical services); Simmons v. Stephenson, 84 S.W.3d 926, 928 (Ky. Ct. App. 2002) (stating that the consumer protection statute applies only to entrepreneurial, commercial, or business aspect of the practice of medicine).

jury lawyers.<sup>124</sup>

### III. DISTINGUISHING BETWEEN FEDERAL PREEMPTION AND APPLICATION OF REGULATORY COMPLIANCE EXEMPTIONS CONTAINED IN CPAS

Regulatory compliance exemptions contained in CPAs are separate and distinct from constitutional principles of federal preemption. Although they share some attributes in their underlying policy and application, it is important to note their differences in scope.

#### A. Principles of Preemption

The Supremacy Clause of the United States Constitution gives Congress authority to preempt any state law that conflicts with the exercise of federal power.<sup>125</sup> Congress occasionally provides that a federal law preempts state statutes and common law within the text of a statute, a practice known as “express preemption.” In other cases, preemption can be implied through the purpose or structure of the federal law. The Supreme Court has recognized that “[e]ven without an express provision for preemption, we have found that state law must yield to a congressional Act.”<sup>126</sup> This occurs in two situations: (1) when Congress intends to occupy an entire regulatory field leaving no room for state law making (field preemption) or (2) when there is a conflict between the state and the federal law (conflict preemption).<sup>127</sup> Under conflict preemption principles, a state law is preempted if the regulated party cannot comply with both the state and federal regulation.<sup>128</sup> Additionally, courts may find state statutes or common law claims preempted where, under the circumstances of a particular case, state law “stands as an ob-

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124. Washington Legal Foundation, Commencing Trade Regulation Rule Proceedings Under § 18(a)(1)(B) of the Federal Trade Commission Act to Regulate Contingency Fee Agreements Entered Into by Attorneys (Aug. 14, 2001) (on file with authors). FTC regulation of the legal profession would appear consistent with its approach respecting the practice of medicine, the commercial aspects of which it has found subject to the FTC Act. See generally *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (bringing action against dental association for forbidding its members to submit dental X-rays to dental insurers); *Am. Med. Ass’n v. FTC*, 638 F.2d 443 (1980), *aff’d*, 455 U.S. 676 (1982) (bringing action against American Medical Association for enforcing restraints on advertising, solicitation, and contract practices by physicians). While the FTC has issued a pamphlet on the rights of legal consumers, it has not acted to otherwise regulate the legal profession. See Federal Trade Commission, *FTC Facts for Consumers: Need a Lawyer? Judge for Yourself*, <http://www.ftc.gov/bcp/online/pubs/services/lawyer.pdf> (last visited Sept. 23, 2007).

125. U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

126. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

127. *Id.*

128. See *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

stacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>129</sup> The Supreme Court has “held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes.”<sup>130</sup> The Court has also made clear that agency positions on the preemptive effect of federal law, even when not a result of formal rule-making, are “entitled to respect”<sup>131</sup> and accorded “substantial” deference.<sup>132</sup>

CPA claims that allege theories of liability that are contrary to a federal approval or a specific federal regulatory standard directly conflict with the statutory authority of a federal agency. Ordinary principles of conflict preemption preclude such suits when they interfere with a federal agency’s ability to carry out its regulatory functions, impose inconsistent and irreconcilable obligations on manufacturers, and place the public health and safety at risk. Common examples of preempted consumer protection claims include most traditional areas of federal regulation, such as securities misrepresentations, credit reporting, or copyright infringement.<sup>133</sup> On the other hand, courts have allowed use of CPA claims to create private remedies for alleged violations of federal laws that do not contain a private right of action, so long as the plaintiff’s theory would not impose requirements inconsistent with federal law.<sup>134</sup>

Preemption has two principal limitations. First, preemption comes

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129. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000).

130. *See Hillsborough County*, 471 U.S. at 713; *see also Fidelity Fed. Savs. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 153-54 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”).

131. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000).

132. *Spreitsma v. Mercury Marine*, 537 U.S. 51, 67-68 (2002).

133. *See Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 305 (3d Cir. 2005) (finding that the Securities Litigation Uniform Standards Act preempts securities misrepresentation claims under consumer protection laws); *Jaramillo v. Experian Info. Solutions, Inc.*, 155 F. Supp. 2d 356, 362 (E.D. Penn. 2001) (holding that the Fair Credit Reporting Act preempted consumer protection claims regarding allegedly deceptive credit reporting practices); *Goes Lithography Co. v. Banta Corp.*, 26 F. Supp. 2d 1042, 1047 (N.D. Ill. 1998) (concluding that the federal Copyright Act preempted infringement claims under the state Uniform Deceptive Trade Practices Act).

134. For instance, a federal court has permitted CPA claims related to the fat and calorie contents in french fries to proceed against McDonald’s under Illinois and New York law for alleged violations of the Nutrition Labeling in Education Act (NLEA), which is enforced by the FDA and does not include a private right of action. *See Reyes v. McDonald’s Corp.*, Nos. 06 C1604, 06 C 2813, slip op., 2006 WL 3253579, at \*6 (N.D. Ill. Nov. 8, 2006). The court ruled, however, that the plaintiffs could proceed with their CPA claim only to the extent that their allegations of “misbranding” are identical with what would be considered a violation of the NLEA; any broader definition of “misbranding” than that provided in the NLEA would be preempted. *See id.* at \*7-8. In another case, claims related to the handling of genetically modified corn were allowed under Tennessee’s CPA for alleged violations of the Federal Insecticide, Fungicide and Rodenticide Act, which is regulated by the Environmental Protection Agency (EPA) and similarly does not contain a private right of action. *See In re Starlink Corn Prod. Liab. Litig.*, 212 F. Supp. 2d 828, 836 (N.D. Ill. 2002) (applying, in part, Tennessee consumer protection law). Similarly, as in *Reyes*, the *Starlink* court found that the federal law did not preempt state law claims that imposed identical, but not additional, labeling requirements as the EPA. *See id.* at 836.

into play only when a *federal* statute or regulation addresses an issue involved in a CPA claim. Preemption does not address the interaction between *state* regulation and CPA lawsuits. Second, courts construe preemption narrowly, preferring to permit state regulation of an area, whether by statute or lawsuit, unless there is a clear conflict between the federal law or objective and the state law claim.<sup>135</sup> This narrow construction is supportive of federalism principles.

Regulatory compliance exemptions are rooted in state statutes, not federal constitutional law. They embrace a policy, not rooted in federalism concerns, of interpreting the broad language of CPAs in a manner that respects the regulatory authority of a state or federal government agency.<sup>136</sup> For that reason, the application of such exemptions is far broader than preemption. They apply when federal or state regulation is in tension with a CPA claim. Moreover, as the case law demonstrates, for a defendant to assert the exemption, it may be sufficient that a government agency has authority to regulate the practice or industry at issue or has implicitly decided to permit the practice.<sup>137</sup>

### *B. The Intersection: FDA Regulation of Prescription Drug Labeling and Marketing*

Despite the FDA's close regulation of prescription drug advertising,<sup>138</sup> and its authority to seek civil and criminal penalties against those who fail to disclose information to regulators,<sup>139</sup> pharmaceutical companies are among the principal targets of CPA litigation.<sup>140</sup> There is a strong argument that the scope of CPAs was never meant to include FDA-approved drugs. The clear public policy behind these provisions is that consumer protection laws were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by the government. Some courts have properly recognized

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135. See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) (finding that a state's unfair competition law prohibiting the copying of a product not protected by a patent or copyright was contrary to the objectives of federal patent laws and therefore preempted).

136. See *Porr v. NYNEX Corp.*, 660 N.Y.S.2d 440, 442 (N.Y. App. Div. 1997) ("It has repeatedly been held that a consumer's claim, however disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is viewed as an attack upon the rate approved by the regulatory commission.").

137. See *supra* Section III.B.1.

138. The FDA oversees the advertising, marketing, and promotion of prescription drugs. See 21 U.S.C. §§ 321(n), 331(a), 352(a) (2000); 21 C.F.R. § 202.1(e)(4)(i)(a) (2006). When the FDA finds that an advertisement is misleading, it issues a public warning letter and requires corrective action. See FDA, <http://www.fda.gov/cder/warn/> (last visited Sept. 23, 2007).

139. The FDA investigates suspected violations of its requirements for the submission of information using its general statutory investigative authority, and it is empowered to address fraud by seeking injunctive relief, and civil and criminal penalties. 21 U.S.C. §§ 331(e), 332-34. In addition, the FDA can seek penalties against any manufacturer that makes a false statement to the federal government. 18 U.S.C. § 1001 (2000).

140. See generally James P. Muehlberger & Cary Silverman, *Lawsuits Without Injury: The Rise of Consumer Protection Claims*, DRUGS & SUPPLEMENTS, Oct. 2006, at 4.

that the FDA's regulation of prescription drug marketing precludes CPA claims based on federal preemption.<sup>141</sup> Regulatory compliance exemptions provide an additional basis for precluding such suits under state law.

Typically, plaintiffs' lawyers bring CPA claims involving prescription drugs as class actions on behalf of a group of individuals in a state, or, in some cases, the entire country, who purchased the drug, but did not suffer any ill effects. These lawsuits usually allege that the company promoted a drug as safe and effective, when the product either was not as effective as consumers allegedly believed, or the company's advertising failed to disclose to the public a known risk associated with the drug. Claims may allege that the company's aggressive advertising of the drug resulted in artificial inflation of the product's price beyond its actual value. Damages sought are usually either a complete refund of the purchase price (on behalf of thousands of consumers), or the difference between the sale price and the hypothetical actual value. In recent years, such claims have been made involving Claritin,<sup>142</sup> OxyContin,<sup>143</sup> Prempro,<sup>144</sup> and Rezulin,<sup>145</sup> among other products.

Consider the case of Vioxx, which has made news due to the thousands of individual product liability lawsuits filed after Merck & Co. voluntarily withdrew the popular arthritis drug from the market in September 2004. The withdrawal came in response to a Merck-sponsored study that found an increased relative risk of heart attack after eighteen months of use of the drug compared to patients taking a sugar pill. Most of the product liability claims that have gone to trial have ultimately re-

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141. See, e.g., *Pa. Employee Benefit Trust Fund v. Zeneca, Inc.*, No. 05-075-SLR, 2005 WL 2993937, at \*2-4 (D. Del. Nov. 8, 2005) (unpublished opinion) (holding that the Delaware Consumer Fraud Act does not apply to actions involving the safety and efficacy of an FDA-approved prescription drug); see also *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 177-78 (D.D.C. 2003) (dismissing class action on behalf of patients prescribed OxyContin, a medication for chronic pain relief, for failure to state an actionable injury under consumer protection law).

142. *N.J. Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 177 (N.J. Super. Ct. App. Div. 2003) (finding plaintiffs who claimed allergy medication was not as effective as advertised failed to establish a causal nexus between representations and any loss suffered under the New Jersey Consumer Fraud Act).

143. *Williams*, 297 F. Supp. 2d at 177-78 (dismissing District of Columbia's Consumer Protection Procedures Act claim that the manufacturer over-promoted the drug as providing "smooth and sustained" pain relief for twelve hours with little chance of addiction, which allowed the manufacturer to artificially inflate its prices).

144. *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 566-68 (E.D. Ark. 2005) (denying certification of a consumer-protection class due to material variations in the consumer laws of the twenty-nine states at issue and the need to show individual plaintiffs relied on the allegedly deceptive advertisement and were injured as a result).

145. *In re West Virginia Rezulin Litig. v. Hutchinson*, 585 S.E. 2d 52, 62-65 (W. Va. 2003) (plaintiffs argued that manufacturers aggressively and falsely marketed the drug as having breakthrough effectiveness with low side effects, but did not fully disclose problems with the drug, ruling that the statutory requirement that a plaintiff show an "ascertainable loss" under West Virginia Consumer Credit and Protection Act did not require a showing of actual damages and finding that plaintiffs needed only to allege that they received a product that was different or inferior to that which they believed they purchased).

sulted in defense verdicts.<sup>146</sup> But some lawyers opted not to recruit injured plaintiffs and have instead filed CPA claims on behalf of thousands of consumers who used Vioxx, but do not allege any personal injury. These claims instead allege deceptive advertising without full disclosure of risks, leading consumers to pay more for the drug than it was worth.<sup>147</sup> A New Jersey class action lawsuit included similar allegations, but on behalf of third-party payors nationwide, such as insurance companies and health maintenance organizations, rather than common consumers.<sup>148</sup> In July 2005, a trial court granted class certification, and the appellate division affirmed, ruling that it would apply the New Jersey Consumer Fraud Act, which does not include a regulatory compliance exemption, to each class member's claim.<sup>149</sup> The New Jersey Supreme Court reversed, however, finding the following: that the differences between the way third-party payors encouraged or discouraged prescription of the drug; the inability to show an "ascertainable loss" on a class-wide basis other than through an inappropriate "fraud on the market theory;" and the lack of need for class treatment of litigation involving sophisticated institutional plaintiffs each seeking large sums, precluded certification.<sup>150</sup> If the plaintiffs were to have won the lawsuit, then they would have received "threefold" damages, attorneys fees and costs under the New Jersey law.<sup>151</sup> Moreover, had the New Jersey Supreme Court reached a different outcome, the case would have encouraged forum shopping of both individual consumer claims and nationwide class actions to New Jersey, where there is no regulatory compliance exemption and many pharmaceutical companies are subject to jurisdiction due to their business operations in the state.<sup>152</sup>

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146. See Merck & Co., Annual Report (Form 10-K), at 3 (Feb. 28, 2007) (noting that in the Vioxx product liability lawsuits, of the twenty-nine plaintiffs whose claims had been scheduled for trial, seven claims were dismissed, seven claims were withdrawn before trial by plaintiffs, and juries decided in Merck's favor nine times and in plaintiffs' favor four times).

147. See Beth Musgrave, *Vioxx Class-Action Suit in State Law; Firm Says 150,000 Kentuckians Took Drug, Weren't Told of Risks*, LEXINGTON HERALD-LEADER, Oct. 26, 2004, at B6 (reporting on a class action lawsuit filed on behalf of more than 150,000 Kentucky residents); Complaint, House v. Merck & Co., (W.D. Okla., filed Sept. 30, 2004), available at <http://www.federmanlaw.com/pdf/CompHouse.pdf>.

148. See *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136, 1139-40 (N.J. Super. Ct. App. Div. 2006) (affirming certification of nationwide class action alleging that third-party payors paid approximately 800% more than they should or would have for Vioxx due to Merck's allegedly deceptive marketing, advertising, promotion, and sale of the prescription drug relating to its representations on the safety and efficacy of the drug).

149. *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, No. ATL-L-3015-03, 2005 WL 2205341, at \*1 (N.J. Super. Ct. July 29, 2005), *aff'd*, 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006). While acknowledging "sufficient variations" among state CPAs to pose a conflict, the trial court found, based on a superficial choice-of-law analysis, that New Jersey had the strongest interest in applying its laws primarily because the defendant was a citizen of that state. *Id.* at \*17.

150. See *Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007).

151. N.J. STAT. ANN. § 56:8-19 (West 2001).

152. The New Jersey lawsuit exemplifies many of the problems with consumer litigation. Product liability implications of the New Jersey claim aside, it seems unlikely that sophisticated third-party payors (organizations that provide insurance benefits to members by reimbursing part of the

Another recent case of note is *Pennsylvania Employees Benefit Trust Fund v. Zeneca, Inc.*,<sup>153</sup> in which the plaintiffs claimed that the manufacturer of Nexium violated the Delaware Consumer Fraud Act by claiming in its advertising that Nexium was superior to Prilosec.<sup>154</sup> Both drugs treat acid reflux disease and frequent heartburn. Delaware's consumer protection law exempts advertising or mechanizing practices that are subject to, and comply with, the rules and regulations of the FTC, but does not contain a general regulatory compliance exemption application to conduct in compliance with the rules of other government agencies.<sup>155</sup> The United States Court of Appeals for the Third Circuit, though noting that the FTC and FDA initially had concurrent jurisdiction over prescription drug advertising, declined to extend the clear statutory language to conduct that now exclusively falls within the FDA's jurisdiction.<sup>156</sup> The Third Circuit, however, found that the purpose of the Food, Drug & Cosmetic Act "would be frustrated if states were allowed to interpose consumer fraud laws that permitted plaintiffs to question the veracity of statements approved by the FDA."<sup>157</sup> Thus, the court found claims under Delaware's consumer protection law challenging labeling or advertising of FDA-approved prescription drugs implicitly preempted.<sup>158</sup>

### C. *Deciding Whether to Apply the CPA Exemption or Preemption*

While the Nexium case shows that preemption may be a route to achieve congruence between regulatory compliance and liability where an explicit exemption to the statute is absent, in some cases, defenses based on federal preemption and regulatory compliance may both be available. In such situations, courts have also dismissed cases on preemption grounds.<sup>159</sup> In other cases, such as those involving the FTC's

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cost of prescription medication in return for premiums paid by their members) are the type of "consumers" that such laws are intended to protect. In addition, a local court's application of its own state law to regulate trade practices in other states undermine the autonomy of sister states and their ability to regulate conduct within their borders. See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 852-53 (Ill. 2005); Schwartz & Lorber, *supra* note 3, at 1230-32. Moreover, substantial variations between state CPA laws, such as provisions requiring the plaintiff to give notice to the defendant prior to suit, the presence of regulatory compliance exemptions, the need to show individual reliance, the availability of statutory or treble damages, and, whether the law permits class treatment at all, makes certification of classes involving plaintiffs from multiple states particularly inappropriate.

153. No. 05-5240, 2007 U.S. App. Lexis 19601 (3d Cir. Aug. 17, 2007).

154. *Id.* at \*8.

155. See DEL. CODE ANN. tit. 6 §2513(b) (2005).

156. See *Pa. Employees Benefit Trust Fund*, 2007 U.S. App. Lexis 19601 at \*8-11.

157. *Id.* at \*35.

158. *Id.* at \*36.

159. See, e.g., *Pa. Employee Benefits Trust Fund v. Zeneca, Inc.*, No. 05-075-SLR, 2005 WL 2993937, at \*4 (D. Del. Nov. 8, 2005) (unpublished opinion) (acknowledging separate grounds for dismissal and stating "to the extent that any of these [CPAs] do not have a similar exemption clause, the claims are preempted by the FDA's approved labeling"). Ordinary principles of conflict preemption may preclude suits that would require warnings that differ from what the FDA has approved.

regulation of light cigarettes, courts have instead opted to act based on the regulatory compliance exemption found in the state statute.<sup>160</sup> Given the well-established principle that courts should avoid deciding constitutional questions unless necessary,<sup>161</sup> courts are likely to prefer application of statutory regulatory compliance exemptions over use of preemption, particularly when both further similar public policies and achieve the same result. Federalism concerns are not at issue when a court applies a state's own regulatory compliance defense. Moreover, application of a regulatory compliance defense does not require a conflict between state law and the policy of the federal agency, but only that the defendant's conduct was in compliance with or authorized by federal law.<sup>162</sup>

The grounds used to dismiss the claim may have important implications for judicial review. If a court dismisses on preemption grounds, this federal constitutional issue is subject to review in the Supreme Court of the United States. Decisions based on regulatory compliance provisions do not raise a federal question, leaving the state's highest court as the final arbiter of appeals.

#### IV. COURTS AND LEGISLATURES SHOULD ACT

While the intent of state legislatures in enacted CPAs was to provide a means of private redress for consumers where government regulation is lacking, there appears to be little certainty or predictability as to the applicability of exemptions for regulated conduct. Courts have found closely regulated conduct exempt with or without explicit exemptions for specific industries or authorized conduct, or any regulatory exemption whatsoever. Courts have grounded these exemptions in anything from an FTC interpretation to the generalized notion of a regulatory scheme. Yet, courts in other states with very similar statutory language have allowed consumer protection claims to proceed against comprehensively regulated industries.

State courts and legislatures can take action to ensure that interpretation of consumer protection statutes is consistent with the regulatory

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*See* Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products and Draft Guidances and Two Guidances for Industry on the Content and Format of Labeling for Human Prescription Drug and Biological Products; Final Rule and Notices, 71 Fed. Reg. 3921, 3935-36 (Jan. 24, 2006).

160. *See, e.g.,* Price v. Philip Morris, Inc., 848 N.E.2d 1, 22-23 (Ill. 2005) (discussing federal preemption under the Federal Cigarette Advertising and Labeling Act, but reserving judgment on the issue).

161. *See, e.g.,* Arizona v. Evans, 514 U.S. 1, 33 (1995); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 349 (1936) (Brandeis, J., concurring) (stating the "cardinal principle" that courts ascertain whether construction of a statute is fairly permissible before engaging in constitutional inquiry).

162. *See* Murray R. Garnick & James Rosenthal, *But the Government Said OK*, LEGAL TIMES, July 9, 2007, at 52 (comparing the standards applicable to preemption to regulatory compliance exemptions provided by state consumer protection laws).



policy of the state, and that businesses that comply with the law are not subject to unpredictable and inconsistent liability. Courts should interpret the statute with the overriding purpose behind enactment of CPAs as a gap-filling safeguard where government oversight and regulation does not exist to protect the public. As former dean of Harvard Law School James Landis remarked, “the emphasis must lie upon the honest effort of courts to give effect to the legislature’s aims, even though their perception be perforce through a glass darkly.”<sup>163</sup> Thus, even when the CPA is not clear, looking to the entire statutory scheme and regulatory law enacted by the legislature to protect consumers in other areas, courts should interpret these statutes in a manner that respects the authority and institutional expertise of government agencies. CPAs should not be used as a means to effectively create new private rights of actions when not explicitly provided by the legislature or to impose a private regulatory regime on top of publicly funded and politically accountable government oversight.

Applying these principles, some state courts have acted to reign in CPA lawsuits against regulated industries where the language of the statute is ambiguous or court precedent has misconstrued legislative intent. Changes in the nature of modern tort litigation can provide a basis for overturning established legal precedents, where warranted,<sup>164</sup> and the increasing use of CPAs as a vehicle for private actions presents a compelling argument that the litigation front is changing, and that courts should take adaptive measures. For example, in 2000, the Supreme Court of New Hampshire overruled earlier case law to find that trade or commerce subject to a regulatory board or officer authorized by statute was outside the scope of the CPA.<sup>165</sup> Before 2000, only transactions expressly permitted by a regulatory board or officer were considered exempt.<sup>166</sup> The court stated that its ruling corrected a “troubling result because it is difficult to envision any commercial transaction which is prohibited by the Consumer Protection Act but expressly permitted by a statutorily authorized regulatory body.”<sup>167</sup> While the court’s decision came in the context of the applicability of the CPA to the practice of law, courts have already applied its reasoning to other regulated areas.<sup>168</sup>

In the absence of judicial modifications to accomplish the legisla-

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163. James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886, 893 (1930).

164. See Victor E. Schwartz, et al., *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C.L. REV. 317, 337 (2006).

165. See *Averill v. Cox*, 761 A.2d 1083, 1087 (N.H. 2000) (overruling *Gilmore v. Bradgate Assocs., Inc.*, 604 A.2d 555 (N.H. 1992)).

166. See *id.*

167. *Id.*

168. See, e.g., *Bell v. Liberty Mut. Ins. Co.*, 776 A.2d 1260, 1261 (N.H. 2001) (finding insurance trade exempt from CPA); *Enterasys Networks, Inc. v. Gulf Ins. Co.*, 364 F. Supp. 2d 28, 35 (D.N.H. 2005) (finding insurance trade exempt from CPA).

ture's purpose, adapt to the modern litigation environment, and provide more uniform outcomes, it is up to state legislatures to intervene. State legislatures can amend CPAs where needed to include a general exemption from the CPA for conduct already regulated by government agencies, or to clarify the application of an existing exemption. For example, in 1999, the Michigan Supreme Court held that the state CPA's regulatory compliance exemption covering any "specifically authorized" conduct permitted private actions against an insurer.<sup>169</sup> The Michigan Legislature reacted by amending its regulatory exemption provision to eliminate this new private right of action. The Legislature apparently had not intended to authorize private claims against insurers when it enacted the CPA; a position supported by the fact that the Insurance Code did not allow private rights of action.<sup>170</sup> Consequently, within two years of the decision, the Legislature foreclosed all private actions against insurers.<sup>171</sup> As this example illustrates, legislatures can and should reduce uncertainty over a CPA's coverage and take corrective action in the face of unintended interpretations.

Application of regulatory compliance exemptions do not leave consumers without relief. Consumers can use the administrative procedures established for filing a complaint with the state agency with oversight over the conduct at issue, as state legislatures intended. Given that consumer protection claims are regularly asserted as one of many claims in a complaint—frequently motivated by the ability to obtain attorneys' fees, statutory damages, or fulfill lower evidentiary standards—consumers often have other means of relief in the judicial system at their disposal. For example, consumers can assert breach of warranty or fraud claims when applicable; and when they have experienced a personal injury, they can seek recovery under ordinary principles of negligence and product liability law.

Litigation over the coverage of CPA exemptions will likely continue to grow until courts and legislatures develop some semblance of consistent application. In the meantime, businesses suffer with the uncertainty and potentially false sense of security by meeting all applicable regulatory standards, only to face liability in a civil consumer protection

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169. See *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28, 39 (Mich. 1999) (citing MICH. COMP. LAWS § 445.904 (2001)).

170. See MICH. COMP. LAWS SERV. §§ 500.2001 to 2093 (LexisNexis 2001).

171. See MICH. COMP. LAWS SERV. § 445.904. Subsequent court decisions recognize that the amendment removed the ability to bring a Michigan CPA claim against an insurer. See, e.g., *McLiechey v. Bristol West Ins. Co.*, 408 F. Supp. 2d 516, 523 (W.D. Mich. 2006). In some cases, however, legislative decisions are driven by politics, not public policy. Recently, in the midst of considering several bills expanding the liability of pharmaceutical manufacturers, the Michigan House of Representatives approved an amendment of the state's CPA explicitly providing that pharmaceutical products fall within the scope of the CPA and defining a failure to accurately represent the risks involved in the intended use of a prescription or over-the-counter drug as a violation. See H.R. 4046 (Mich. 2007).

lawsuit. Moreover, from the perspective of regulatory agencies, removing regulated conduct from the scope of the CPA preserves their statutory authority and expertise, placing responsibility for determining what is an unfair or deceptive consumer practice firmly in the hands of those charged with protecting the public interest.