

Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model

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I. INTRODUCTION

For much of this century, the Federal Trade Commission (Commission or FTC) has had broad powers to proscribe deceptive and unfair trade practices. Congress and the courts have vested vast discretion in the FTC, trusting it to act only when action was warranted.¹ In the late 1950s, state legislatures began granting to state agencies similarly broad powers and great discretion to prevent consumer deception.² More recently, most states—in an effort further to discourage inappropriate trade practices and to compensate injured consumers—have extended to private consumers the right to sue for deceptive and, in some states, unfair trade practices.³

While this latest extension has indeed aided injured consumers, it has also generated problems of its own. Most states have applied to consumer lawsuits the same definition of offensive practices applied to FTC cases.⁴ Consequently, consumers now enjoy the same unfettered discretion accorded the FTC and state agencies, with one significant difference: individual consumers exercise that discretion in favor of their own concerns, rather than for the public welfare. To put it another way, consumers, in theory at least, may prevail in lawsuits in which consumer victories are not in society's interest. In response, a number of courts, sensing that something is awry, have disregarded deceptive trade practices statutes altogether, while others have devised limiting principles which are too broad.⁵ The result is that deserving consumers lose in meritorious cases.

An example will help illustrate the problems of applying standards under the Federal Trade Commission Act (FTC Act) to private actions. In some situations, a deceptive trade practice has occurred; yet no remedy is in order because repetitions of the wrong cannot be deterred—perhaps because a merchant who behaves properly cannot avoid the problem—and the consumer has suffered little or no injury. In such a case a public agency would surely not act, but a consumer under current law could choose to sue. More concretely, suppose a newspaper prints an advertisement for a merchant: dishes, normally costing 280 dollars, are on sale for 39.95 dollars.⁶ A consumer seeks to buy the goods at the advertised price but is turned away. The sale price, she is told, is a typographi-

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1. See *infra* notes 38-41 and accompanying text.

2. See *infra* notes 55-61 and accompanying text.

3. See *infra* notes 64-89 and accompanying text.

4. See *infra* notes 73-89 and accompanying text.

5. See *infra* notes 113-34 and accompanying text.

6. The facts of this example are based on *Geismar v. Abraham & Straus*, 109 Misc. 2d 495, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981).

cal error. Under long-standing common law principles, seller would not be liable for breach of contract because seller has not made an offer to buyer.⁷ But under the FTC Act, seller seemingly has engaged in "unfair or deceptive acts or practices" and hence could probably be sanctioned by the FTC.⁸ The FTC might act if seller had in fact engaged in a "bait and switch" transaction—luring consumers to the store with promised bargains which seller has no intention of delivering.⁹ However, if the newspaper simply printed the wrong number, and the seller is innocent, the FTC would probably devote its limited resources to more significant deceptions. The attorney general of the state, empowered to act by a "Little FTC Act" might similarly decline to proceed in the matter. Nevertheless, the injured consumer could sue the seller under the laws of nearly every state in the union, and could, in many states, win a judgment for more than her damages, as well as recover her attorney's fees—even though the seller's only mistake was to advertise in a newspaper which printed a typographical error.¹⁰

This Article seeks a fairer accommodation of the conflicting interests of merchant and consumer in consumer deception cases. After reviewing the current state of the law, the Article discusses the principal policies which ought to inform the law of deceptive trade practices. Finally, the Article proposes some changes in existing law to effectuate those policies.

II. THE LAW OF DECEPTIVE TRADE PRACTICES

The law of deceptive trade practices has two main sources: common law rules (some of which have been codified in the Uniform Commercial Code) and the Federal Trade Commission Act¹¹ and the state statutes modeled on it (com-

7. See, e.g., *Schenectady Stove Co. v. Holbrook*, 101 N.Y. 45, 4 N.E. 4 (1885); *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 83, 207 N.Y.S. 753 (Mun. Ct. 1924); E. FARNSWORTH, *CONTRACTS* § 3.10 at 140-41 (2d ed. 1990); J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 2-6(e), at 36-39 (3d ed. 1987).

8. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1988) provides that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The Federal Trade Commission Act is discussed in the text accompanying *infra* notes 19-54.

9. For example, in *People v. Levinson*, 23 Misc. 2d 483, 199 N.Y.S.2d 625 (Sup. Ct. 1960), seller advertised aluminum siding at low prices—the "bait"—but attempted to "switch" the consumer to higher-priced articles. The Attorney General proved the bait and switch by showing that seller did not pay commissions to sales clerks on sales of the advertised articles and that sales clerks were instructed to display deliberately damaged specimens of the advertised article and to criticize the advertised article. See also, *Williams v. Bruno Appliance & Furniture Mart*, 62 Ill. App. 3d 219, 379 N.E.2d 52 (1978).

10. See *infra* notes 64-89 and accompanying text. It would be a mistake to assume that the amounts recovered in consumer lawsuits are always small. In *Pope v. Rollins Protective Services Co.*, 703 F.2d 197 (5th Cir. 1983), for example, the plaintiff recovered \$450,000. See also *Bandura v. Orkin Exterminating Co.*, 865 F.2d 816 (7th Cir. 1988) (upholding verdict of \$625,000 for plaintiffs plus award of attorney's fees of more than \$200,000 and costs of more than \$90,000). And, of course, class actions offer a possibility of large recoveries. For a case allowing recovery of \$50 on the facts described in the text, even though plaintiff did not prove any damages, see *Geismar v. Abraham & Straus*, 109 Misc.2d 495, 499, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981). See also *Beslity v. Manhattan Honda*, 120 Misc. 2d 848, 467 N.Y.S.2d 471 (Sup. Ct. 1983) (plaintiff recovered \$50 statutory damages when deceived by ad which contained mistake on discount; mistake made not by seller but by "advertising company").

11. Federal Trade Commission Act, Ch. 311, § 5, 38 Stat. 717 (1914) (current version appears at 15 U.S.C. § 45 (1988)). The events leading to the enactment of this Act are described in S. WAGNER, *THE FEDERAL TRADE COMMISSION* 4-18 (1971); G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 16-27 (1924; reprinted in 1968); P

monly called "Little FTC Acts" or deceptive trade practices acts). These two sources of law represent very different approaches to the problems of deception.

A. Common Law Rules

The common law rules applicable to deceptive trade—founded principally on the law of fraud and contract—are not particularly good vehicles for consumers. The claims are often difficult and expensive to prove. For example, the list of elements which must be proved to make out a common law fraud claim is daunting: "the elements [of] deceit are . . . '(1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity, and (4) made with the intention that it shall be acted upon, and (5) acted upon with damage. . . .' " In addition to these elements, it must also be proved that the plaintiff "(6) relied upon the representations, (7) was induced to act upon them, and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity."¹² A plaintiff in a typical consumer case founded on the common law of deceit will find that the cost of pleading¹³ and proving all of those elements exceeds the amount at issue.¹⁴ While the claim of breach of

WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE §§ 1.01, 1.02 (1989); Kinter, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1271-75 (1966).

12. Coffin v. Dodge, 146 Me. 3, 5-6, 76 A.2d 541, 543 (1950) (quoting Crossman v. Bacon & Robinson Co., 119 Me. 105, 109 A. 487, 489 (1920)); see also Peery v. Hansen, 120 Ariz. 266, 269, 585 P.2d 574, 577 (Ariz. Ct. App. 1978); Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. Ct. App. 1978); Warfield v. Hicks, 91 N.C. App. 1, 8, 370 S.E.2d 689, 692-93 (N.C. Ct. App. 1988); Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E.2d 63, 65 (N.C. Ct. App. 1979); Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977); Pacific Northwest Life Ins. Co. v. Turnbull, 51 Wash. App. 692, 701, 754 P.2d 1262, 1268 (Wash. Ct. App. 1988); cf. Inman v. Ken Hyatt Chrysler Plymouth, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988) (a fraud "complaint is fatally defective if it fails to allege all nine elements of fraud"). See generally D. PRIDGEN, CONSUMER PROTECTION AND THE LAW ch. 2 (1989). THE RESTATEMENT (SECOND) OF TORTS § 526 comment c, states that the speaker need not know the statement to be false; "it is enough that he believes the representation to be false." In certain circumstances the RESTATEMENT supports liability for negligent misrepresentation. See *id.* §§ 552-552C. See generally, Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973).

13. Many jurisdictions require fraud to be pleaded with particularity. For criticism of this requirement, see Richman, Lively & Mell, *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959 (1987); Lees, *Rule 9(b)-Who Needs It?*, 3 J. CONTEMP. L. 105 (1976); Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?* 104 F.R.D. 143 (1985).

14. See, e.g., Hill, *Introduction*, 8 ST. MARY'S L.J. 609, 609-10 (1977) ("I was frequently asked . . . to help [clients] in what would now be called a 'consumer case.' . . . [E]ach had a common characteristic—the amount in controversy was generally very small, normally not more than two hundred dollars. These losses were simply too small to justify the costs of litigation. . . . The imbalance between litigation costs and potential recovery was not the only factor that made common law remedies ineffective. First, an action for fraud required rigorous proof Contract law was no better Because of these two problems—proof requirements and litigation costs—I was forced to turn down many cases even though they were meritorious"); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 667-68 (1977) ("The infrequency of consumer suits against advertisers is part of a larger institutional pattern in which consumers often find themselves powerless. . . . [C]onsumer class suits often are impossible to bring because of decisions in the federal system making it impossible to aggregate separate claims in order to satisfy the \$10,000 minimum jurisdictional amount and because of the impracticality in many states of maintaining a class action. . . . This situation is characteristic of the typical advertising deception") (footnotes omitted); Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 725 (1972) ("under the traditional rules of the game, it was less expensive to suffer most deceptive trade practices than to remedy them through legal action"); State v. Independence Dodge, Inc., 494 S.W.2d 362, 370 (Mo. Ct. App. 1973) ("private causes of action had proved largely ineffective to prevent consumer fraud. In actual practice, experience had shown that individual action by consumers is much too

contract is sometimes easier to prove than the historically disfavored claim of fraud¹⁵—if only because it has fewer elements—it can still be burdensome to prove.¹⁶ Because punitive damages are not available for contract claims, such claims are not likely to yield large sums.¹⁷ And, in any event, absent specific statutory authorization, plaintiffs suing on a common law theory are not generally entitled to attorney's fees.¹⁸ Consequently, the FTC Act and its progeny are more important to consumers today.

B. *The Federal Trade Commission Act*

Instead of banning specifically-described deceptive acts, Congress chose simply to proscribe "deceptive and unfair trade practices" and left the task of defining that phrase to the FTC, and to some extent, the courts. The FTC has responded by defining deception broadly, and trusting itself not to bring wasteful proceedings. That may have worked for the FTC—although even about that, there is some doubt—but, as described in the following sections, a similar approach by state legislatures has led to distortions in private actions brought under the state statutes. In this section, the Article discusses the standards for proceeding under the FTC Act.

In 1914, Congress enacted the Federal Trade Commission Act, declaring unlawful unfair methods of competition. In 1931, the Supreme Court held that while the FTC could regulate advertising that would injure competitors, it could not ban advertising solely to prevent deception of the public.¹⁹ Congress responded in 1938 by amending the FTC Act to prohibit both unfair and deceptive acts.²⁰

Only the FTC can proceed under the FTC Act.²¹ Thus, the FTC can, by selecting its caseload appropriately, target cases in which there is a real possibil-

costly in that the expense of litigation usually outweighs the amount of likely recovery. Furthermore, the onerous provisions of adhesion contracts ma[d]e recovery in this type of case difficult, while at the same time the growing impersonal character of the market place has made retail relationships less amenable to the traditional disciplines of consumer good will and the amenities of mutual acquaintanceship.").

15. CLARK, *LAW OF CODE PLEADING* 311-12 (2d ed. 1947); CLARK, *CASES ON MODERN PLEADING* 59 (1952); Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432 (1984); Saveri, *Pleading Fraudulent Concealment in an Antitrust Price Fixing Case—Rule 9(b) v. Rule 8*, 17 U.S.F. L. REV. 631, 636 (1983).

16. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 544, 276 S.E.2d 397, 400 (1981) ("Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof.").

17. See, e.g., H. ALPERIN & R. CHASE, *CONSUMER LAW* § 26, at 43 (1986) ("punitive damages are not awarded for a breach of contract"). See generally Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969).

18. See, e.g., *Hall v. Cole*, 412 U.S. 1, 4 (1973) ("the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization. . .") (footnote omitted); Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?* 20 VAND. L. REV. 1216 (1967); Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963).

19. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

20. *Wheeler-Lea Act of 1938*, Pub. L. No. 447, ch. 49, 52 Stat. 111 (1938).

21. For the proposition that private actions do not lie for violations of the Act, see *Bott v. Holiday Universal, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 60, 973 (D.C. Cir. 1976); *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973); cf. *Pan American World Airways v. United States*, 371 U.S. 296, 306 (1963) (dicta: statute based on FTC Act does not embrace a remedy for private wrongs but is only a means of vindicating the public interest); but see *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976) (private right of action exists when FTC had previously entered into

ity for deterring fraud, and avoid proceedings which would be counterproductive.²² Various statutory and practical limits discourage the FTC from bringing pointless cases.²³ One practical limit restraining FTC abuses is, of course, politics. FTC commissioners are appointed by the President and confirmed by the Senate for terms of seven years.²⁴ While commissioners may be removed only for "inefficiency, neglect of duty, or malfeasance in office,"²⁵ thus insulating commissioners to some extent from political considerations, it is inevitable that at least some commissioners will remain sensitive to the winds of political life. Quite apart from their personal ambitions, they know that Congress is willing to rein them in if they go too far. In 1980, Congress withdrew the power to promulgate certain rules which the FTC was then contemplating, including regulations governing children's advertising.²⁶ Congress can also send clear signals through oversight hearings, proposed legislation, and budget directives.²⁷

cease and desist order against defendant's parent corporation). See generally Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274 (1975) (arguing for private cause of action); Note, *Private Judicial Remedies for False and Misleading Advertising*, 25 SYRACUSE L. REV. 747 (1974) (same); Naclerio, *The Federal District Court as Small Claims Tribunal: An Argument Against the Holding in Guernsey v. Rich Plan*, 5 HOFSTRA L. REV. 345 (1977) (opposing private right of action); Comment, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibility*, 69 NW. U.L. REV. 462 (1974) (same). Not only can consumers not sue under the FTC Act, but also consumers have no recourse when the Commission declines to bring a case. See Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 16 (1985) ("The Federal Trade Commission has almost total independence in deciding to commence cases. Consumers and competition may request that the FTC begin investigations or prosecutions, but an FTC decision to reject these suggestions is not reviewable.") (footnote omitted); cf. Heckler v. Chaney, 470 U.S. 821 (1985) (Food and Drug Administration refusal to commence proceeding not reviewable absent statute so providing). Of course, as discussed below, state agencies and private actions under state "Little FTC Acts" have also influenced FTC Act jurisprudence.

22. The FTC can, of course, take account of many considerations in deciding whether to commence a particular proceeding. One commentator has suggested that before initiating a false advertising proceeding, the FTC should examine the effect a victory would have on antitrust enforcement. For example, a cease and desist order might force a seller out of business, rendering the industry less competitive and ultimately harming consumers. Schechter, *Letting the Right Hand Know What the Left Hand's Doing: The Clash of the FTC's False Advertising and Antitrust Policies*, 64 B.U.L. REV. 265 (1984).

23. Naturally, no bureaucracy is perfect and the FTC has made its share of errors. One often cited example of FTC overzealousness is *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944). *Gelb* claimed that its hair dye colored hair "permanently" meaning, of course, that the user's hair need not be dyed again until the hair grew out. But the FTC feared that consumers would believe that use of *Gelb's* dye would obviate forever further hair coloring. *Gelb* is criticized in Pitofsky, *supra* note 14, at 676 n.58 ("astonishing"); Comment, *The FTC and Deceptive Trade Practices: A Reasonable Standard?* 35 EMORY L.J. 683, 689-90 (1986) ("extreme example"); Note, *On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act*, 10 U. PUGET SOUND L. REV. 143, 157 (1986) ("absurd results"); see generally Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 458-62 (1964).

24. 15 U.S.C. § 41 (1988). See also 16 C.F.R. § 0.1 (1991).

25. 15 U.S.C. § 41 (1988). See also *Humphrey's Executor v. United States*, 295 U.S. 602, 619-26 (1935).

26. Federal Trade Commission Improvements Act of 1980, § 11, 94 Stat. 374, amending 15 U.S.C. § 57a. The 1980 statute also restricted the FTC's power to regulate private standard setting and certification, *id.* at § 7; insurance, *id.* at § 5; agricultural cooperatives, *id.* at § 20; and the funeral industry, *id.* at § 19. Two commentators on the 1980 statute observed that the FTC's "recent experiences may force the FTC to keep its eye constantly on the political currents of the day." Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 530 (1980).

27. See Stack, "Much Ado About Nothing": A Pragmatic View of Section 5, 50 ANTITRUST L.J. 811, 815-16 (1982):

Political control over the FTC . . . often . . . takes the form of oversight hearings, proposed legislation and—as we have recently seen—budget directives. This form . . . is . . . effective. [For example,] several

A second practical limit to FTC excess is scarce resources. The FTC budget is less than 55 million dollars,²⁸ which is obviously a small sum for regulating the many transactions and businesses within the FTC's purview. Because the FTC lacks the staff to pursue many significant improprieties, it is unlikely to expend its scarce resources on trivial deceptions.²⁹

Finally, the FTC Act itself limits the FTC to some degree by providing that the FTC may bring only proceedings which "would be to the interest of the public. . . ."³⁰ While courts usually defer to the FTC on which actions are in the public interest,³¹ and thus the public interest requirement is not a terribly stringent limitation, courts claim they will overturn an FTC action if they find an abuse of discretion.³²

In sum, given the restraints on the FTC, the FTC must choose its cases so carefully that it is unlikely to bring as many worthwhile cases as it would like, let alone expend its scarce resources trying pointless cases. Indeed, these restraints have sometimes proved so crippling that during the 1960s the FTC was harshly criticized as ineffective³³ after which the FTC became more aggressive

commission decisions in the mid-1940s suggested that base point pricing systems might violate Section 5 The five commissioners soon found themselves testifying before a congressional subcommittee to explain what they had in mind. A few months later, the FTC issued a policy directive retreating from its earlier position.

28. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-62, 103 Stat. 988 (1989).

29. Leaffer & Lipson, *supra* note 26, at 554 ("The FTC must select cases carefully because of scarce budgetary resources."); Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 729 n.10 (1972) (the FTC "is modestly staffed [and] far removed from most local communities"). See also Hill, *supra* note 14, at 611 ("[T]he Commission was, and still is, generally interested in bringing legal or administrative action where there are numerous consumers affected by the allegedly unlawful practice. Many one-time consumer abuses do not reach this threshold.") (footnote omitted).

30. 15 U.S.C. § 45(b) (1988). See also D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 8.03, at 8-11 (1988) ("Perhaps Congress meant to assure itself and the public that the FTC would not be able to use its rather immense substantive powers in a way that would waste taxpayers' money or unduly burden individual business defendants for insignificant transgressions."); see generally French, *The Federal Trade Commission and The Public Interest*, 49 MINN. L. REV. 539 (1965); P. WARD, *supra* note 11, § 3.03.

31. See, e.g., *Slough v. FTC*, 396 F.2d 870, 872 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968) (determination of public interest "is essentially one for the Commission and will only be reversed on a showing of an abuse of discretion"); *Guziak v. FTC*, 361 F.2d 700, 704 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941). See generally D. PRIDGEN, *supra* note 30, § 8.03; Leaffer & Lipson, *supra* note 26, at 525 n.23 (suggesting public interest limitation "encourag[es] restraint in case selection").

32. See, e.g., *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Slough v. FTC*, 396 F.2d 870, 872 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968); S. KANWIT, FEDERAL TRADE COMMISSION § 1.05 (1988). In an early decision, *FTC v. Klesner*, 280 U.S. 19, 28, 30 (1929), the Supreme Court found that the public interest was not implicated when the FTC sought to prevent a retailer from using the name "Shade Shop" for its window shade department when another nearby store also called itself "Shade Shop."

33. See, e.g., AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); E. COX, R. FELLMETH & J. SCHULZ, THE NADER PROJECT ON THE FEDERAL TRADE COMMISSION (1969); R. POSNER, REGULATION OF ADVERTISING BY THE FTC, at 17-23 (1973). See also Dostert, *Case Studies in Consumer Fraud*, 25 BUS. LAW. 153, 154 (special issue 1969) (The FTC had investigated Ora Lee Williams' complaint against the Walker-Thomas Furniture Company that the company was behaving unconscionably in using dragnet security clauses and had concluded "it does not warrant the attention of the Commission." The dispute led to the now-classic case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) in which the court found the company's conduct unconscionable.).

for a time.³⁴ Some feel that the FTC has lapsed back into lassitude.³⁵

In light of these restraints, the FTC could hardly be blamed for seeking the broadest definition of deceptive conduct consistent with public policy considerations. After all, the broader the definition of deception, the easier the case for the FTC. And since only the FTC can proceed under the FTC Act,³⁶ the FTC need hardly worry about establishing standards that others might abuse. Even in the worst case scenario, if the FTC were to act improvidently, the usual remedy provided under the FTC Act is a cease and desist order,³⁷ meaning that merchants would simply have to terminate a practice, rather than pay money damages.

In fact, though the courts have contributed to the definition of deception, the FTC has taken the lead in shaping it for five principal reasons. First, the FTC Act does not define the phrase "deceptive acts or practices." Second, decisions by the FTC on which cases to bring—and in particular, which cases not to bring—necessarily have an impact on the federal law of deceptive practices.³⁸ Third, the FTC Act gives the Commission the power to promulgate regulations labeling specific conduct unfair or deceptive.³⁹ Fourth, when the FTC staff concludes that a particular merchant has behaved deceptively and that FTC action is appropriate, the Commission typically does not take the case to the courts until after an FTC administrative law judge and the Commission itself have ruled on the matter.⁴⁰ Consequently, the FTC has produced more than 100 volumes of reports of FTC decisions construing and applying the statutes within the FTC's jurisdiction; these volumes cannot help but influence courts and litigants. Fifth, and perhaps of greatest importance, the courts have accorded FTC decisions great deference.⁴¹

34. See, e.g., Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529, 1530 (1971); Leaffer & Lipson, *supra* note 26, at 526-29. Cf. Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403, 447 (1981) (Empirical study concludes that "[t]he 'toothless tiger' image of FTC advertising regulation is wrong. Visible and sometimes very substantial effects of the regulation show up in the product market, the advertising market, and, especially, the capital markets.").

35. See Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125 (1987) (Chief of Consumer Protection Division, State of Maryland refers to "perception that the Federal Trade Commission has abandoned its strong enforcement activities through market analyses and cost/benefit theories regarding materiality and injury, all of which are in service of a market that is assumed capable of regulating itself.").

36. See *supra* note 21 and accompanying text.

37. 15 U.S.C. § 45(b) (1988). Cease and desist orders are discussed at length in P. WARD, *supra* note 11, § 14.

38. See *supra* note 21 and accompanying text.

39. 15 U.S.C. § 57a(a)(1)(A) (1988). Until 1975, the FTC's authority to promulgate trade regulations appeared at 15 U.S.C. § 46(g). The FTC also issues Industry Guides to explain which practices are deceptive and which are not. 16 C.F.R. subchapter B (1990 & 1991).

40. The FTC's authority to proceed administratively is found in 15 U.S.C. § 45(b) (1988). For a discussion of the procedure for FTC administrative proceedings, see P. WARD, *supra* note 11, § 12. The FTC may also sue in federal court for an injunction pending completion of FTC administrative proceedings. 15 U.S.C. § 53(b) (1988). See generally P. WARD, *supra* note 11, § 14.02[3].

41. See, e.g., *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 48-49 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("The Commission's judgment is to be given great weight by reviewing courts."); *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1142 (9th Cir. 1978) ("[t]he FTC has accumulated much expertise. We are not to lightly set aside agency action based on the exercise of such accumulated expertise merely because, were we trying the matter anew, we might reach a different result. We are not to set aside the Commission's action unless it is apparent that it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of

Not surprisingly, and perhaps not inappropriately, the FTC has generally used its power to produce rules which make it easy for the FTC to find particular actions deceptive. Until 1983, the FTC took the view that advertising is deceptive when the representations have a capacity or tendency to deceive the ignorant, unthinking, and credulous consumer.⁴² In 1983 the sharply divided Commission retreated a bit from its previous statements and adopted slightly more conservative standards for determining what constitutes deception.⁴³ The FTC now takes the view that a merchant acts deceptively "if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."⁴⁴ Even under that more conservative approach, the FTC may establish deception on a much lesser showing than is required of a consumer suing a merchant in, say, a common law fraud or breach of warranty action. Thus, in contrast with the common law rules, the FTC need not show that the merchant has made a false statement (in fact, the FTC may find even true claims deceptive⁴⁵); or that the merchant intended to deceive,⁴⁶ or indeed that anyone relied upon the statement,⁴⁷ was

discretion or otherwise not in accordance with the law) (citations omitted). See generally Developments in the Law, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1039 (1967) ("[r]ecent judicial opinions yield the Commission very broad discretion on all of the critical issues."); Comment, *The FTC and Deceptive Trade Practices: A Reasonable Standard?* 35 EMORY L.J. 683, 685 (1986) ("the appellate courts, mindful of the presumed expertise of the Commissioners in the field of trade regulation, have applied a very deferential standard of review to FTC determinations."); Note, *The Need for a Statutory Definition of "Deceptive" Advertising*, 19 NEW ENG. L. REV. 127 (1983) ("Reviewing Courts defer to FTC findings of deceptive advertising."). For criticism of judicial deference to the FTC on the issue of deception, see Pitofsky, *supra* note 14, at 678. The great deference accorded FTC decisions contrasts with early Supreme Court decisions construing the FTC Act before the Act was amended to bar deceptive practices. In *FTC v. Gratz*, 253 U.S. 421, 427 (1920), the Court held that it was up to the courts, and not the FTC, to determine what conduct fell within the FTC Act. See also *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923). After Congress expanded the FTC's jurisdiction to include deceptive practices, the courts may have seen the amendment to the FTC Act as a repudiation of *Gratz* and so accorded the FTC more power to define deceptive practices.

42. See, e.g., *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); Developments in the Law, *supra* note 41, at 1040-43.

43. See FTC Policy Statement on Deception, contained in letter of James C. Miller, III (FTC Chair) to Senator Bob Packwood, dated Oct. 14, 1983. The policy statement is discussed in Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399 (1988); Sullivan & Marks, *The FTC's Deceptive Advertising Policy: A Legal and Economic Analysis*, 64 OR. L. REV. 593 (1986); Jacobs, *Consumer Litigation and its Relationship to the Federal Trade Commission's "Unfairness" and "Deception" Standards*, 16 U. TOL. L. REV. 903 (1985); Comment, *The FTC and Deceptive Trade Practices: A Reasonable Standard?* 35 EMORY L.J. 683 (1986); Comment, *The Federal Trade Commission's Deception Enforcement Policy*, 35 DE PAUL L. REV. 125 (1985). For the view that the 1983 policy "statement represents a . . . clarification of—not a change in—[prior] law," see Crawford, *Unfairness and Deception Policy at the FTC: Clarifying the Commission's Role and Rules*, 54 ANTITRUST L.J. 303, 305 (1985) (article by Director, FTC Bureau of Consumer Protection).

44. FTC Policy Statement on Deception at 4, contained in letter of James C. Miller, III (FTC Chair) to Senator Bob Packwood, dated Oct. 14, 1983.

45. See, e.g., *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943) ("Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive."); *Removatron Int'l Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 22,619 (1988); *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (FTC "will deem an advertisement to convey a claim if consumers acting reasonably under the circumstances would interpret the advertisement to contain that message" even if claim is not express); *Bristol-Meyers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

46. See *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) ("proof of intention to deceive is not requisite to a finding of violation of the statute"); see also *FTC v. Algoma Lumber*, 291 U.S. 67 (1934); Schulman, *Little F.T.C. Act: The Neglected Alternative*, 9 J. MARSHALL J. OF PRAC. & PROC. 351, 361 (1976). Cf. Cohan, *The Rights and Duties of Retail Merchants Under the Consumer Protection Laws: Emergent Doctrines*

deceived by it,⁴⁸ or even injured by it.⁴⁹ The FTC's standards have vastly aided the FTC in preventing abusive behavior, and, by and large, courts have gone along with them. It would, in fact, be more accurate to refer to the law of confusing trade practices, rather than deceptive trade practices, because the FTC and the courts focus far more on confusion than on deception.

*In re Cliffdale Associates*⁵⁰ illustrates the FTC standards. Cliffdale sold by mail the "Ball-Matic Gas Saver Valve," a device which would supposedly improve gas mileage. The FTC found to be deceptive, among other practices, descriptions of the Ball-Matic "as the most significant automotive breakthrough in the last ten years . . . an amazing automobile discovery," and an "important automobile invention."⁵¹ In fact, the Ball-Matic relied on technology that had been available to consumers for years and so could not properly be characterized as new. It appears that, at common law a consumer would not have been able to recover damages for Cliffdale's deception. Of course, a consumer who was disappointed by the fact that the Ball-Matic was not a new invention would probably not bother to sue Cliffdale, given the relatively small purchase price of the Ball-Matic. But a consumer who did go to such lengths might well be equally disappointed by the outcome of the litigation. Under traditional contract theory, Cliffdale's statements would probably not have created a warranty that the Ball-Matic was a new device.⁵² Similarly, it is likely that a common law action in deceit would founder on the ground that Cliffdale's statements were mere puffery on which reliance was not justified.⁵³ And yet, the Cliffdale advertisements do seem deceptive and hence should have been barred. It is clearly in society's interests to stop misleading advertising. One route to that end is the one chosen by Congress: write general rules leaving much discretion to an administrative agency, and depend on the courts and the restraints outlined above to keep it from abusing its power.⁵⁴

and *Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 312 (1983) ("most courts have held that the plaintiff need not establish intent to deceive" under state "Little FTC Acts").

47. See *Travel King, Inc.*, 86 F.T.C. 715, 773-74 (1975); see generally Whitman, *Reliance as an Element in Product Misrepresentation Suits: A Reconsideration*, 35 SW. L.J. 741 (1981).

48. See *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Resort Car Rental Sys. v. FTC*, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975).

49. *FTC v. Raladam Corp.*, 316 U.S. 149, 152 (1942); *FTC v. Sterling Drugs Inc.*, 317 F.2d 669 (2d Cir. 1963); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944).

50. 103 F.T.C. 110 (1984).

51. *Id.* at 166-68.

52. Express warranties are governed in most states by § 2-313 of the Uniform Commercial Code. Under that provision, in certain circumstances an "affirmation of fact or promise" or "description of the goods" will constitute a warranty, but Cliffdale seemingly did not describe the goods as new or affirm or promise that the goods were new in a way which would satisfy the statutory standard. Moreover, § 2-313(2) provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

53. See, e.g., *Wilkinson v. Walker*, 143 Ga. App. 838, 240 S.E.2d 210 (1977) (cotton picking machine in "good condition" found puffery); *Tibbs v. National Homes Constr. Corp.*, 52 Ohio App. 2d 281, 288-89, 369 N.E.2d 1218, 1224 (1977) (building materials of "high quality" found puffery).

54. See *supra* notes 23-35 and accompanying text. Some have suggested that the FTC has too much discretion on the subject of deceptive advertising. See generally Note, *The Need for a Statutory Definition of "Deceptive" Advertising*, 19 NEW ENG. L. REV. 127, 138-39 (1983).

C. *Little FTC Acts*

Inspired by the model of a public agency with broad powers and discretion to prevent deceptive advertising, state legislatures, beginning in the late 1950s, began enacting statutes designed to prohibit deceptive and, in some states, unfair practices.⁵⁵ By 1981, every state in the country had enacted such a statute.⁵⁶ Initially, these laws provided for enforcement by a state agency, often the state attorney general or a local district attorney.⁵⁷

The substantive provisions of these statutes vary. Some—like the FTC Act—proscribe deceptive practices only in general terms. For example, New York provides simply that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful,”⁵⁸ and “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”⁵⁹ Other statutes enumerate specific violations and also contain a catch-all provision. The 1966 revision of the Uniform Deceptive Trade Practices Act, published by the National Conference of Commissioners on Uniform State Laws, declares, for example, that a person commits a deceptive trade practice when he does any of the following:

- (1) passes off goods or services as those of another;
- (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) uses deceptive representations or designations of geographic origin in connection with goods or services;

55. This development is discussed in Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 274-75 (1971). See also Cole, *supra* note 35, at 126 (State statutes “were intended to supplement limited federal resources.”). The various state statutes are discussed in great detail in J. SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (2d ed. 1988).

56. T. LE. PROTECTING CONSUMER RIGHTS § 2.10, at 21 (1987).

57. Lovett, *supra* note 55, at 274. For discussion of state agencies enforcing consumer protection laws, see generally Sebort, *Enforcement of State Deceptive Trade Practice Statutes*, 42 TENN. L. REV. 689 (1975); Note, *The Role of California's Attorney General and District Attorneys in Protecting the Consumer*, 4 U.C. DAVIS L. REV. 35 (1971); Silbey, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 LAW & SOC'Y REV. 849 (1980-81); Cole, *supra* note 35; Mooney, *The Attorney General as Counsel for the Consumer: The Oregon Experience*, 54 OR. L. REV. 117 (1975). For a study of the number of complaints received by state consumer protection agencies and the resolution of those complaints, see Note, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984).

58. N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988).

59. N.Y. GEN. BUS. LAW § 350 (McKinney 1988). See also N.Y. EXEC. LAW § 63.12 (McKinney 1988 & Supp. 1991) (prohibiting “repeated fraudulent or illegal acts” including “any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions”). Other broadly written statutes include ARIZ. REV. STAT. ANN. § 44-1522 (1989); CAL. BUS. & PROF. CODE §§ 17200, 17500 (West 1987); CONN. GEN. STAT. § 42-110b (1987); DEL. CODE ANN. tit. 6 § 2513 (1975); FLA. STAT. ANN. § 501.204 (West 1988); KY. REV. STAT. ANN. § 367.170 (Michie/Bobbs-Merrill 1987); MONT. CODE ANN. § 30-14-103 (1989); NEB. REV. STAT. § 59-1602 (1988); N.D. CENT. CODE § 51-15-02 (1986); S.C. CODE ANN. § 39-5-20 (Law Co-Op. 1985); VT. STAT. ANN. tit. 9 § 2453 (1985); WASH. REV. CODE ANN. § 19.86.020 (1989); WIS. STAT. ANN. § 100.20 (West 1988). Such statutes have usually been upheld against void for vagueness challenges. See generally Norton, *The South Carolina Unfair Trade Practice Act and the Void-for-Vagueness Doctrine*, 40 S.C.L. REV. 641 (1989) (arguing that statutes are too vague).

- (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;
- (7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparages the goods, services, or business of another by false or misleading representation of fact;
- (9) advertises goods or services with intent not to sell them as advertised;
- (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts or price reductions; or
- (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.⁶⁰

60. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2 (1966). An earlier version of the Act was published in 1964. Another uniform statute, the Unfair Trade Practices and Consumer Protection law, was developed by the FTC jointly with the Committee on Suggested State Legislation of the Council of State Governments and has three alternatives. See generally J. SHELDON, *supra* note 55, at 78-79 n.100. These statutes all bear a marked resemblance to each other. A number of states have adopted one or the other, often with variations and additions of their own. Statutes listing specific fraudulent practices include ALA. CODE § 8-19-1 to -15 (1984); ALASKA STAT. § 45.50.471 (1989); ARK. CODE ANN. § 4-88-106 (1987); CAL. CIV. CODE § 1770 (West 1985 & Supp. 1991); DEL. CODE ANN. tit. 6 § 2532 (1975); D.C. CODE ANN. § 28-3904 (1981 & Supp. 1990); GA. CODE ANN. § 10-1-393 (1989 & Supp. 1990); GA. CODE ANN. § 106-1203 (1990); HAW. REV. STAT. § 481A-3 (1985); IDAHO CODE § 48-603 (1977); ILL. ANN. STAT. ch. 121 ½ § 312 (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 714.16 (West 1979 & Supp. 1990); KAN. STAT. ANN. § 50-626 (1983); ME. REV. STAT. ANN. tit. 10 § 1212 (1980); MINN. STAT. ANN. § 325D.44(1) (West 1981 & Supp. 1991); MISS. CODE ANN. § 75-24-5 (1972 & Supp. 1990); NEB. REV. STAT. § 87-302 (1987); N.H. REV. STAT. ANN. § 358-A:2 (1984 & Supp. 1990); N.M. STAT. ANN. § 57-12-2(c) (1987 & Supp. 1989); OHIO REV. CODE ANN. § 1345.02 (Baldwin 1988); OR. REV. STAT. § 646.608 (1988 & Supp. 1990); PA. STAT. ANN. tit. 73 § 201-2 (Purdon 1971); S.D. CODIFIED LAWS ANN. § 37-24-6 (1986 & Supp. 1990); TENN. CODE ANN. § 47-18-104 (1988 & Supp. 1990); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987); UTAH CODE ANN. § 13-11-4 (1986 & Supp. 1990); VA. CODE ANN. § 59.1-200 (1987 & Supp. 1990); WYO. STAT. § 40-12-105 (1977). Many states which have enacted a version of one or another of the uniform statutes have added additional provisions designed to deter specific practices. Among the most notable of these additional deceptive trade practices are:

--"Representing that a part, replacement, or repair service is needed when it is not." CAL. CIV. CODE § 1770(o) (West 1985 & Supp. 1991). See also ALA. CODE § 8-19-5(13) (1984); ALASKA STAT. § 45.50.471(b)(15) (1989); IDAHO CODE § 48-603(16) (1977).

--"Knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages." ARK. CODE ANN. § 4-88-106(a)(6). See also ALA. CODE § 8-19-5(12) (1984).

--"Misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a transaction." ALA. CODE § 8-19-5(14). See also ALASKA STAT. § 45.50.471(b)(16) (1989); CAL. CIV. CODE § 1770(r) (West 1985 & Supp. 1991).

--"Disconnecting, turning back or resetting the odometer of a vehicle to reduce the number of miles indicated." ALASKA STAT. § 45.50.471(b)(18) (1989). See also ALA. CODE § 8-19-5(15) (1984).

--"Advertising of any sale by falsely representing that a person is going out of business." ALA. CODE § 8-19-5(16) (1984).

--"Selling or offering to sell a right of participation in a chain distributor scheme." ALASKA STAT. § 45.50.471(b)(20) (1989). See also ALA. CODE § 8-19-5(19) (1984).

--"Representing that an agreement confers or involves rights, remedies or obligations which it does not confer or involve, or which are prohibited by law." ALASKA STAT. § 45.50.471(b)(14) (1989). See also CAL. CIV. CODE § 1770(n) (West 1985 & Supp. 1991).

--"Selling, falsely representing or advertising meat, fish, or poultry which has been frozen as fresh food." ALASKA STAT. § 45.50.471(b)(21) (1989).

--"Advertising furniture without clearly indicating that it is unassembled if such is the case." CAL. CIV. CODE § 1770(k) (West 1985 & Supp. 1991).

The state statutes, like the FTC Act, typically grant enormous power to the public agencies which enforce them, and for many of the same reasons Congress granted so much power to the FTC.⁶¹

State and local consumer agencies lack sufficient resources to pursue every consumer fraud vigorously,⁶² and so, like the FTC, face strong incentives to confine their activities to cases likely to have a broad impact.⁶³ To plug the holes in consumer fraud enforcement, nearly every state has now extended to injured consumers the power to sue merchants who engage in deceptive practices.⁶⁴ In an effort to make it worth the consumer's while to sue,⁶⁵ many states provide for one or more of treble damages,⁶⁶ punitive damages,⁶⁷ or statutory

"Obtaining the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed." IDAHO CODE § 48-603(12) (1977).

61. See, e.g., *People v. Gym of Am., Inc.*, 177 Colo. 97, 114, 493 P.2d 660, 669 (1972) ("Just as the FTC has been allowed to decide upon the most effective enforcement techniques, so too should the Colorado attorney general be granted the opportunity to choose . . ."); *Kugler v. Romain*, 58 N.J. 522, 537, 279 A.2d 640, 648 (1971) ("The Legislature intended to confer on the Attorney General the broadest kind of power to act in the interest of the consumer public . . ."); *State v. Areaco Investment Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (statute "simply declares unfair or deceptive practices unlawful . . . to give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions").

62. See, e.g., Lovett, *supra* note 55, at 274 ("[T]he government agencies which prosecute deceptive trade practices have been modestly financed, have been spread thinly, and have had little direct consumer impact in most sections of the country. . . . [P]rosecuted efforts have not been strong or well financed in many states."); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 642 (1977) (Attorney General of Texas observed that "[W]ith a limited staff and budget, it is clear the Division cannot go to court over every complaint.") (footnote omitted); Note, *supra* note 57, at 44-45 ("Only a small number of the nearly four hundred telephone calls a month received by the San Diego Consumer Fraud Division from complaining consumers are subsequently investigated."); Sebert, *supra* note 57, at 694 ("[I]n most states . . . the vast bulk of staff time is consumed in responding to, investigating, and mediating" consumer disputes, rather than enforcing consumer rights.); Norton, *supra* note 59 ("The FTC encourages state adoption of legislation [creating a private cause of action for deceptive trade practices] because it does not have the resources to police unfair acts or practices."); *Beslity v. Manhattan Honda*, 120 Misc. 2d 848, 852, 467 N.Y.S.2d 471, 474 (N.Y. Sup. Ct. 1983) (New York private claim statutes enacted because of "in large measure the inability of the New York State Attorney General to adequately police false advertising and deceptive trade practices."); D. PRIDGEN, *CONSUMER PROTECTION AND THE LAW* § 3.02[1] (1988). For a discussion of the obstacles faced by at least one consumer protection agency, see Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529 (1971). For still other problems faced by consumer protection agencies caused by the workings of such offices, see Silbey, *supra* note 57. There are, of course, other rules governing false advertising, including Printer's Ink Statutes, e.g., N.Y. PENAL LAW § 190.20 (McKinney 1988); TENN. CODE ANN. § 39-3-910 (1982); and postal fraud statutes, e.g., 18 U.S.C. § 1341 (1979 & Supp. 1990). See generally Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968).

63. Cf. Sebert, *supra* note 57, at 721 ("State agencies . . . may be more likely to use their power to obtain monetary redress as part of a coordinated enforcement program aimed at eradicating the most serious offenses."). See also *supra* notes 28-29 and accompanying text.

64. See *supra* notes 58-60. Arkansas, Iowa, and North Dakota may be exceptions. See J. SHELDON, *supra* note 55, at 271-73.

65. See, e.g., Comment, *The Deceptive Trade Practices—Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879, 883 (1986) ("by providing generous remedies, the Deceptive Trade Practices—Consumer Protection Act removes the economic barriers to consumer litigation"); *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 403-04 (1981) (Treble damages make "more economically feasible the bringing of an action where the possible money damages are limited, and thus encourage private enforcement."); *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (extra damages encourage consumer suits under Texas "Little FTC Act"). For discussion of noncompensatory damages in consumer litigation, see Rice, *supra* note 17; Rice, *supra* note 62.

66. ALA. CODE § 8-19-10(2) (1984); ALASKA STAT. § 45.50.531(a) (1987); D.C. CODE ANN. § 28-3905(k) (1988); HAW. REV. STAT. 480-13(b)(1) (1986); MASS. GEN. LAWS ANN. ch. 93A § 9 (1982); MONT. CODE ANN. § 30-14-133(1) (1989); N.H. REV. STAT. ANN. § 358-A:10 (1984); N.J. STAT. ANN. § 56:8-19 (1989); N.M. STAT.

minimum damages,⁶⁸ and nearly all authorize the award of attorney's fees to successful consumer plaintiffs.⁶⁹ The possibility of a significant damage recovery undoubtedly deters some merchants from engaging in deceptive practices,⁷⁰ while affording the damaged consumer an opportunity for compensation.⁷¹ Thus, the decision to allow consumers to sue is, on the whole, a happy one.

As a rule, these private claims are very different from the traditional common law claims.⁷² In deciding private deceptive trade practices suits, state

ANN. § 57-12-10(B) (1987); N.Y. GEN. BUS. LAW 349(h) (McKinney 1988); OHIO REV. CODE ANN. § 1345.09 (Page's 1979); PA. STAT. ANN. tit. 73 § 201-9.2 (Purdon 1973); S.C. CODE § 39-5-140 (Law. Co-Op 1985); TENN. CODE ANN. § 47-18-109(3) (Supp. 1988); TEX. BUS. & COM. CODE ANN. tit. 2 § 17.50(b) (Vernon 1980); VT. STAT. ANN. tit. 9, § 2461 (1985); WASH. REV. CODE § 19.86.090 (1989). *Cf.* WIS. STAT. § 100.20(5) (1988) (double damages). *See also* Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981) (trebling of damages mandatory and not in discretion of trial judge).

67. Statutes expressly authorizing punitive damages for deceptive trade practices include CAL. CIV. CODE § 1780(a)(4) (West Supp. 1991); CONN. GEN. STAT. § 42-110g(a) (1987); D.C. CODE ANN. 28-3905(k)(C) (1988); GA. CODE ANN. § 106-1210 (1990); IDAHO CODE § 48-608 (Supp. 1990); KY. REV. STAT. ANN. § 367.220 (1987); MO. REV. STAT. § 407.025(1) (1990); OR. REV. STAT. § 646-638(1) (1987); R.I. GEN. LAWS § 6-13.1-5.2(a) (1985). *See generally* J. SHELDON, *supra* note 55, at 307-10.

68. ALA. CODE § 8-19-10 (1984) (\$100); ALASKA STAT. § 45.50.531(a) (Supp. 1990) (\$200); HAW. REV. STAT. § 480-13 (1986) (\$1,000); IDAHO CODE § 48-608 (Supp. 1990) (\$6,000); KAN. STAT. ANN. § 50-634 (1989) (\$2,000); MASS. GEN. LAWS ANN. ch. 93A § 9 (1985 & Supp. 1990) (\$25); MICH. COMP. LAWS ANN. § 445.911 (Supp. 1988) (\$250); MONT. CODE ANN. § 30-14-133 (1989) (\$200); NEB. REV. STAT. § 59-1609 (1988) (up to \$1,000); N.H. REV. STAT. ANN. § 358-A:10 (1984) (\$200); N.M. STAT. ANN. § 57-12-10 (1978) (\$100); N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988) (\$50); OR. REV. STAT. § 646.638 (1987) (\$200); PA. STAT. ANN. tit. 73 § 201-9.2 (Purdon Supp. 1990) (\$100); R.I. GEN. LAWS § 6-13.1-5.2 (1985) (\$200); UTAH CODE ANN. § 13-11-19 (1986) (\$2,000); VA. CODE § 59.1-204 (1987) (\$100); W. VA. CODE § 46A-6-106 (1986) (\$200).

69. *See* the statutes cited *supra* notes 58-60. *See also* Cole, *supra*, note 35, at 130 ("All of those states that have private rights of action now have provisions for attorneys' fees. . . . The attorneys' fees provisions are, of course, intended to encourage private attorney general enforcement of the consumer protection laws . . ."). For a discussion of attorney's fees awards in actions for deceptive trade practices, *see* J. SHELDON, *supra* note 55, at 318-29.

70. *See, e.g.*, Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1626 (1983) ("Unscrupulous merchants know that federal and state government agencies can monitor and detect only a small fraction of the deceptive or fraudulent practices occurring in the marketplace. In contrast, when consumers have an effective private remedy, the unscrupulous merchant is never certain who can safely be defrauded, and who will respond with a lawsuit."); Woods v. Littleton, 554 S.W.2d 662, 671 (Tex. Civ. App. 1977) (treble damages deter violations and such deterrence is a necessary complement to public enforcement agencies); Vallery v. Bermuda Star Line, Inc., 141 Misc. 2d 395, 398, 532 N.Y.S.2d 965, 967 (N.Y. Civ. Ct. 1988) (New York law creating private cause of action "was designed to encourage private enforcement of consumer protection laws so as to deter deceptive business practices and supplement the actions of the Attorney General in the enforcement of consumer protection laws."); Heastie v. Community Bank, 690 F. Supp. 716, 722 (N.D. Ill. 1988) ("[T]he purpose of the Consumer Fraud Act [is] to deter all forms of unfair and deceptive conduct and to provide remedies to those who have been damaged . . .").

71. *See, e.g.*, Gross-Haentjens v. Leckenby, 38 Or. App. 313, 317, 589 P.2d 1209, 1210 (1979) (purpose of private enforcement provision is to provide for "restitution for economic loss suffered by a consumer as the result of a deceptive trade practice"). *See also* Best, *supra* note 21, at 4, 46 (1985) ("[P]rivate litigation is the best process for controlling many kinds of troublesome advertising. It is faster than actions by the FTC or other governmental units; its substantive outcomes reflect public concerns; its remedies have the force of the law; and it will ordinarily be brought into action only against ads whose falsehoods have been effective in the marketplace. . . . The time consumed by FTC proceedings and subsequent appeals can often be very long. . . . [T]he total time for full adjudication can be as long as a decade.").

72. *See, e.g.*, Bandura v. Orkin Exterminating Co., 865 F.2d 816, 820 (7th Cir. 1988) ("Illinois law is clear that it is unnecessary to prove the elements of common law fraud in order to recover under the [Illinois deceptive trade practices statute]. . . . [A] cause of action based on common law fraud and a cause of action under [the Illinois statute] are entirely separate."). Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 626, 382 N.E.2d 1065, 1069-70 (1978) ("The statutory language is not dependent on traditional tort or contract law concepts for its definition."); Kennemore v. Bennett, 755 S.W.2d 89, 91 (Tex. 1988) ("traditional contractual theories are not controlling"); Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988) ("[A] primary purpose of the [Deceptive Trade

courts have generally looked to standards developed under the FTC Act,⁷³ sometimes in response to specific statutory commands,⁷⁴ and sometimes as a matter of statutory construction.⁷⁵ It is, of course, a time honored rule in statutory interpretation that statutes copied from another jurisdiction are to be interpreted as they were by the originating jurisdiction.⁷⁶ Thus, most state courts do not require plaintiffs in deceptive trade practice cases to prove that the defendant intended to deceive;⁷⁷ some do not require plaintiff to show reliance on the

Practices] Act was to provide consumers a cause of action for deceptive trade practices without the numerous defenses encountered in a common law fraud or breach of warranty suit.”).

73. See, e.g., *Marshall v. Miller*, 302 N.C. 533, 544, 276 S.E.2d 397, 401 (1981) (“The character of the plaintiff, i.e., whether public or private, should not alter the scope of the remedy under this statute.”).

74. For example, W. VA. CODE § 46A-6-101(1) (1984) provides: “the purpose of this article is to complement the body of federal law governing . . . unfair, deceptive and fraudulent acts or practices It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.” Similarly MONT. CODE ANN. § 30-14-104(1) (1989) states that “in construing [the statute prohibiting deceptive trade practices] due consideration and weight shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act” Other statutory instructions to defer to federal constructions of the FTC Act, at least to some extent, appear at ALA. CODE § 8-19-6 (1984); ALASKA STAT. § 45.50.545 (1986); ARIZ. REV. STAT. ANN. § 44-1522 (1988); CONN. GEN. STAT. ANN. § 42-110b(b) (1987); FLA. STAT. ANN. § 501.204(2) (West 1988); GA. CODE ANN. § 10-1-391(b) (1989); HAW. REV. STAT. § 480-2(b) (Supp. 1989); IDAHO CODE § 48-618 (1977); ILL. ANN. STAT. ch. 121 ½ ¶ 262 (Supp. 1990); ME. REV. STAT. ANN. tit. 5 § 207(1) (1989); MD. COMM. LAW CODE ANN. § 13-105 (1990); MASS. GEN. LAWS ANN. ch. 93A § 2(b) (1985); N.H. REV. STAT. ANN. § 358-A:13 (1984); N.M. STAT. ANN. § 57-12-4 (1988); R.I. GEN. LAW § 6-13.1-3 (1985); S.C. CODE ANN. § 39-5-20(b) (Law Co-Op 1985); TENN. CODE ANN. § 47-18-115 (1988); TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Vernon 1987); VT. STAT. ANN. tit. 9 § 2453 (1984); WASH. REV. CODE ANN. § 19.86.920 (1989).

75. See, e.g., *In re Scrimpsheer*, 17 Bankr. 999, 1015 (N.D.N.Y. 1982) (applying New York law); *People v. Colorado State Christian College*, 76 Misc. 2d 50, 54-55, 346 N.Y.S.2d 482, 487-89 (N.Y. Sup. Ct. 1973); *Marshall v. Miller*, 302 N.C. 539, 542-43, 276 S.E.2d 397, 399 (1981); *Hardy v. Toler*, 288 N.C. 303, 307, 218 S.E.2d 342, 345 (1975); *Commonwealth ex rel. Zimmerman v. Nickel*, 26 Pa. D. & C.3d 115, 120 (C.P. Mercer Cty. 1983). See also Leaffer & Lipson, *supra* note 26, at 532 (“[S]tate courts applying these statutes increasingly have adopted the standards of ‘unfairness’ and ‘deception’ that have been developed and used by the FTC, and approved by the federal courts.”); J. SHELDON, *supra* note 55, at 82 (“Courts also show great deference to FTC actions in interpreting UDAP statutes where the statute does not expressly refer to the precedential value of FTC decisions.”); Cohan, *supra* note 46, at 301 (“Even without an express legislative directive, federal authorities should still be considered where there is a lack of state precedent.”). But see Note, *Consumer Protection Statutes and the Common Law: Is the Imposition of Double or Treble Damage Awards “Unfair” to the Businessman?*, 15 SUFFOLK U.L. REV. 1157, 1177-78 (1981) (“The significant differences between the state statutes and their federal counterpart greatly diminish the value of FTC decisions as a guide on the state level.”).

76. See, e.g., *Donahue v. Warner Bros.*, 2 Utah 2d 256, 272 P.2d 177 (1954); *Iacone v. Cordillo*, 208 F.2d 696 (2d Cir. 1953); *Marqueze v. Caldwell*, 48 Miss. 23, 31 (1873); N. SINGER, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 52.02 (4th ed. Sands 1973). For cases concluding that the legislature presumably adopted the FTC interpretations, see *Guste v. Demars*, 330 So. 2d 123, 125 (La. Ct. App. 1976); *People v. Colorado State Christian College*, 76 Misc. 2d 50, 54-55, 346 N.Y.S.2d 482, 487-89 (N.Y. Sup. Ct. 1973); *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980); *Wesware, Inc. v. State*, 488 S.W.2d 844, 848 (Tex. Civ. App. 1972).

77. See, e.g., *Chern v. Bank of Am.*, 15 Cal. 3d 866, 876, 544 P.2d 1310, 1316, 127 Cal. Rptr. 110, 116 (1976); *Nash v. Hoopes*, 332 A.2d 411, 413 (Del. Super. Ct. 1975); *American Buyers Club of Mt. Vernon v. Hayes*, 46 Ill. App. 3d 270, 272, 361 N.E.2d 1383, 1384 (1977); *Willman v. Ewen*, 230 Kan. 262, 267, 634 P.2d 1061, 1065 (1981); *People v. Colorado State Christian College*, 76 Misc. 2d 50, 56, 346 N.Y.S.2d 482, 489 (N.Y. Sup. Ct. 1973); *Thomas v. Sun Furniture & Appliance Co.*, 61 Ohio App. 2d 78, 80, 399 N.E.2d 567, 569 (1978); *Riley v. Enterprise Furniture Co.*, 54 Ohio Misc. 1, 3, 375 N.E.2d 821, 823 (1977); *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988); *Hyder-Ingram Chevrolet, Inc. v. Kutach*, 612 S.W.2d 687, 689 (Tex. Ct. Civ. App. 1981); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 50-51, 554 P.2d 349, 357-58 (Wash. Ct. App. 1976). See generally Cohan, *supra* note 46, at 312.

deceptive statement;⁷⁸ or that anyone was misled or deceived by it;⁷⁹ and most, if not all, define deception in the same way as the FTC.⁸⁰

Moreover, consumers suing for deceptive trade practices are not subject to many defenses traditionally available in contract actions.⁸¹ For example, courts have held inapplicable to deceptive trade practices cases the statute of frauds,⁸² "as is" disclaimers,⁸³ the doctrine of substantial performance,⁸⁴ the parol evidence rule,⁸⁵ the common law merger doctrine,⁸⁶ contractual limitations on liability or remedies,⁸⁷ privity of contract requirements,⁸⁸ and the doctrines of

78. *Massachusetts v. Hale*, 618 F.2d 143, 147 (1st Cir. 1980); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703-04, 322 N.E.2d 768, 779 (1975); *Testo v. Russ Dunmire Oldsmobile*, 16 Wash. App. 39, 51, 554 P.2d 349, 358 (Wash. Ct. App. 1976). *But see Peery v. Hansen*, 120 Ariz. 266, 269, 585 P.2d 574, 577 (1978); *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988); *see generally Cohan, supra* note 46, at 312-14.

79. *See Chern v. Bank of Am.*, 15 Cal. 3d 866, 876, 544 P.2d 1310, 1316, 127 Cal. Rptr. 110, 116 (1976); *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 272-73, 361 N.E.2d 815, 819 (1977); *Marshall v. Miller*, 302 N.C. 539, 548-49, 276 S.E.2d 397, 403 (1981); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 50-51, 554 P.2d 349, 357-58 (Wash. Ct. App. 1976). *But cf. Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303, 309 (M.D.N.C. 1988) ("[A] private plaintiff cannot recover in an action for a deceptive trade practice if the plaintiff is unable to prove that the deceptive practice worked. Basic legal principles dictate that a private plaintiff must show that he or she suffered an injury as a result of a defendant's acts. The plaintiff must have been deceived; plaintiff must suffer 'actual injury'").

80. Indeed, many states still use the pre-1983 standards, which are even more generous to the consumer than the current standards. *See supra* notes 42-44 and accompanying text.

81. *See, e.g., Note, supra* note 70, at 1622 ("These statutes . . . eliminate most of the common law defenses traditionally barring recovery by consumers . . ."); *Shenandoah Assoc. v. J & K Properties, Inc.*, 741 S.W.2d 470, 496 (Tex. Ct. App. 1987) (Texas deceptive trade practices act "not subject to common law defenses" such as waiver and ratification).

82. *See, e.g., McClure v. Duggan*, 674 F. Supp. 211, 224 (N.D. Tex. 1987) (statute of frauds not impediment to private action under Texas "Little FTC Act"). The statute of frauds is codified for the sale of goods at U.C.C. § 2-201 (1990). Other U.C.C. statutes of frauds appear at §§ 1-208, 2A-201, and 8-319.

83. *See, e.g., Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740 (1978). Under the U.C.C., the phrase "as is" disclaims the implied warranties of merchantability and fitness for particular purpose. U.C.C. § 2-316 (1990).

84. *See, e.g., Smith v. Baldwin*, 611 S.W.2d 611, 614 (Tex. 1980).

85. *See, e.g., Teague Motor Co. v. Rowton*, 84 Or. App. 72, 733 P.2d 93 (1987) (parol evidence may be used in suit under state's "Little FTC Act"); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (same); *Capp Homes v. Duarto*, 617 F.2d 900, 902 n.1 (1st Cir. 1980) (applying Massachusetts law); *Cole, supra* note 35, at 128 ("Principles, such as the parole [sic] evidence rule which would often preclude success in certain contract disputes, would not preclude a state consumer protection action."). The parol evidence rule is codified in part at U.C.C. § 2-202 (1990).

86. *Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988). *See generally Note, DTPA Precludes Use of Merger Doctrine and Parol Evidence Rule in Breach of Warranty Suit: Alvarado v. Bolton*, 41 BAYLOR L. REV. 373 (1989).

87. *See, e.g., International Nickel Co. v. Trammel Crow Distrib.*, 803 F.2d 150, 155-56 (5th Cir. 1986) (contractual limitations inapplicable in suit under Texas "Little FTC Act"); *Corral v. Rolling Protective Serv. Co.*, 240 Kan. 678, 732 P.2d 1260 (1987) (same under Kansas law); *Reliance Universal, Inc. v. Sparks Indus.*, 688 S.W.2d 890 (Tex. Ct. App. 1985) (same under Texas law). U.C.C. §§ 2-718 and 2-719 authorize contractual limitations to remedies for sales of goods.

88. *See, e.g., Nei v. Boston Survey Consultants*, 388 Mass. 320, 324, 446 N.E.2d 681, 684 (1983) (dicta: absence of privity irrelevant under "Little FTC Act"); *Raudebaugh v. Action Pest Control, Inc.*, 59 Or. App. 166, 650 P.2d 1006 (1982) (holding absence of privity irrelevant under "Little FTC Act"); *FleNNiken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983) (same). *See generally Note, The DTPA and Privity: Let the Buyer Beware Becomes Let the Buyer Recover*, 39 BAYLOR L. REV. 787 (1987) ("The DTPA does not require privity between a plaintiff and defendant."); *but see Simpson v. Smith*, 34 Ohio Misc. 2d 7, 12, 517 N.E.2d 276, 281 (1987) ("some privity of contract . . . must exist before a person may be" liable). Privity requirements for warranty suits are codified in U.C.C. § 2-318 (1990).

waiver and ratification.⁸⁹

This near automatic application of standards under the FTC Act to consumer actions is troublesome. It is one thing for an administrative agency restricted by economic and political limitations and charged with acting in the public interest to employ broad standards in deciding whether to impose a cease and desist order. But it is another thing when consumers, who are not so restrained, have access to the same standards and can obtain damages and attorney's fees.⁹⁰ "Little FTC Acts" arm consumers with a powerful weapon against merchants, enabling consumers to prevail even when it may not be in society's interest for them to win.

The *Geismar* case, discussed earlier, illustrates the point.⁹¹ Abraham & Straus, a department store, advertised a sale of dishes in a newspaper; the advertisement quoted an incorrect price for the dishes—an apparent typographical error. Nevertheless, a consumer who wished to purchase the dishes at the erroneous price was able to recover statutory damages under New York's "Little FTC Act."⁹² That is an overly harsh response to a typographical error. If the newspaper made the mistake—perhaps an employee pressed the wrong button—it is difficult to see why the store should be liable.⁹³ Obviously, the store would not have been liable if the newspaper had deliberately printed an erroneous advertisement the store had not placed. Is that situation different from the *Geismar* case? The store probably is incapable of preventing typographical errors from occurring, unless it stops advertising altogether. Thus, allowing recovery against the store is unlikely to deter future deceptions of the same type.

A public agency probably would not have pressed the *Geismar* case, once it satisfied itself that the error was unintentional—even though the public agency might have prevailed if it had proceeded. While public agencies sometimes exercise their discretion improperly, in the consumer arena they generally err on the side of doing too little, rather than too much,⁹⁴ and so reliance on the discretion of public agencies not to commence pointless proceedings in consumer matters seems well placed. But consumers are not subject to the same constraints and so can bring wasteful and near pointless *Geismar* type cases.⁹⁵

The next section discusses more fully the problems created by applying FTC rules to private consumer suits. It also suggests a solution.

89. See, e.g., *Shenandoah Assoc. v. J & K Properties, Inc.*, 741 S.W.2d 470, 496 (Tex. Ct. App. 1987) (waiver and ratification defenses ineffective against deceptive trade practices statute).

90. See Lynn, *Anatomy of a Deceptive Trade Practices Case*, 31 Sw. L.J. 867, 871 (1977) ("[a]s with any government action, an ill-conceived or poorly-executed [FTC] policy can ultimately be checked by political intervention. No such check, however, exists to prevent the private damage action using a capacity to deceive standard from going awry, resulting in clogged dockets and policies dictated by minor cases of little or no concern to the public at large. The capacity to deceive test, which was borrowed by the Texas attorney general from FTC actions, was never designed to be used in the private action for damages.") (footnotes omitted).

91. See *supra* notes 6-10 and accompanying text.

92. *Geismar v. Abraham & Straus*, 109 Misc. 2d 495, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981).

93. Of course, the merchant could assert a claim against the newspaper, but the newspaper, fearing liability, might insert a disclaimer in its advertising contracts.

94. See *supra* note 62 and accompanying text.

95. Cf. Developments in the Law, *supra* note 41, at 1039 ("Resolution of these problems involves policy judgments of the most fundamental kind and the view of an institution relatively responsive to political forces and with access to a staff familiar with the market situation should be accorded special weight.").

III. HOW THE LAW SHOULD BE CHANGED

In order to examine possible solutions to problems with deceptive trade practices law, it is necessary to understand the policies on which any solution should be based. Accordingly, the Article now turns to those policies, beginning with the rather basic concept of why the law should prohibit deceptive trade practices at all.

A. *The Policies Informing Deceptive Trade Practices Law*

Deceptive trade practices may take many forms: bait and switch transactions⁹⁶ and referral sales schemes⁹⁷ are two better known forms. Probably the clearest example of the genre is deceptive advertising, and so the balance of the Article focuses primarily on that. The chief benefit of truthful advertising, from the standpoint of economic theory, is that it makes for better-informed consumers; ideally, the more information consumers possess when they choose among competing purchases, the more efficiently the free market will allocate resources.⁹⁸ In practice, of course, much advertising is not designed to help consumers choose the best product, but only to keep a product's name in the consumer's mind. Still, advertising does have the potential for enhancing market efficiency, and sometimes it realizes that potential.⁹⁹

Obviously, advertising must be truthful if it is to improve the efficiency of the markets. Inaccurate advertising could deceive consumers into purchasing goods and services because of qualities the goods and services do not possess, thereby distorting the functioning of the markets. Accordingly, preventing deceptive advertising is in the interests of the economy as a whole. Similarly, dishonest advertising harms consumers, because consumers will be disappointed or worse when products fail to live up to their billing. Finally, false advertising damages advertisers as a whole because consumers who have been deceived in the past may not believe other advertising, even advertising which makes true claims. If consumers do not believe advertisements, and ignore advertising when deciding which goods and services to purchase, advertising will lose much of its value.

96. See *supra* note 9.

97. In referral sales schemes, the seller tells consumers that they will be paid for referring other customers to the seller, and that if they furnish enough other buyers, the good "will pay for itself." The consumer typically signs a note promising to pay a lender for the purchase; later the seller disappears, without having paid the consumer for any referrals. The consumer is thus induced to purchase the goods by the false hope that the product will not cost the consumer anything. See, e.g., *Norman v. World Wide Distrib., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963); *Braddock v. Family Finance Corp.*, 95 Idaho 256, 506 P.2d 824 (1973).

98. See Kintner, *supra* note 11, at 1269 ("The success of an economic democracy, no less than that of a political democracy, depends upon informed intelligent choice. Thus, the widespread dissemination of information with respect to alternatives is imperative; otherwise, choices would be made in a vacuum and would become meaningless, if not plainly capricious.").

99. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.").

Clearly then, deterrence of false advertising should be one policy objective shaping the law of deceptive trade practices.¹⁰⁰ A second policy focuses on the need to compensate those injured by false advertising—usually consumers fooled by the advertisements and competitors who suffer diminished sales. A third policy is minimizing the cost of litigation over deceptive advertising, which is particularly important when dealing with consumer matters, given the small monetary stakes at issue in the typical transaction.¹⁰¹ As a practical matter, that means that the cause of action must be simple—and hence, inexpensive—to prove. “Little FTC Acts” have, by and large, accomplished that goal.

In considering deceptive trade law, it is also helpful to understand an important economic impediment to false advertising: merchants who depend on repeat purchases have little incentive to engage in false advertising. For example, a consumer who purchases detergent because the seller falsely promises that the detergent will make the consumer's clothes whiter is unlikely to purchase the same detergent again, and so detergent manufacturers would be well advised to avoid deceptive claims.¹⁰²

There remain, however, a number of situations in which vendors perceive their economic interests as served by false advertising. The fly-by-night con artist is the classic example: by the time his frauds are discovered, he has decamped; a second sale to the same consumer is not on his agenda. A familiar example from theater is Professor Harold Hill in *The Music Man*,¹⁰³ whose pattern was to sell band instruments (“76 Trombones”) and then flee before the local citizens discovered he could not teach their children how to play them. A more recent example: when Hurricane Hugo hit South Carolina in 1989, swindlers visited damaged homes and promised to repair them. After receiving down payments, the swindlers disappeared, leaving the homes just as Hugo had.¹⁰⁴

100. Cf. Jacobs, *supra* note 43, at 917 (stating deterrence effect of government and private enforcement actions); Cohan, *supra* note 46, at 299-300 (“The goals of [state consumer protection statutes] are to foster fair and honest competition, prevent dishonesty, and eliminate sharp practices and dealings in the marketplace to protect victimized consumers.”) (footnotes omitted); *Beslity v. Manhattan Honda*, 120 Misc. 2d 848, 852, 467 N.Y.S.2d 471, 474 (N.Y. Sup. Ct. 1983) (quoting from legislative history of New York consumer fraud statute that purpose of statute is to “add a strong deterrent against deceptive business practices.”).

101. Indeed, the Texas Deceptive Trade Practices—Consumer Protection Act expressly directs that the statute should be construed to “provide efficient and economical procedures to secure [consumer] protection.” TEX BUS. & COM. CODE ANN. § 17.44 (Vernon 1987).

102. See generally Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 551 (1979) (“[t]he economics of advertising . . . indicates that there generally will be little incentive to mislead in advertising.”); Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 794 (1979) (“To the extent that the seller's future sales depend on his maintaining a reputation for reliability, he can be expected to exercise self-restraint in his claims and . . . to reduce the likelihood of deception.”). Of course, sometimes advertisers do not behave rationally. And sometimes employees behave in a way which they believe is in their own best interests at the expense of their employer's best interest. Thus, one commentator noted that managers of grocery stores which are part of a chain sometimes overprice specials to improve store profitability, even though that makes the chain's advertising deceptive as to the particular store. See Verkuil, *Developments in the Regulation of Supermarket Advertising Practices: An Empirical Analysis*, 48 N.Y.U. L. REV. 395, 412-13 (1973). For an interesting empirical study on the economics of advertising regulation, see Peltzman, *supra* note 34, at 403.

103. Book, music and lyrics by Meredith Wilson; story by Meredith Wilson and Franklin Lacey. *The Music Man* opened in 1957, and a movie version was released in 1962.

104. Diamond, *Con Men Eager to Compound Disaster*, L.A. Times, Oct. 27, 1989, at D1, col. 2.

There are many other circumstances in which the unscrupulous find it tempting to engage in deceptive advertising. Sellers of low-fat frozen yogurt sometimes falsely advertise the number of calories in their product, and consumers, lacking the ability to verify such claims, may never learn of the deception.¹⁰⁵ Appliance repairers sometimes claim the appliance needed work it did not need, in order to inflate the repair bill.¹⁰⁶ The deterrence rationale operates with special force on such greedy fraud-doers, for by increasing the cost of fraudulent advertising, the practice can be made more expensive, even prohibitively so.¹⁰⁷

But there are other situations in which it is less likely that false advertising can be deterred. A merchant may, for example, engage in false advertising by mistake. A typographical error may be the cause, as in the example above.¹⁰⁸ Or the merchant may honestly base its advertisement on published government statistics which later turn out to have been erroneous.

FTC v. Algoma Lumber Co. is instructive.¹⁰⁹ Algoma sold wood from the pine species *Pinus ponderosa*. Pine trees had generally been divided into two groups, white pine and yellow pine. The white pine is more durable than the yellow, and so was more expensive. *Pinus ponderosa* is botanically a yellow pine, but around 1880 some lumber manufacturers began calling it "California white pine." This practice continued until 1924 when, in response to complaints and investigations, some of these manufacturers stopped referring to it as California white pine. Others persisted, and in 1929 the FTC commenced proceedings to enjoin the use of the label California white pine. The Supreme Court upheld the FTC's order prohibiting manufacturers from calling the wood "white" and acknowledged that "[m]any retail dealers receiving orders for white pine deliver California white pine, not knowing that it differs from the lumber ordered."¹¹⁰ That is especially understandable given that some merchants had been calling the wood white pine for forty years or more. A

105. Burros, *Eating Well; Soft Serve Desserts: How Low in Calories?*, N.Y. Times, Aug. 9, 1989, at C1, col. 6. (Study found 14 of 32 samples tested to have 120% or more of number of calories claimed). For a particularly frightening example of a deceptive health claim pertaining to food, see Kunstel, *Something Fishy?*, Chicago Tribune, Oct. 19, 1989, at § 7, p. 4, col. 1. (pregnant woman purchased fish after being told it was a delicious species from New York; New York authorities had listed fish on state pollution advisory warning pregnant women not to eat it). See generally Reich, *supra* note 102, at 795 ("A seller will have an incentive to deceive consumers, however, when the present value of all future revenues attributable to the deceptive message . . . is greater than the present value of revenues that otherwise would be generated by a nondeceptive message [D]eceptive claims [will not] affect future sales if the consumer has difficulty evaluating the product or service actually received in light of the claims for it").

106. Kerr, *Law Aims at Improving Picture on VCR Reports*, Newsday, Nov. 15, 1989, at 23. (Department of Consumer Affairs "found that three VCR-rental stores told an undercover investigator that it would cost between \$29.95 and \$129.95 to repair a VCR in which the problem was actually a bad 25-cent fuse."). Cf. *Precise Auto Electric, Inc. v. Commissioner*, 151 A.D.2d 680, 542 N.Y.S.2d 733 (N.Y. App. Term 1989) (automobile repair shop replaced working alternator when problem was bad fuse).

107. Further on the costs of deceptive advertising from *The Music Man*: in the song "Rock Island" a salesman complains that Professor Hill has made it impossible for legitimate sellers to sell to townspeople Hill has already visited, because Hill's broken promises have made the locals suspicious of traveling salesmen.

108. See *supra* notes 6-10 and accompanying text.

109. 291 U.S. 67 (1934).

110. *Id.* at 72. At that time, the FTC Act did not prohibit deceptive practices but only unfair practices. See *supra* notes 19-20 and accompanying text. Nevertheless, the label white pine would surely be found deceptive were the same case to arise today.

merchant who did not know that the wood was in fact a yellow pine, and who had always heard it referred to as white, might have advertised the wood as white without realizing the error. Merchants who cannot prevent the deception from occurring, or who cannot reasonably discover that the advertising is deceptive, cannot be deterred from false advertising. Consequently, the deterrence rationale for preventing deceptive advertising does not operate as to such sellers, and the chief policy behind allowing a private cause of action for damages against such sellers must be the desire to compensate those who have been misled. In such cases, awards of multiple damages and punitive damages are no more justifiable than they are in ordinary small-stake breach of contract cases.

Finally, there are circumstances in which merchants advertise falsely and in which it is simply not desirable to deter the false advertisement. Three examples make the point. First, consider telephone book yellow page ads. Telephone books are typically issued for a period of one year, and yet within that year changes may occur which render the advertisement deceptive. Suppose an advertisement states the address of a particular business, but six months later the business moves to a new location. The move has made the ad incorrect, hence deceptive, yet few would seek to deter such a move solely because the ad had not yet run its course. Indeed, to the extent that the law makes changing location difficult, it may increase market distortions as businesses are either forced to remain in locations no longer able to support them, or find it more expensive to move.

The second example is the singer Madonna, who, suffering from laryngitis, cancelled one concert and rescheduled another and offered refunds for tickets to both concerts.¹¹¹ Both cancelling and rescheduling a concert would constitute deceptive trade practices, if the standards used by courts were taken literally. It is, of course, hard to believe that any court would go so far as to find Madonna liable in these circumstances; surely a court would find a way to hold for Madonna, if only to avoid making the court and the consumer fraud rules appear ludicrous. The only way Madonna could have avoided falsely advertising the dates of her concerts—given the later need to cancel and reschedule—was not to advertise her concerts at all, which is obviously not a helpful outcome. But if a court must struggle to avoid the wrong result, the rules need to be reexamined.

A third situation in which it is unwise to deter fraudulent advertising is political speech. Many political campaigns today are conducted in large measure through commercials, and some of the claims made in the advertising are of dubious veracity. Yet to attempt to deter such claims through false advertising lawsuits would put freedom of political discourse at risk, an undesirable result and one substantially blocked by the first amendment.¹¹²

111. *Madonna Reschedules*, N.Y. Times, June 19, 1990 at C20, col. 6.

112. See *NYPIRG v. Insurance Information Inst.*, 140 Misc. 2d 920, 531 N.Y.S.2d 1002 (N.Y. Sup. Ct. 1988), *aff'd*, 554 N.Y.S.2d 590 (App. Div. 1990). The court held that political speech was within the purview of New York's "Little FTC Act" as written, but that the statute could not constitutionally reach political speech. The decision was affirmed on the grounds that the statute did not reach editorial comment and that the advertisement was protected by the first amendment.

In sum, the law of false advertising should discourage some deceptive advertising, but not deceptions which are the innocent by-products of conduct which is otherwise desirable. In addition, the rules should also seek to compensate those injured by deception, and should be inexpensive to administer. Obviously, there is tension between the desire to make distinctions between different types of deception and the need to provide inexpensive adjudication. The law thus far has not made those distinctions, and merchants have paid a price for that. In fact, consumers have too, as the next section demonstrates, because of the manner in which some judges have responded to these unwarranted victories for consumers.

B. *Judicial Responses to "Little FTC Acts"*

Judges have responded in one of three ways when presented with cases in which a consumer victory seems unfair.¹¹³ Some have simply followed the statute, perhaps with a suggestion that revisions are in order.¹¹⁴ Others have simply disregarded the statute. As the author of the 1979 amendment to the New York "Little FTC Act," which permitted consumers to sue merchants directly, observed in 1989, "Small Claims judges are both ignorant of and hostile to the 1979 amendment."¹¹⁵ Unfortunately this hostility has spilled over into cases where the consumer should recover.

Consider *Pantelas v. Montgomery Ward & Co.*¹¹⁶ Montgomery Ward advertised a power painter and power roller. When plaintiff sought to purchase the goods, a Montgomery Ward sales clerk told plaintiff that the items were out of stock and issued a "raincheck." Plaintiff was informed 273 days later that the items were available. Although plaintiff acknowledged that she had not suffered any out-of-pocket loss, she sued under Michigan's "Little FTC Act" complaining that she had suffered "total aggravation."¹¹⁷ The court, relying on common law fraud cases, held that plaintiff had not suffered an actionable loss.

Pantelas seemed to involve precisely the kind of advertisement which deceptive trade practices statutes were designed to prevent: the seller, without any apparent justification, ran a correctly printed advertisement which made promises the seller did not keep. Once the consumer travels to a store to purchase an item, the consumer will often purchase something, even if the sale item is unavailable, affording the seller a benefit from its false advertising.

113. One observer has written that "an honest teacher must present the judicial reaction to these unfair and deceptive trade practices statutes as highly disputed politics." Macaulay, *Bambi Meets Godzilla: Reflecting on Contracts Scholarship and Teaching vs. Unfair Trade Practices and Consumer Protection Statutes*, 26 Hous. L. Rev. 575, 598 (1989).

114. See, e.g., *Geismar v. Abraham & Straus*, 109 Misc. 2d 495, 499-500, 439 N.Y.S.2d 1005, 1008 (Dist. Ct. Suffolk County 1981) (The "implications of this . . . statute are awesome . . . [The statute] may be in need of legislative review and revision."); *Capp Homes v. Durate*, 617 F.2d 900, 902 n.1 (1st Cir. 1980) ("We might agree with the [consumers'] concession at trial that the scope of the statute is 'frightening,' but this is a legislative, not a judicial matter. Nor is the statute necessarily frightening in application to the present case.").

115. Spencer, *Legislative Counsel Wins Suit Based on Bill He Drafted*, N.Y.L.J., July 17, 1989, at 1, col. 5 (remark by Eugene D. DeSantis, counsel to the New York State Assembly Consumer Protection Committee). Mr. DeSantis has himself sued under the New York statute. See *infra* text accompanying notes 119-24.

116. 169 Mich. App. 273, 425 N.W.2d 782 (1988).

117. *Id.*

Studies conducted during the sixties and seventies found that advertised specials were, in fact, frequently unavailable.¹¹⁸ A recovery for the consumer would deter such conduct, thus furthering the policy behind allowing private claims.

*DeSantis v. Sears, Roebuck & Co.*¹¹⁹ provides an even clearer example of judicial hostility to deceptive trade practices statutes. On December 17, defendant advertised as part of a Christmas sale that a sabre saw was 20 dollars off. Plaintiff attempted to purchase the saw on the following day as a Christmas gift, but was told that that particular branch had run out of the saws before the sale. Plaintiff refused a rain check¹²⁰ and instead sued under New York's "Little FTC Act" even though his only damages were "an unnecessary trip to the store."¹²¹ Sears defended at trial on the ground that it had allocated sufficient quantities of the saw to the store based on past sales at the store, but that unusual demand had depleted the stock. The Small Claims Court held for Sears and threatened to sanction plaintiff for bringing a frivolous suit.¹²²

DeSantis points up a particular problem in consumer litigation. Consumer matters are often litigated in small claims courts. Small claims courts are in some respects the modern equivalent of the frontier court. Small claims court judges, knowing that their decisions are rarely, if ever appealed, often dispense rough justice according to their own values, rather than the niceties of the law.¹²³ Because so many consumer cases are brought in small claims courts, their refusal to employ the deceptive trade practices statutes can effectively nullify them. In *DeSantis*, however, the consumer appealed, and ultimately prevailed. The Appellate Court, noting that the advertisement stated "WRAP UP A BEAUTIFUL CHRISTMAS AT SEARS" and so was geared towards Christmas shoppers, reversed, vindicating the policies behind the New York Statute.¹²⁴

118. The studies are discussed in Boies & Verkuil, *Regulation of Supermarket Advertising Practices*, 60 GEO. L.J. 1195 (1972).

119. 148 A.D.2d 36, 543 N.Y.S.2d 228 (3d Dept. 1989).

120. Rainchecks allow consumers to purchase an out-of-stock item at the advertised price, when the item becomes available at a later date. Obviously, they are an imperfect substitute for the sale item. See Boies & Verkuil, *supra* note 118, at 1199-1200.

121. Spencer, *supra* note 115, at 2, col. 5.

122. *Id.* at col. 3.

123. See *The Role of the Small-Claims Court* in CONSUMER REPORTS 606 (Nov. 1979) (noting flexibility of small claims courts). See generally National Center for State Courts, Report on Small Claims Courts (1978).

124. Other examples of narrow constructions of "Little FTC Acts," which may have been motivated by judicial hostility to the statute, include *Willman v. Ewen*, 6 Kan. App. 2d 321, 627 P.2d 1190 (1981), *aff'd* 230 Kan. 262, 634 P.2d 1061 (1981) (Car dealer had entered into a written contract to sell a limited production car to the buyer. Though seller had already sold the car to someone else and was unable to obtain another one, seller misled buyer for three months about the availability of the car. The trial court held seller had not committed a deceptive trade practice but the appellate courts reversed.); *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357 (Ky. Ct. App. 1978) (After seller and buyer signed agreement, seller's agent told buyer that buyer owned good and buyer made down payment on good, seller announced that good could not be sold for agreed upon price. Court found no violation of consumer protection act which prohibited unconscionable, false, misleading or deceptive acts.); *Gross-Haentjens v. Leckenby*, 38 Or. App. 313, 589 P.2d 1209 (1979) (No cause of action under Unlawful Trade Practices Act when dealer represented that car had good brakes, when in fact it did not. Dealer also promised that brakes would be checked and repaired if necessary, when in fact they were not. The court reasoned that (1) plaintiff could sue under products liability theories; and (2) statute allows recovery to anyone who "suffers any ascertainable loss of money or property, real or personal," and plaintiff suffered personal injury.); *Deer Creek Constr. Co. v. Peterson*, 412 So. 2d 1169, 1173 (Miss. 1982) (The statute applies only to advertise-

The third approach taken by judges is to search for some principled way to justify a decision for the consumer only when appropriate.¹²⁵ Unfortunately, these judges have generally, in the words of Justice Cardozo, "fumble[d] about, feeling in a vague way that some . . . problem is involved, but missing the universal element which would have quickened . . . decision with the inspiration of a principle."¹²⁶ For example, one court ruled that a plaintiff could recover for a deceptive trade practice only if "[s]ubstantial aggravating circumstances" are present.¹²⁷ That will often not be true in deceptive trade practices cases—including many cases in which it is desirable to deter repetitions of the merchant's conduct.

Some courts have concluded that deceptive trade practices acts should not apply to "[p]rivate transactions not of a recurring nature or without ramification for the public at large."¹²⁸ Other courts, putting it somewhat differently, have ruled that consumers can prevail only if they can show that the merchant's practice would be a source of danger to other members of the consuming public;¹²⁹ that the statutes do not cover sales by private individuals;¹³⁰ or that there must be a public injury;¹³¹ or an impact on the public interest.¹³²

Attempts to limit deceptive trade practices statutes on such a basis miss the mark. They appear to be founded at least in part on the "public interest"

ments and not to "representations made during the negotiation process for the purchase of a particular item or items."); *Trifiro v. New York Life Ins. Co.*, 845 F.2d 30, 34 (1st Cir. 1988) (plaintiff suing for violation of "Little FTC Act" must show that reliance on deceptive statement was reasonable).

125. See, e.g., *McDonald, The Applicability of the Illinois Consumer Fraud and Deceptive Business Practices Act to Private Wrongs*, 39 DEPAUL L. REV. 95, 96 (1989) ("Many courts have been uncomfortable with the Act's expansive nature and have sought to limit its applicability . . ."); *Haroco, Inc. v. American National Bank & Trust*, 647 F. Supp. 1026, 1034 (N.D. Ill. 1986) ("Courts, aghast at the apparent breadth of [deceptive trade practice statutes] have searched for means to limit their reach."); Macaulay, *supra* note 113, at 594-95 (Some judges see deceptive trade practices acts "as a costly and foolish interference with business and the market . . . The Georgia courts seem to have reduced their statute to regulating sales of expensive cars.").

126. B. CARDOZO, *GROWTH OF THE LAW* 99-103 (1924).

127. *Hageman v. Twin City Chrysler Plymouth*, 681 F. Supp. 303, 307 (M.D.N.C. 1988).

128. *Genesco Entertainment v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984). See also *Nardella v. Braff*, 621 F. Supp. 1170, 1173 (S.D.N.Y. 1985); *Rubin v. Telemet America, Inc.*, 698 F. Supp. 447, 451 (S.D.N.Y. 1988) (deceptive trade practices act "was not adopted to address unique problems that may occur between a solitary consumer and a merchant.").

129. See *Zeevan v. Black*, 156 Ga. App. 82, 86, 273 S.E.2d 910, 915 (1980).

130. See, e.g., *Lantner v. Carson*, 374 Mass. 606, 609-10, 373 N.E.2d 973, 975-76 (1978) (statute bars "unfair or deceptive acts or practices in the conduct of any . . . commerce"); *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979) (same).

131. See, e.g., *Brode v. Tax Management, Inc.*, 14 U.S.P.Q.2d 1195, 1207 (N.D. Ill. 1990); *Newman-Green, Inc. v. Alfonso-Larrain*, 590 F. Supp. 1083, 1087 (N.D. Ill. 1984) (discusses public injury requirement and concludes "plaintiff must show defendant has engaged in deceptive practices in promoting its goods or services to its market in general."); *National Union Fire Ins. v. Continental Illinois Corp.*, 652 F. Supp. 858, 861 (N.D. Ill. 1986); *Frahn v. Urkovich*, 113 Ill. App. 3d 580, 586, 447 N.E.2d 1007, 1011 (1983) (statute does not apply to private wrongs); *Beaton & Assocs. v. Joslyn Mfg. & Supply*, 159 Ill. App. 3d 834, 843-44, 512 N.E.2d 1286, 1293 (1987) (same); *Blake v. State Farm Mut. Auto. Ins.*, 168 Ill. App. 3d 918, 924, 523 N.E.2d 85, 89 (1988) (same). See generally *McDonald, supra* note 125, at 95.

132. After the Connecticut Supreme Court imposed a public interest requirement on deceptive trade practice actions, in *Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc.*, 190 Conn. 528, 536, 461 A.2d 1369, 1373 (1983), the legislature amended the Connecticut statute to provide that proof "of public interest or public injury shall not be required in any action brought under this section." CONN. GEN. STAT. § 42-110g(a) (1987). Other cases imposing a public interest requirement include *Noack Enter. v. Country Corner Interiors*, 290 S.C. 475, 478, 351 S.E.2d 347, 350 (S.C. Ct. App. 1986); *Newton v. Moffie*, 13 Mass. App. Ct. 462, 467-68, 434 N.E.2d 656, 659-60 (1982).

limitation in the FTC Act,¹³³ and presumably, the view that when consumers function as private attorneys general they ought to serve more than just their own interests. However, except in the state of Washington, which has enacted its own version of the public interest requirement,¹³⁴ the states which borrowed the wording of the FTC Act did not copy the public interest requirement. The rather clear implication is that the limitation does not apply to actions under the state statutes, at least not in the way it has been construed by the courts and the FTC. The courts must search elsewhere for a limiting principle.

Moreover, limiting deceptive trade practice claims to recurring frauds seems unduly restrictive. Why should a merchant whose fraud cannot be repeated escape liability? If the purpose of the statutes is to deter consumer fraud, surely that purpose would be better served by applying the statutes to all unjustified frauds, without regard to the uniqueness of the fraud. While it may make sense to limit FTC actions to frauds likely to have a broad impact, private citizens should not be so limited.¹³⁵ Indeed, it is precisely because the FTC is so limited that consumers should be able to sue in such cases.

The solution is not, of course, simply to eliminate the consumer's right of action altogether. Private lawsuits are a necessary adjunct to publicly financed cases.¹³⁶ Obviously, if the merchant in *Geismar* had deliberately advertised a price at which it had no intention to sell, liability would be appropriate. For example, in *Williams v. Bruno Appliance and Furniture Mart*,¹³⁷ seller's advertisement showed pictures of a sofa, loveseat, and lounge chair over a price of 298 dollars. When buyer sought to purchase the three pieces at that price, seller refused to sell, claiming that 298 dollars was the price for the sofa by itself. The buyer purchased several other items, not on sale, for a total of 462.50 dollars. The buyer later attempted without success to cancel his purchase, and ultimately sued seller for engaging in deceptive trade practices. The court held that, based on buyer's allegation that seller had intentionally published the misleading advertisement, buyer had made out a cause of action and could proceed to trial. If buyer's allegations are true, seller's conduct—a classic "bait and switch"—is reprehensible and seller should be liable. Allowing recovery in such cases will fulfill the goals of false advertising law: deterring future frauds and

133. See *supra* notes 30-32 and accompanying text. See also *Brode*, 14 U.S.P.Q. 2d at 1207 (public injury concept based on case law interpreting FTC Act); *Ivey*, *Barnum & O'Mara*, 190 Conn. at 536, 461 A.2d at 1373 (public interest requirement derived from FTC Act); *Newton*, 13 Mass. App. Ct. at 467-68, 434 N.E.2d at 659-60 (same).

134. WASH. REV. CODE ANN. § 19.86.920 (1989). See *infra* notes 153-56 and accompanying text.

135. See *Govern*, *Paradigm and Paradox in New York Consumer Credit Law: After Holder in Due Course*, 6 ANN. REV. OF BANKING L., 119, 145 (1987); Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOKLYN L. REV. 509, 529-30 (1982). For cases applying deceptive trade practices statutes to transactions involving only a few people, see *Hyland v. Zuback*, 146 N.J. Super. 407, 413, 370 A.2d 20, 23 (1976) (The court applied the Consumer Fraud Act to boat repairman who did not solicit work and wrote "there is no reason to honor the argument that an unconscionable practice is subject to remedy only when widespread."); *Bonn v. Haubrith*, 123 Wis. 2d 168, 173-74, 366 N.W.2d 503, 505-06 (1985) (applying statute to contract where initial contact was made by telephone rather than advertisement because "misleading representations are no less harmful when they follow an initial telephone contact than a media advertisement"); *Heastie v. Community Bank*, 690 F. Supp. 716 (N.D. Ill. 1988).

136. See *supra* notes 62-71 and accompanying text.

137. 62 Ill. App. 3d 219, 379 N.E.2d 52 (1978).

compensating the victims. The merchant in *Williams* should not escape liability merely because public agencies lack the resources to police the merchant's particular deception.

The actual *Geismar* result could conceivably be justified on one or more of three theories. One would focus on the fact that the consumer may have suffered damages, no matter how minuscule—perhaps the consumer visited the store or made a telephone call.¹³⁸ At the very least, the consumer has been disappointed.¹³⁹ If the consumer has no recourse against the merchant, the consumer will bear these damages. Allowing a right of action will shift the damages to the merchant. While the merchant in *Geismar* was not responsible for the misprint, if it is liable it might seek an opportunity to review future advertisements before publication. Consequently, making the advertiser responsible could, in theory, increase the advertiser's care and lead to less deceptive advertising.

Second, the merchant can, in fact, perform a risk spreading function. If deceptive advertisements are inevitable, perhaps it is undesirable that their cost should be borne by the few consumers who are misled. Allocating the cost initially to the merchant, through a damages action, makes the cost of deceptive advertising just another cost of doing business. The merchant can pay the consumer's damages and then obtain compensation, in effect, by raising its prices. Other consumers who benefit from advertising will pay the higher prices, and so the cost of deceptive advertising will be shifted from those who are deceived to all those who buy from advertisers—and all those who benefit from advertising.¹⁴⁰ Alternatively, the merchant may possibly be able to reallocate the damages to the erring newspaper, and let it spread the cost.

On the other hand, the law seldom cuts so fine as to compensate someone for the inconvenience of a telephone call or a minor disappointment.¹⁴¹ It is one thing to allow the consumer compensation in a private action when the merchant could have prevented the problem, for that will deter misconduct. It is quite another to allow a private cause of action against an innocent advertiser for the sole purpose of compensating for trivial and, in some cases, nonexistent injuries, and to allow statutory damages.

138. For a case holding that a consumer who travels to defendant's place of business because of a deceptive ad is injured, and so is entitled to damages, see *Beslity v. Manhattan Honda*, 120 Misc. 2d 848, 854, 467 N.Y.S.2d 471, 475 (N.Y. Sup. Ct. 1983).

139. Compare *Mayhall v. A.H. Pond Co.*, 129 Mich. App. 178, 180, 341 N.W.2d 268, 269-72 (1983) (defendant advertised diamonds were perfect; plaintiff who was disappointed when diamonds were not perfect held to have suffered actionable loss) with *Panatelas v. Montgomery Ward & Co.*, 169 Mich. App. 273, 425 N.W.2d 782 (1988) (plaintiff, whose only damage at having to wait 273 days to obtain advertised special was "total aggravation," held not to have suffered actionable loss). In both cases, of course, allowing the plaintiff to recover should deter future frauds.

140. See Comment, *supra* note 65, at 917 ("It is generally recognized that the overall increase in costs [caused by successful deceptive trade practices actions] will be passed through the market structure to be borne by the final consumer.").

141. See *Dixon, Irmaos & CIA v. Chase Nat'l Bank of N.Y.*, 144 F.2d 759, 763 (2d Cir.), cert. denied, 324 U.S. 850 (1944) (loss of \$17 interest on transaction involving \$9,700 is insignificant and does not justify dishonor of letter of credit).

A third possible justification for *Geismar* rests on the cost of litigation. Consumer cases are typically for small stakes;¹⁴² that is why it is necessary to offer statutory, multiple, and punitive damages, and attorney's fees—because otherwise few consumers would sue. If courts recognize an additional defense, they increase the cost of litigating consumer cases, which will further reduce the willingness of consumers to sue. However, the price for having workable bright-line rules on deceptive trade practices may be the occasional unfortunate result, as in *Geismar*.

Laws under which merchants like the seller in *Geismar* would not be liable, without adding unduly to litigation expense, would be preferable. The best way to deal with rules which make it prohibitively expensive for consumers with legitimate grievances to obtain redress is to increase the amounts awarded to prevailing consumers, rather than penalize merchants who have done nothing wrong.

The law must create some substitute for the agency discretion that operates in FTC cases so that consumers cannot, by bringing false advertising cases, deter desirable conduct. The next section of the Article explores how the law should be changed to accommodate this goal.

C. *A Proposed Solution*

The best solution seems to be to enact statutes which contain three parts. One section should outlaw, in as specific terms as possible, practices like bait and switch transactions which are plainly deceptive—so as to leave no doubt, as a more generally written statute might. A second section should contain a more general catch all, to cover the deceptive practices yet to be invented—of which there will surely be many.

As ample models exist for these first two sections,¹⁴³ the third section is the most troublesome. The third section must be a substitute for agency discretion, making it possible for merchants to prevail in cases where they should prevail. This section must also satisfy judges so that they will enforce the statute as written. Ideally, it would be possible to draft a provision which would specifically describe the exclusions from the statute. Texas, in fact, has attempted to do just that.

The Texas Deceptive Trade Practices Act is used far more often than most such statutes, perhaps because businesses can sue under its provisions, as well as consumers.¹⁴⁴ One study examining cases filed in Harris County, Texas, identified 712 cases raising deceptive trade practices allegations during two six-month periods.¹⁴⁵ The amounts sought in the Texas cases are also Texas-sized; the

142. See *supra* note 14 and accompanying text.

143. See *supra* notes 58-60 and accompanying text.

144. The Texas statute appears at TEX. BUS. & COM. CODE ANN. §§ 17.41-826 (Vernon 1987 & Supp. 1991). In 1975, the Texas statute was amended to allow businesses and corporations to sue. 1975 TEX. GEN. LAWS 149. The Texas statute is also required study at at least one Texas law school, Baylor, which undoubtedly contributes to lawyer awareness and use of the statute.

145. Atlas, Atlas, & Nimmer, *DTPA in the Courts: Two Empirical Studies and a Proposal for Change*, 21 ST. MARY'S L.J. 609, 619 (1990). The two periods were January through June of 1985, and the same months in 1986. The authors reviewed 2,683 case files. Harris County includes the City of Houston.

study found 75 cases in which the plaintiffs sought 200,000 dollars or more.¹⁴⁶ The authors of the study found that deceptive trade practices cases were the third most common type of case to go to trial in Harris County and that they produced plaintiff's verdicts more often than any other type of civil claim, other than worker's compensation claims.¹⁴⁷ With this heavy use, flaws in the Texas statute are more likely to become apparent, and in fact, since the Texas statute was broadened in 1973 to allow private law suits, the Texas legislature has frequently amended it.¹⁴⁸ One of these amendments contained the following provision:

it is a defense to the award of any damages or attorneys' fees if the defendant proves that before consummation of the transaction he gave reasonable and timely written notice to the plaintiff of the defendant's reliance on

(1) written information relating to the particular goods or services in question obtained from official government records if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;

(2) written information relating to the particular good or service in question obtained from another source if the information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information; or

(3) written information concerning a test required or prescribed by a government agency if the information from the test was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information.¹⁴⁹

The Texas defense is only a partial substitute for discretion. It exempts the merchant in some cases when the merchant is not at fault. But it does not protect the merchant in other cases when the consumer should lose; for example, the Texas statute would not protect the merchant in the *Geismar* case. It is probably not possible to draft a statute which would delineate precisely the cases in which the merchant should win, for the same reasons it is prudent to use a general catch-all to proscribe undescribed consumer frauds. It is simply too difficult to imagine every type of case which should be excluded from the consumer fraud statutes.

This problem of line drawing is also exacerbated by the need to make fine distinctions. For example, it would not do the trick simply to create a defense

146. *Id.* at 622-24.

147. *Id.* at 638-40. About 15% of all civil cases tried in Harris County included a deceptive trade practices allegation and plaintiffs won verdicts in nearly 61% of those trials.

148. *See id.* at 614. The Texas statute was amended in 1975, 1977, 1979, 1981, 1983, 1985, 1987, and 1989. A brief history of the Texas statute is given at *id.* 614-17.

149. TEX. BUS. & COM. CODE ANN. § 17.506(a) (Vernon 1987). The statute requires that the defense be a "producing cause" of the damage. TEX. BUS. & COM. CODE ANN. § 17.506(b) (Vernon 1987). An earlier version of the Texas statute, in language seemingly copied from the Federal Truth in Lending Act, 15 U.S.C. § 1640(c) (1988), provided that the plaintiff's recovery would be limited to actual damages and reasonable attorney's fees if the defendant "proves that the action complained of resulted from bona fide error notwithstanding the use of reasonable procedures adopted to avoid error." 1977 TEX. GEN. LAWS 216. Apparently this short-lived provision was interpreted as applying only to clerical mistakes, such as errors in calculating numbers, as is the comparable truth in lending provision. *See Stendebach v. Campbell*, 665 S.W.2d 557, 559 (Tex. Civ. App. 1984); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 606 (Tex. Ct. App. 1984). OHIO REV. CODE ANN. § 1345.11 (Page's 1988). While this provision might resolve the *Geismar* problem, it would not address all of the cases in which the consumer should not recover.

for typographical errors. The case of *Crooks v. Pay Less Drug Stores Northwest, Inc.*¹⁵⁰ illustrates why. The defendant had prepared a newspaper advertising supplement. The supplement described a razor said to have a list price of 1 dollar and 29 cents as being on sale for 89 cents. In fact, seller had intended to advertise that replacement cartridges for razors, rather than the razor itself, were on sale for 89 cents. The razor normally sold for 3 dollars and 29 cents. Defendant discovered the error after the circular had been printed and distributed to the newspapers, but before the newspapers were published. Rather than cancelling or reprinting the circular, the defendant purchased an advertisement elsewhere in the newspapers to disclose the error. Although the original circular was illustrated and printed in color, the corrective advertisement was printed in small print, in black and white, and did not have any pictures. Defendant also placed at its checkout stands signs indicating the error. Plaintiff did not see the corrective advertisement and visited defendant's store in an attempt to purchase the razor. When defendant refused to sell the razor for 89 cents, plaintiff sued for violation of the Oregon Unlawful Trade Practices Act, winning an award of 200 dollars statutory damages plus attorney's fees.

In *Crooks*, unlike *Geismar*, the merchant had a reasonable opportunity to avoid the deception—it could have withdrawn or reprinted the advertisement—but it declined to avail itself of that opportunity. Accordingly, the seller in *Crooks* should have been found liable, since it permitted the dissemination of information which it knew to be deceptive. That is precisely the type of conduct which false advertising laws should deter. Corrective advertising is not a satisfactory solution because corrective advertising, as in *Crooks*, invariably fails to reach all who saw the original advertisement.

Similarly, consider the business which moves six months after placing a telephone book yellow pages advertisement. The yellow pages advertisement, under current law, would probably be considered deceptive, an unfortunate result. Yet the problem could not appropriately be resolved by excepting addresses printed in telephone book advertising from deceptive advertising statutes because some telephone book advertisements which contain incorrect addresses ought to be actionable. For example, in one case, a television repairer advertised in a telephone book that he had offices at several locations where he was not in fact present.¹⁵¹ He apparently did so in an attempt to convince local residents that his was a local business, and hence merited their patronage. The repairer was able to maintain the deception by having employees visit customers in their homes. When a merchant deliberately advertises false information for the purpose of soliciting business, liability is obviously appropriate, and thus in some situations even erroneous information about a merchant's location ought to be actionable.

The best solution appears to be to draft a statutory provision which would replace the discretion of the administrative agency with the discretion of the

150. 285 Or. 481, 592 P.2d 196 (1979).

151. The case is described in Schrag, *supra* note 34, at 1543-50. See also Uniform Deceptive Trade Practices Act § 4 (1966) (declaring it unlawful when one "[u]ses deceptive representations or designations of geographic origin in connection with goods or services.").

judge; that is, let judges, within specified bounds, decide whether the consumer should prevail. The state of Washington has seemingly tried to do so. Its legislature included the following in describing the purposes of Washington's deceptive trade practices act:

It is, however, the intent of the legislature that [the deceptive trade practices act] shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest¹⁵²

In interpreting this provision, the Supreme Court of Washington penned words which sound as if they might accommodate the concerns raised in this Article. The court has written, for example, that a "court must weigh the public interest in prohibiting anticompetitive conduct against the recognition that businesses need some latitude within which to conduct their trade,"¹⁵³ and "[w]here conduct is motivated by legitimate business concerns, there can be no violation of [the statute]."¹⁵⁴ But in *Hangman Ridge Training Station v. Safeco Title Ins. Co.*,¹⁵⁵ the Supreme Court of Washington announced five questions which must be answered in the affirmative for a private dispute to affect the public interest:

(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?¹⁵⁶

This test has two principal problems. First, it excludes from liability merchants whose conduct ought to be included within the statute. A merchant who devises a new scheme for defrauding consumers ought to be liable even if he defrauds only one or two consumers. Such a merchant could and should be deterred by even-handed application of deceptive trade practices law. Second, it does not necessarily save from liability merchants who should be saved. Suppose that the seller in *Geismar* is a heavy advertiser, which is, in fact, the case. Also suppose that its past advertisements had contained other typographical errors—a plausible assumption for any frequent advertiser. In that case *Geismar* might satisfy Washington's public interest test. The Washington legislature did not provide adequate guidance to its courts on how to accomplish the purposes of the statute, and, as a result, the Washington courts have gone off the track. To be satisfactory, deceptive trade practices statutes should also provide more guidance with a view towards limiting and channeling judicial discretion.

Two other factors must be considered in attempting to draft an appropriate provision. First, any time the law recognizes an additional obstacle to liability,

152. WASH. REV. CODE ANN. § 19.86.920 (1989).

153. *State v. Black*, 100 Wash. 2d 793, 803, 676 P.2d 963, 969 (1984).

154. *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 54, 738 P.2d 665, 677 (1987).

155. 105 Wash. 2d 778, 719 P.2d 531 (1986).

156. *Id.* at 790, 719 P.2d at 538. See also *Travis v. Washington Horse Breeders Ass'n*, 111 Wash. 2d 396, 407, 759 P.2d 418, 423-24 (1988). *Hangman* is sharply criticized in Note, *supra* note 23, at 148.

it increases the expense of litigation, a particularly troublesome problem in consumer litigation. One way to alleviate the problem somewhat is to put the burden of proof, including both the burdens of production and persuasion, on the merchant. That way, plaintiffs will not have to respond to the defense unless the merchant carries its burden, and so plaintiffs will not have to present evidence on the issue in every case.

Second, given the tendency of small claims court judges to disregard statutes they dislike, some device is needed to check them. One such device is to require the judges to explain their reasoning in writing. The discipline of justification can help produce proper decisions. While a writing requirement will slow judges down, slower decisions are preferable to swift but erroneous ones.

The following statutory provision would fairly balance the concerns raised:

(a) It shall be a defense to any deceptive trade practices action if the seller carries the burden of proof of showing that either

- (1) a person in the seller's position who acted reasonably in all respects could not have avoided the deception, or
- (2) an event has occurred after publication of an advertisement which renders the advertisement false but either
 - (A) the event could not reasonably have been avoided or anticipated; or
 - (B) it is not desirable to deter or prevent the occurrence of the event.

(b) If the court finds that the seller has carried its burden of proof on this issue, the court may allow the consumer actual damages, or, in an appropriate case, no damages, but shall not award the consumer multiple or statutory damages or attorney's fees. If the merchant raises this defense, the court shall explain its decision in writing. It shall not be a defense that the merchant's specific acts are unlikely to be repeated, or that recovery is not in the public interest as that phrase has been previously construed.

(c) Examples of the defense referred to in paragraph (a) include:

- (1) A periodical printed an advertisement on behalf of the seller which contained erroneous statements not supplied by the seller and the seller did not have a reasonable opportunity to discover the error or prevent its publication.
- (2) The seller relied on written information relating to the particular goods or services in question obtained from official government records or another source if the written information was false or inaccurate and the seller did not know and could not reasonably have known of the falsity or inaccuracy of the information.

Such a provision offers more hope in attaining the goals of deceptive trade practices statutes than existing legislation. It also increases the likelihood that courts will enforce the statutes as written rather than ignoring them or construing them too narrowly.

Of course, the courts which have felt free to graft other limiting principles upon deceptive trade practices statutes need not await amendment of those statutes to overturn the public interest and similar exceptions and interpret the statutes more in keeping with their purposes. It is a time honored tradition that courts should not apply a statute literally when its purpose will not be served.¹⁵⁷ Accordingly, courts, at least more activist courts, could conceivably simply de-

157. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

cline to apply deceptive trade practice statutes where the purpose of those statutes—to deter deceptive practices—will not be accomplished.

IV. CONCLUSION

At present, deceptive trade practices statutes are written too broadly, and assume something in their application—judicious exercise of discretion—which is often lacking. Amendments along the lines suggested can bring about a more appropriate balancing of the interests of merchant and consumer without sacrificing anything in the effort to deter deception, while at the same time making the statutes more credible by increasing the willingness of judges to enforce them.

