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Uncertain Standards of Unfairness in State Consumer Protection Laws

The United States Supreme Court has stated that "'Fairness' does not seem to us a judicially manageable standard."[1] Yet businesses in every jurisdiction in the United States are subject to federal and state statutes that specifically create causes of action for marketing strategies, sales practices and pricing decisions that are alleged not to be "fair." As defendants alleged to have violated those statutes often find, the lack of any clear and definite standard for "unfair" practices can make it difficult to contest such claims short of going to trial.

Similar criticisms of the standard for unfair practices under the Federal Trade Commission Act (FTC Act)—which served as the model for many state consumer protection acts—were made in the 1970s. Those criticisms prompted the FTC in 1984 to adopt a somewhat more objective and consistent standard. However, there is little evidence that state courts or regulators today are following the FTC's lead, which suggests that businesses will continue to live with unpredictable and uncertain standards for unfair practices for the foreseeable future.

Amorphous State Standards of Unfairness

The California Supreme Court has recently acknowledged that the "standard for determining what business acts or practices are 'unfair' in consumer actions" under the state's Unfair Competition Law (UCL) is "currently unsettled." *Capito v. San Jose Healthcare Sys., LP*, 17 Cal.5th 273, 284 (Cal. 2024).[2] As summarized in *Capito*, the sweep of California's UCL—like that of many other states' consumer protection acts—is immense, encompassing "acts or practices which are unlawful, *or* unfair, *or* fraudulent," such that "a practice is prohibited as 'unfair'…even if not 'unlawful.'" *Id.* (emphases added).[3] Other states' unfair trade practices acts (UTPAs) are similarly broad.[4]

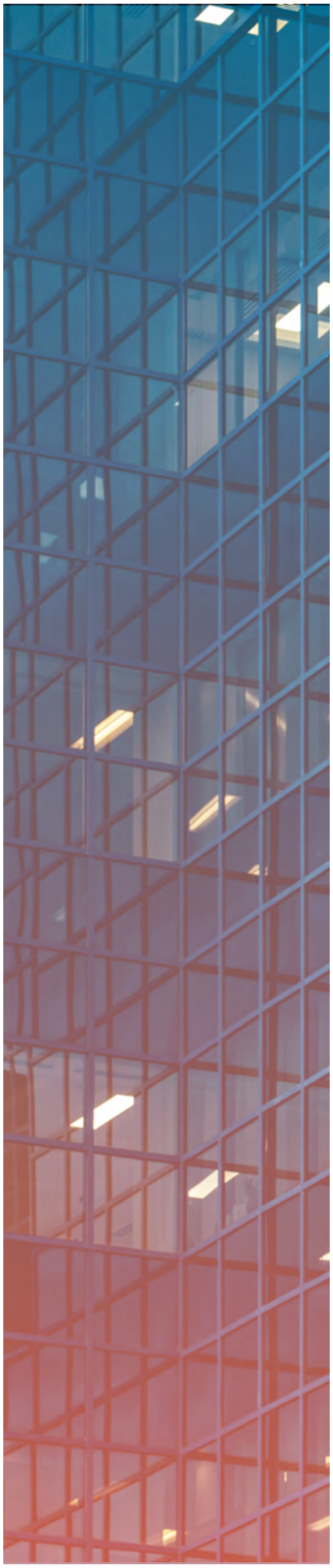
To identify otherwise lawful yet unfair practices, courts in most states apply some form of the balancing test first articulated by the FTC in 1964 and then recognized by the US Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), to determine "whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair." Those factors are:

1 *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004).

2 Cal. Bus. & Prof. Code § 17200 ("As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.").

3 17 Cal.5th 273, 284 ("Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.'").

4 For instance, Louisiana's UTPA, La. Rev. Stat. § 51:1405, declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," which the state supreme court candidly admitted is "broadly and subjectively stated." *Levine v. First Nat'l Bank of Commerce*, 948 So. 2d 1051, 1065 (La. 2007). *See also, e.g.*, Ala. Code § 8-19-5(27) (barring any "unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce"); 815 ILCS 505/2 (declaring unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices").



> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers…[5]

As courts have recognized, these *Sperry-Hutchinson* (S&H) criteria are either intrinsically subjective or highly fact-intensive, qualities that significantly limit their ability to serve as a consistent and predictable standard for "unfairness." In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*,[6] for instance, the California Supreme Court noted that:

> [v]ague references to "public policy,"…provide little real guidance. "'[P]ublic policy' as a concept is notoriously resistant to precise definition, and…courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.'"[7]

Significantly, the court in *Cel-Tech* concluded that the S&H factors are "too amorphous and provide too little guidance to courts and businesses" in cases involving *unfair competition* but declined to apply its assessment to consumer claims.[8]

The "substantial injury" factor also provides little sure guidance. Typically, the injury does not have to be quantifiable, but may include subjective harms, such as mental harms and "unwarranted health and safety risks."[9] Further, as the Washington Supreme Court recently held in *Greenberg v. Amazon.com, Inc.*, unless the facts are undisputed, the question of whether the challenged practice satisfies the "substantial injury" prong is one that "can be answered *only* by a jury," so that "'the jury [is] free to determine what could constitute an unfair and deceptive act or practice' for the purposes of the CPA."[10]

While the *Sperry-Hutchinson* criteria are themselves unclear, it is also true that the application of the criteria has been uneven and inconsistent. The *Capito* court acknowledged several different, inconsistent approaches by appellate courts just within California. For instance, with respect to the "public policy" prong, some California appellate courts have held that only violations of public policy "'tethered' to specific constitutional, statutory or regulatory provisions" can be relevant to the assessment of unfairness,[11] while others have rejected that position as inconsistent with the principle that "a practice is prohibited as 'unfair'…even if it is not 'unlawful.'"[12] Still others have held that in consumer cases, an entirely different balancing test applies, under which determining whether a business practice or act is "unfair" requires an "examination of the impact of the practice or act on its victim…balanced against the reasons,

5 405 U.S. at 244 n.5 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964)).

6 20 Cal.4th 163, 185 (Cal. 1999).

7 *Id.* at 185 (quoting *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1095 (Cal. 1992)).

8 *Id.* at 187 n.12 ("Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.' We also express no view on the application of federal cases such as [*Sperry*] that involve injury to consumers and therefore do not relate to actions like this one.").

9 *E.g., Commonwealth v. Meta Platforms, Inc.*, 2024 BL 385983, at *12 (Mass. Super. Ct. Oct. 17, 2024).

10 3 Wn.3d 434, 477 (Wash. 2024) (quoting *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 921 (Wash. 2001)) (emphasis added); *see also Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 710 (N.D. Cal. 2019) (denying defendant's motion for summary judgment on the unfair business practices claim because "[w]hether defendants' intent to expose illegal acts and conduct outweighs the harm to consumers is a subject of significant material dispute," and that "[w]hether UCL-cognizable unfair acts occurred and what the social utility of those acts were is hotly debated and best determined post-trial after all the evidence has come in").

11 *Aleksick v. 7-Eleven, Inc.*, 140 Cal. Rptr. 3d 796, 807 (Ct. App. 4th Dist. 2012) (quoting *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 854 (Ct. App. 1st Dist. 2002)); *see also Bardin v. Daimlerchrysler Corp.*, 39 Cal. Rptr. 3d 634, 637 (Ct. App. 4th Dist. 2006) (same).

12 *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 776 (Ct. App. 2d Dist. 2006) ("[I]n the context of consumer cases, 'tethering' to positive law undercuts the ability of the courts to deal with new situations, and new abuses.").

justifications and motives of the alleged wrongdoer."[13] Yet others have held that courts must "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim" while also applying the S&H criteria of whether the practice "offends an established public policy" and "is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[14]

The standards for unfairness are similarly ill-defined in other jurisdictions. In *Greene v. Clean Rite Ctrs., LLC*, the court held that a defendant's alleged non-disclosures stated a claim under the "unfair practices" prong of Massachusetts's UDPA.[15] The court rejected the plaintiffs' claim that the defendant's practices violated a specific statute and the claim that those practices were deceptive.[16] However, it concluded that defendant's alleged conduct fell sufficiently close to the "penumbra" of statutes that, while inapplicable to the defendant's conduct, required disclosure in "similar circumstances," to constitute an actionable claim for an unfair practice.[17]

In *State ex rel. Shikada v. Bristol-Myers Squibb Co.*, the Hawai'i Supreme Court similarly held that the defendant's alleged failure to warn consumers was unfair, not because the defendant had breached a duty it *actually* had, but because it had taken steps to *avoid* incurring a duty by "suppressing research" and "failing to further investigate" certain findings about their product, and failing to fund studies that "could draw more attention to the variability of response."[18] The court held that those practices—which it described as "[p]reventing risks from becoming apparent for financial gain" and "prioritiz[ing] profits over patients"—"offends Hawai'i public policy" and constitutes "immoral, unethical, oppressive, [or] unscrupulous" conduct sufficient for liability under Hawai'i's statute.[19]

Further uncertainty comes from the unpredictable way courts combine the S&H factors when determining whether a practice is unfair. In most jurisdictions, it is left to the individual court in particular cases to decide what weight to assign to each factor, and how to balance one against the other. For instance, in *Shikada*, the Hawai'i Supreme Court held that plaintiffs "[do]n't need to run the table" by showing that the challenged practice satisfies *each* S&H factor because "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three."[20] And in *Greenberg*, the Washington Supreme Court went even further in rejecting the possibility that the S&H factors impose any real limits on constraints on the scope of "unfair" practices, holding that:

> *our CPA simply has no limitations on the range of effect the defendant's conduct must have for a plaintiff to state a cognizable claim to relief. Rather, in cases where a plaintiff alleges that an act or practice is unfair, but that act or practice is not regulated by statute, the plaintiff needs to show only*

13 *Progressive West Ins. Co. v. Superior Court of Yolo County*, 37 Cal. Rptr. 3d 434, 452 (Ct. App. 3d Dist. 2005) ("[T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.").

14 *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 72 Cal. Rptr. 3d 888, 895-96 (Ct. App. 2d Dist. 2008); *see also Bardin v. Daimlerchrysler Corp.*, 39 Cal. Rptr. 3d 634, 637 (Ct. App. 4th Dist. 2006) (same).

15 714 F. Supp. 3d 134, 146 (E.D.N.Y. 2024). The defendant there required customers using their laundry machines to pay with a card that could be loaded in increments of $10, when the price per load was such that the balance of the card was necessarily greater than zero. Plaintiffs alleged that practice was unfair because the amounts loaded on the card are non-refundable, and so the "inaccessible" balance constitutes an unfair "hidden fee." *Id.* at 138-39.

16 *Id.* at 142-45.

17 *Id.* at 146-47 (citing *Cooper v. Charter Communs. Entm'ts I, LLC*, 760 F.3d 103, 112 (1st Cir. 2014)); *see also Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 26 (1st Cir. 2001) (noting that plaintiff's failure to offer any evidence that the defendant had a post-sale duty to warn of a potential defect "does not necessarily dispose of the unfairness question," since "there is an argument, which is not frivolous," that the defendant's failure to notify the plaintiff of a risk "was unethical and reaches the level of 'unscrupulousness'" required under Massachusetts law).

18 152 Haw. 418, 424 (Haw. 2023).

19 *Id.* at 424-25; *see also Acadiana Renal Physicians*, 321 So. 3d at 473 (concluding that "any alleged violation of LUTPA necessarily involves allegations of unflattering conduct on the part of the defendants"); *State v. Big Brother Sec. Programs*, No. 326-4-20 Cncv, 2020 BL 192538, at *7 (Vt. Super. Ct. Apr. 26, 2020) (challenged practice may be "unfair" by violating "'public values beyond simply those enshrined in the letter or encompassed in the spirit of' other laws") (quoting *Sperry*, 450 U.S. at 244); *JD Fabulous Floors, LLC v. A. Secondino & Son, Inc.*, 2022 WL 17959248, at *3 (Conn. Super. Ct. Dec. 21, 2022) (finding allegation that defendant knew that plaintiff "had limited resources and might have difficulty litigating and recouping the money owed to it because of that status" was sufficient to defeat summary judgment on unfair practices claim) (internal quotation omitted).

20 152 Haw. at 445 (holding that "meeting any one of the three criteria supports an unfair acts or practices UDAP claim"); *see also Am. Car Rental, Inc. v. Comm'r of Consumer Prot.*, 273 Conn. 296, 305-06, 869 A.2d 1198 (2005) (alterations omitted) (a practice "may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three…"); *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 418 (Ill. 2002) ("[A]ll three of the criteria in *Sperry* do not need to be satisfied to support a finding of unfairness."); *Pettiford v. Branded Mgmt. Grp., LLC*, 104 Mass. App. Ct. 287, 296 (Mass. App. Ct. 2024) (holding violation of public accommodation law involving racial discrimination established unfairness without having to consider if it caused "substantial injury" to consumers); *Big Brother Sec. Programs*, 2020 BL 192538, at *8 ("Because the court has found that Palmer's actions violate public policy, it need not address the other two potential bases for a finding of unfairness under the Consumer Protection Act.").

> *that the defendant's conduct is in violation of public interest. Additionally, we go further to conclude the application of our CPA is not dependent on the federal S&H criteria and that there may even be additional ways that a plaintiff can show that act or practice that is unregulated by statute is unfair.*[21]

Another source of unpredictability regarding state standards of unfairness comes through the use of safe harbors. Consumer protection statutes are intended, of course, to be flexible enough to address the "innumerable 'new schemes which the fertility of man's invention would contrive,'" since "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited."[22] At the same time, however, there is great value in ensuring that complying with the law should offer *some* protection from allegations of unfairness. Thus, more than two-thirds of state legislatures have created "safe harbors" in their consumer protection acts to exempt from liability conduct that complies with applicable statutes or regulations.[23]

Yet there is considerable uncertainty in the application of those purported safe harbors, since courts typically interpret those safe harbors extremely narrowly. For instance, in *Singleton v. Naegeli Reporting Corp.*, the plaintiff alleged that a court-reporting service unfairly inflated the cost of its transcripts by making certain formatting changes.[24] The trial court dismissed the claim, finding that the defendant's formatting practices are "closely regulated by a state regulatory body," and so protected by the CPA's safe harbor.[25] The appellate court reversed, holding that the state regulation—which set standards for the number of lines of text per page, the number of characters per inch of text and the number of characters per line of text—did not "specifically permit" the defendant's adjustments to the number of characters per inch and insertion of tabs and paragraph breaks that were alleged to be "unfair."[26]

Similarly, in *Shikada*, the Supreme Court of Hawai'i rejected the defendant's argument that compliance with FDA labeling requirements shielded it from liability for failing to update product labels to disclose certain risks. The court there held that the safe harbor applies only to conduct that is "specifically allowed or required by another authority,"[27] and held that the safe harbor did not apply because the state's claim concerned "Defendants' *conduct*, not only the contents of the Plavix label."[28]

As *Singleton* and *Shikada* suggest, the applicability of safe-harbor provisions in consumer protection statutes depends critically on how the court chooses to characterize the allegedly unfair conduct. That characterization may be a subjective matter, which introduces yet another degree of unpredictability and uncertainty into determinations of liability for unfair practices.

21 3 Wn.3d at 459 (internal citations omitted) (emphases added).

22 *Cel-Tech Communications, Inc.*, 973 P.2d 527, 540 (Cal. 1999) ("[U]nfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."); *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 568 (N.Y. 1959) ("The incalculable variety of illegal commercial practices denominated as unfair competition is proportionate to the unlimited ingenuity that overreaching entrepreneurs and trade pirates put to use.") (internal quotation marks and citation omitted).

23 *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who—The Government or Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 104 n.52 (2007) (listing state-safe harbor statutory provisions).

24 142 Wn. App. 598, 601 (Wash. App. Div. 2 2008).

25 *Id.* at 611.

26 *Id.* (quoting *Vogt v. Seattle-First Natl. Bank*, 117 Wn.2d 541, 552 (Wash. 1991)); *see also Reg'l Fin. Co. of Ga., LLC v. Pearson*, 373 Ga. App. 388, 392 (Ga. Ct. App. 2024) (acknowledging "limited authority on what precisely constitutes 'specific authorization'" but holding that defendant's sending plaintiff an unsolicited live check for $3,100 that when cashed created a loan did not fall within the Georgia statute's safe harbor because the only related regulation allowed lenders to send individuals unsolicited live checks for less than $3,000).

27 152 Haw. at 414 (citing Haw. Rev. Stat. § 481A-5(a)(1), which exempts from liability "[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency").

28 *Id.*

Contrast Between Federal and State Standards of Unfairness

Significantly, much of the subjectivity and unpredictability in the application of state standards of unfairness is avoidable. In particular, the FTC's interpretation of "unfair" practices under the FTC Act—the federal statute that was the model for most state UTPAs—provides a guide for giving definition to the otherwise amorphous conceptions of unfairness.

The FTC's current approach to unfairness was a response to perceptions that its use of the S&H factors as the standard for "unfairness" was too amorphous a concept to be the basis for regulation and liability. That opposition grew in the late 1970s, when the FTC considered using its authority to regulate "unfair" conduct under Section 5 of the FTC Act to ban all advertising directed at children,[29] and its commissioner mused publicly about the possibility of using that authority to "enjoin a company from cheating on its taxes" or "obtain an order requiring that an environmentalist be placed on the board of a company that repeatedly violates the pollution control laws."[30]

Under pressure from Congress and businesses, the FTC issued its 1980 Unfairness Policy Statement, which centered its concept of "unfairness" on "[u]njustified consumer injury," which it stated was "the primary focus of the FTC Act, and the most important of the three S&H criteria."[31] It further specified that to justify a finding of unfairness, the injury must be "substantial," "not be outweighed by any countervailing benefits to consumers or competition that the practice produces" and "it must be an injury that consumers themselves could not reasonably have avoided."[32] Consistent with its new focus on consumer injury, the FTC eliminated the highly subjective "immoral, unscrupulous, or unethical" S&H criterion as duplicative of the consumer-injury and public-policy criteria.[33] And when Congress codified the 1980 Unfairness Policy Statement's standard for consumer injury in 1994, Congress also marginalized the public-policy criterion, stating that while "the Commission may consider established public policies," those considerations "may not serve as a primary basis for such determination."[34]

Many state courts are directed by statute to give "due consideration," "weight" or "great weight" to FTC and federal court interpretations of the FTC Act.[35] It is therefore striking that state courts have largely continued to apply the S&H criteria to UTPAs decades after the 1980 Unfairness Policy Statement took hold at the federal level.[36] In reaffirming its use of the S&H criteria over the FTC's 1980 Policy Statement, for instance, the Alaska Supreme Court stated that "although the 1980 FTC policy statement that modified the definition of an unfair practice is now over 30 years old, the majority of states still subscribe to the *Sperry* standard for

29 *See* FTC Staff Report on Television Advertising to Children (February 1978); Notice of Proposed Rulemaking on Television Advertising to Children, 43 Fed. Reg. 17,967, 17,969 (1978) ("The petitions raise, and the Report discusses, facts which suggest that the televised advertising of any product directed to young children who are too young to understand the selling purpose of or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning or Section 5 of the Federal Trade Commission Act, requiring appropriate remedy.").

30 William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 Wm. & Mary L. Rev. 1269, 1300 (2019) (quoting Michael Pertschuk, Remarks before the Annual Meeting of the Section on Antitrust and Economic Regulation, Association of American Law Schools, Atlanta, Georgia (Dec. 27, 1977)).

31 FTC Policy Statement on Unfairness, December 17, 1980, appended to *International Harvester Co.*, 104 F.T.C. 949 (1984).

32 *Id.* at 1073.

33 *Id.* at 1076 ("The [unethical or unscrupulous] test has proven…to be largely duplicative. Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well. The Commission has therefore never relied on the third element of S&H as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the first two.").

34 15 U.S.C. § 15(n).

35 *E.g.*, Haw. Rev. Stat.§ 480-2(b) ("In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended."); Fla. Stat. § 501.204(2) ("It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) as of July 1, 2017.").

36 *See, e.g., PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla. 2003) (defining an unfair practice in terms of the S&H criteria where Fla. Stat. Ann. 501.204(2) provides that "due consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts relating to [the FTC Act]"); *Balthazar v. Verizon Hawaii, Inc.*, 109 Hawai'i 69, 123 P.3d 194, 202 (2005) (same when Haw. Rev. Stat. 480-2(b) directs that "the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions, of the [FTC] and the federal courts interpreting section 5(a)(1) of the [FTC Act]"); *Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677, 681 (R.I. 2001) (same when R.I. Gen. Laws § 6-13.1-3 directs that "due consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts").

unfairness used by the FTC and federal courts prior to 1980."[37] In *Rohrer v. Knudson*, the Montana Supreme Court also recognized the change in the FTC's definition of "unfairness" and the statutory requirement that it give "due consideration and weight to interpretations of the FTC." Yet it proceeded to follow the lead of several other states that have rejected the federal definition, in favor of the S&H criteria.[38]

As this suggests, two very different approaches to policing unfair business practices have developed, with a more objective and definite federal standard and broader, more subjective and ill-defined state standards. That divergence between federal and state standards is reflected in an empirical study of claims brought under different state UTPAs and the FTC Act.[39] The study found that in a sample of 50 state UTPA cases that were decided (either for the plaintiff or defendant), nearly 80 percent were ones that would not qualify as illegal under federal standards.[40] And in a sample of UTPA claims in which the plaintiff prevailed in court, a panel of experts found that nearly 40 percent of those successful claims would *not* be considered illegal under the federal standard.[41]

Conclusion

The conceptions of "unfairness" applied under state UTPAs are highly subjective and vague, and so may offer little meaningful guidance to courts or businesses. It also appears that state appellate courts have shown little interest in clarifying those standards. Indeed, after recognizing the "unsettled" state of the UCL's treatment of "unfair" practices, the California Supreme Court in *Capito* stated that there was "no need to decide the UCL standard for 'unfair' business conduct here" and resolved the appeal on narrow, case-specific grounds.[42]

Such an amorphous and unpredictable standard may be an effective way to allow courts to address the "innumerable 'new schemes which the fertility of man's invention would contrive.'"[43] But maintaining that flexibility comes at a cost. For businesses that deal with consumers in particular, this current uncertainty requires them to be very careful that its practices not only comply with the law, but that they not be seen as falling within the "penumbra" of statutes or regulations that might apply to conduct similar to those practices. While reforms in the FTC's federal standard suggest ways that state courts could significantly reduce that uncertainty, it appears that state courts have little inclination to impose similar constraints on their standards for unfairness. For the time being, then, businesses are likely to continue to be subject to a largely unpredictable risk of liability for purportedly "unfair" practices. Moreover, in light of the subjectivity of the state "unfairness" standards, defendants seem likely to continue to experience difficulty limiting their exposure, short of "going all in" on a trial.

When one notes that most UTPA exposure comes from class actions, it is clear that the *in terrorem* effect of taking a certified class to trial is likely to continue to result in substantial settlements to resolve claims involving business practices that are compliant with the law, but which are alleged to be "unfair" to consumers.

37 *ASRC Energy Servs. Power & Communications, LLC v. Golden Valley Electric Assn.*, 267 P.3d 1151, 1162 (Alaska 2012); *see also Rohrer v. Knudson*, 349 Mont. 197, 204 (Mont. 2009) (explaining that "[m]ost states with consumer protection acts patterned after § 5(a)(1) of the FTC Act interpret unfairness as described in the landmark United States Supreme Court case, *FTC v. Sperry & Hutchinson Co.*").

38 349 Mont. at 206.

39 In the study, a panel of experts with consumer-protection experience at or with the FTC evaluated a randomly selected sample of UTPA claims from a set of 17,000 litigated UTPA cases under the FTC standard. Those experts then reported, among other things, whether they believed the alleged practice was unfair under the FTC's unfairness policy statement and, if not, to say which prerequisite(s) under the federal standard were not satisfied. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts*, 63 Fla. L. Rev. 163, 178-82 (January 2011).

40 *Id.* at 184, tbl. 1.

41 *Id.* at 188.

42 17 Cal.5th 273 at 284.

43 *Cel-Tech Communications, Inc.*, 973 P.2d at 540.

Noteworthy

Seventh Circuit: FDCPA Debt Collectors Must Exercise Due Care to Ascertain Whether a Debt Is Disputed

In *Wood v. Sec. Credit Servs., LLC*, the Seventh Circuit addressed whether a debt collector violated the Fair Debt Collection Practices Act (FDCPA) when it unknowingly reported a disputed debt to a credit reporting agency without noting that the debt was disputed. 126 F.4th 1303 (7th Cir. 2025), *reh'g denied*, No. 23-2071, 2025 WL 462078 (7th Cir. Feb. 11, 2025).

The case arose from a disputed credit card debt in which the creditor, Pentagon Credit Union (PenFed), investigated the dispute and found that the debt was valid. It then informed the debtor, Wood, of its conclusion in a letter to which Wood did not respond. PenFed interpreted Wood's lack of response as assent to the validity of the debt and categorized the debt as undisputed. PenFed later sold a number of accounts, including Wood's, to Security Credit Services, LLC (SCS), a debt collector subject to the FDCPA. Relying on PenFed's warranties and representations that it made commercially reasonable efforts to remove "unresolved disputes" from the pool of purchased accounts, SCS reported Wood's account balance as undisputed to credit reporting agencies. Wood filed a complaint alleging that SCS violated § 1692(e)(8)—the substantive provision at issue under the FDCPA, when it reported his debt without communicating that the debt was disputed when SCS *knew or should have known* about his dispute. The district court granted SCS's motion for summary judgment, holding that Wood's lack of response to PenFed's letter was reasonably interpreted as assent to the validity of the debt.

On appeal, the Seventh Circuit addressed: (1) whether SCS's failure to communicate Wood's dispute was false information for the purposes of § 1692(e)(8) of the FDCPA and (2) whether SCS should have known of the dispute in violation of § 1692(e)(8). The *Wood* court answered yes to the former, reasoning that SCS failed to present evidence of industry practice or legal authority indicating that Wood's silence in response to the letter was assent. Further, PenFed's letter did not advise Wood to voice any further dispute and only asked him to contact PenFed to set up a payment plan. Most significantly, Wood's communications with PenFed, refusal to pay the debt, and continued belief that the debt was inaccurate indicated to the court that he disputed his debt at the time of SCS's report to Equifax.

Next, the Seventh Circuit held that there was a genuine issue of material fact as to whether SCS *should have known* about Wood's dispute. The court identified the "should have known standard," as a "negligence" standard in the Seventh Circuit. *Wood*, at 1312–13. Accordingly, the court confirmed that § 1692(e)(8) created a negligence standard, subjecting debt collectors such as SCS to a duty of reasonable care not to report false information. The court rejected SCS's argument that it was not negligent in its purchase of Wood's account, citing contradictions between its 30(b)(6) deposition testimony and its own written policies evidencing a history that it reported debts as "in a disputed status (XB) in order to comply with the FDCPA," *regardless* of investigation results. *Id.* at 1314. Additionally, though Wood conceded that SCS did not know of the dispute nor the letter allegedly validating the debt, upon learning of the litigation, SCS began reporting Wood's debt as disputed and even sought indemnification from PenFed, acknowledging that the account "should not have been in the sale." *Id.* Simply put, according to the court, the record told two different stories about what SCS intended to purchase and how SCS understood its FDCPA reporting obligations. Consequently, the Court declined to attribute credibility to either side of the conflicting evidence. The ruling, however, implies that SCS may have acted unreasonably when it relied on PenFed's interpretation of Wood's silence as assent.

The Seventh Circuit reversed the district court's summary judgment ruling, holding that Wood established a genuine issue of material fact as to whether SCS understood the term "unresolved disputes" to mean disputes that were not resolved to the satisfaction of both PenFed and Wood. *Id.* at 1307. The Seventh Circuit's ruling increases the risk of debt collectors possibly violating the FDCPA if they report previously disputed debts as undisputed, even if they didn't know of the dispute, if the debtor did not subsequently provide assent that it was resolved. To mitigate this risk under the Act, debt collectors are encouraged to demonstrate reasonable care by: (1) facilitating shared understanding of "unresolved disputes" with lenders to ensure compliance with the Act and (2) appropriately scrutinizing the warranties and representations of lenders prior to purchasing debt accounts.

Eleventh Circuit Confirms That FCC Rules Must Conform to Statute

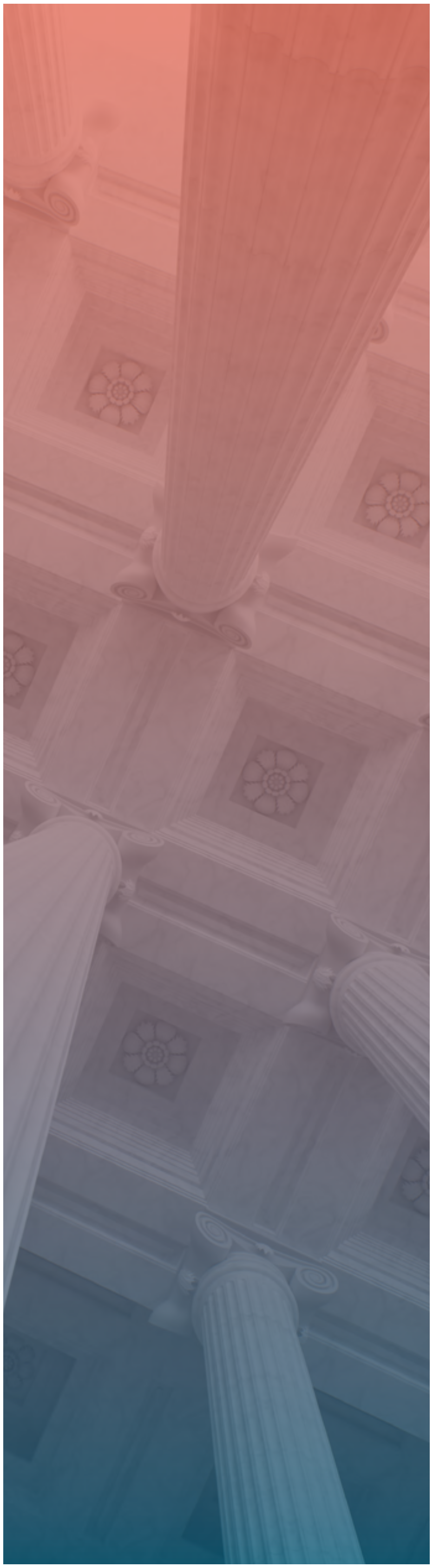
Insurance Mktg. Coal., Ltd. v. Fed. Commc'ns Comm'n, No. 24-10277, 2025 WL 289152 (11th Cir. Jan. 24, 2025), resolved a challenge to the validity of a recent FCC interpretation of the term "prior express consent" as it appears in the Telephone Consumer Protection Act (TCPA).

The TCPA prohibits a calling party from making non-emergency autodialed or prerecorded voice calls without the called party's "prior express consent." In 2012, the FCC promulgated a rule that prohibits a calling party from making autodialed or prerecorded *sales* calls without the called "party's prior express *written* consent."

In 2023, the FCC issued a new legislative rule further interpreting "prior express consent" to include two additional restrictions: (1) consent must be given to only one entity at a time and (2) the subject matter of the calls must be "logically and topically associated" with the interaction that prompted the consent. The FCC's 2023 rule is referred to as the "one-to-one consent" rule.

With the one-to-one consent rule set to take effect in January 2025, IMC filed a petition for review in the Eleventh Circuit, arguing that the 2023 one-to-one consent rule conflicts with the ordinary meaning of "prior express consent." The FCC argued the opposite, of course.

The Eleventh Circuit held that, while the FCC has the authority to implement the TCPA, it *does not* have the authority to "alter" the statute, and that the one-to-one consent rule did just that. Specifically, the Eleventh Circuit found that additional restrictions on "prior express consent" that the FCC added in 2023 were inconsistent with the ordinary statutory meaning of the phrase. The court observed that, under common law principles, "prior express consent" means a willingness for certain conduct to occur that is clearly and



unmistakably stated prior to that conduct. The court concluded that the FCC's one-to-one-consent and "logically and topically" related restrictions impermissibly altered the meaning of the words Congress used in the statute and vacated the relevant part of the 2023 Order.

This ruling is a clear win for businesses that utilize autodialed or prerecorded voice calls. However, the *Insurance Mktg. Coal.* decision seems emblematic of a broader trend in the federal courts, augured by recent Supreme Court decisions, to ensure that administrative agencies act within the authority granted to them by Congress. As such, the case has broader implications for businesses regulated by federal agencies.

Eleventh Circuit Clarifies Restrictions on Debt Collectors Ability to Charge for Payment Processing Fees

In *Glover v. Ocwen Loan Servicing, LLC*, No. 23-12578 (11th Cir. 2025), the Eleventh Circuit Court of Appeals ruled that Ocwen violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f(1), when it charged consumers "Speedpay fees" for making expedited mortgage payments online or by phone. The Eleventh Circuit held that debt collectors cannot collect optional payment processing fees unless those fees are explicitly authorized by the underlying loan agreement or permitted by law.

In *Glover,* plaintiffs' mortgages were serviced by Ocwen, which was a "debt collector" under the FDCPA as to plaintiffs because their loans were delinquent when their loans were transferred to Ocwen for servicing. Though plaintiffs' mortgages prescribed that mortgage payments could be in cash or by check, Ocwen offered borrowers the option to make same-day expedited payments over the phone or online, but at an additional charge ranging from $7.50 to $12 per transaction. These "Speedpay fees" were processed by a third-party vendor, which retained a portion of the fees while Ocwen kept the remainder.

Plaintiffs claimed that the Speedpay fees violate the FDCPA's prohibition on the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

The district court ruled in favor of the plaintiffs, holding that the Speedpay fees were expenses incidental to the principal obligation and were not expressly authorized by the underlying loan agreements.

On appeal, the Eleventh Circuit affirmed the district court's ruling. The court relied primarily on the plain meaning of "any amount" under § 1692f(1). The court reasoned that "any amount" means "any amount" collected while collecting or attempting to collect a debt that is not expressly authorized by the agreement or permitted by law. The court rejected the more limited interpretation proposed by the lower courts and Ocwen that "any amount" means only amounts "incidental" to debts. The court emphasized that "any amount" under § 1692f(1) must be interpreted broadly, not restrictively, citing precedent cases from other circuits, guidance from the Consumer Financial Protection Bureau (CFPB), and decisions from the Federal Trade Commission (FTC) that condemned similar fees under the FDCPA.

The court further rejected the argument that Speedpay fees were separate from debt collection because they are "incurred in a separate agreement" for an optional service. The court explained that "what matters is the relationship between debt collection and the method of collecting, not the nature of the additional amount imposed." Since Ocwen assessed the convenience fees *while* collecting a debt, the collection was achieved, at least in part, through this method, and was therefore unlawful.

Glover is, at least in the Eleventh Circuit, a significant blow to the efforts of some servicers to continue to collect fees in exchange for providing payment methods in addition to those specified in borrowers' mortgages.

Fourth Circuit Holds That Federal Arbitration Act Trumps Servicemembers Civil Relief Act

In *Espin v. Citibank, N.A.* 126 F.4th 1010 (4th Cir. 2025), plaintiffs were retired servicemembers who had accrued large balances on their Citibank credit cards during service. Pursuant to the Servicemembers Civil Relief Act (SCRA), which requires that issuers of credit cards cap interest payable by military members, Citibank assessed plaintiffs interest of 6 percent or less while on active duty. But upon their leaving service, Citibank began charging plaintiffs standard civilian rates, a practice that plaintiffs argued amounted to a "veteran penalty" in violation of the SCRA. Plaintiffs also asserted a cause of action under the Military Lending Act (MLA), in addition to other federal and state law claims.

Citibank moved in the district court to compel arbitration, asserting that the terms and conditions of plaintiffs' credit cards included an agreement to arbitrate disputes and a class arbitration waiver. The district court denied Citibank's motion, holding that the language in 50 U.S.C. § 4042(a)(3) sufficiently evidences congressional intent to "proscribe waivers of the right to pursue relief as a class in federal court." *Espin*, 126 F.4th at 1015. Thus, plaintiffs could proceed in federal court notwithstanding their agreements to arbitrate.

On appeal, the central issue was whether § 4042(a)(3) contains "'a clearly expressed congressional intention' to override the FAA's instruction to enforce arbitration agreements." *Id.* at 1016 (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018)). According to the Fourth Circuit, it does not. § 4042(a)(3) states that a person "aggrieved by a violation of this chapter may in a civil action…be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary." According to the court, this provision is permissive, allowing for an aggrieved person to bring a federal class action despite an agreement to the contrary. But the SCRA as a whole does not even mention arbitration and this silence cannot be read as a prohibition on resolution of SCRA claims in a non-federal forum or the enforcement of agreements to arbitrate. The court remarked that congress knows how to override the FAA and has done so under other statutory frameworks—§ 4042(a)(3)'s silence as to arbitration cannot be given the same effect as an explicit mandate. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103–04 (2012) (collecting cases). The Fourth Circuit also observed that legislative history—while not dispositive—supports its findings. In both 2019 and 2021, proposed revisions to the SCRA that would have prohibited arbitration of claims absent mutual consent were proposed and not enacted.

In contrast to the SCRA, the court noted that the MLA does manifest a congressional intent to override the FAA. In so holding, the Fourth Circuit joined the Eleventh Circuit, which last year found that "the MLA plainly overrides the FAA." *Steines v. Westgate Palace, L.L.C.*, 113 F.4th 1335, 1344 (11th Cir. 2024). A summary of the *Steines* decision can be found in the Winter 2025 edition of The Brief.

Espin clarifies that plaintiffs bringing claims under the SCRA will, at least in the Fourth Circuit, be bound by executed arbitration agreements. This clarification reaffirms the Supreme Court's consistent refusal to "conjure conflicts between the [Federal] Arbitration Act and other federal statutes," *Epic Sys. Corp.*, 584 U.S. at 516–17.

Following *TransUnion*, Fourth Circuit Holds Class-Wide Showing of Injury Related to "Tainted" Home Appraisals Too Speculative for Article III Standing

In *TransUnion LLC v. Ramirez*, the US Supreme Court reiterated that in class actions, every member of the class must have Article III standing in order to recover individual damages. The Court also made clear that where plaintiffs' injuries arise from statutory violations, only plaintiffs who have been concretely harmed by the violation have standing in federal court. In other words, "an injury in law is not an injury in fact" for purposes of Article III standing. 594 U.S. 413, 427 (2021).

Before *TransUnion* was decided, a group of plaintiffs brought a putative class action against Quicken Loans (now Rocket Mortgage) and its affiliates. The plaintiffs alleged that when they used Quicken's services to refinance their home loans, Quicken shared the homeowners' estimates of their homes' value with the appraisers who were supposed to provide independent appraisals of the homes. The result, plaintiffs claimed, is that the appraisals they paid for were "tainted" and therefore worthless. *Alig v. Rocket Mortg., LLC*, 126 F.4th 965, 967, 970 (4th Cir. 2025).

The plaintiffs successfully obtained class certification and summary judgment on their consumer protection, breach of contract and conspiracy claims, winning a judgment of over $10.6 million. The Fourth Circuit affirmed the rulings with the exception of the breach of contract claim, rejecting the defendants' argument that a significant number of the class members were uninjured and therefore lacked standing. It held that the "financial harm" involved in paying for something that was different from what was received—"tainted" appraisals rather than independent ones—constituted a "classic and paradigmatic form of injury in fact." *Id.* at 971.

The defendants petitioned the US Supreme Court for certiorari, which the Court granted following its decision in *TransUnion*. The Court vacated the Fourth Circuit's judgment and remanded the case "for further consideration in light of *TransUnion*." *Rocket Mortg.*, 126 F.4th at 967 (citing *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022). The district court again ruled for the plaintiffs, and the case ended up back in the Court of Appeals. This time, the Fourth Circuit held that the class members failed to show sufficient injuries for Article III standing and reversed the district court's judgment certifying a class and awarding damages.

The Fourth Circuit rejected the district court's determination that the appraisals were necessarily tainted because the appraisers were aware of the borrowers' estimates of their home values, holding that "mere exposure to the borrowers' estimates could only establish *potential* influence, *i.e.*, a risk of influence, and such a risk cannot be the basis for standing to recover damages under *TransUnion*." *Rocket Mortg.*, 126 F.4th at 975. The Appeals Court also rejected the district court's finding that defendants pressured the appraiser to reach the borrowers' estimates, holding instead that there was "no evidence to support that the class members' appraisers were subjected to pressure" and "no evidence that any appraiser for a class member failed to provide an independent appraisal." *Id.*

Therefore, the class-wide plaintiffs failed to meet *TransUnion's* standing requirement that a factual showing of concrete harm be made for each class member claiming damages. *Alig* is the latest example of how *TransUnion* has led the lower courts to scrutinize claims based on statutory violations to discern whether the violations resulted in concrete harm.

Second Circuit Holds That Unique Defenses Are a Rule 23 Typicality Issue, Rather Than an Adequacy Issue

In *Cheng v. HSBC Bank USA, N.A.*, the Second Circuit Court of Appeals held that the district court misapplied the adequacy standard for class certification under Fed. R. Civ. P. 23(a)(4), which requires class representatives to "fairly and adequately protect the interests of the class." 2024 BL 420811 (2d Cir. Nov. 20, 2024). In vacating the district court's denial of class certification, the Second Circuit held that Cheng's susceptibility to unique defenses was not an appropriate consideration under Rule 23(a)'s adequacy requirement.

Cheng brought claims for breach of contract and deceptive practices in violation of New York General Business Law § 349, based on HSBC's failure to pay interest on the day a money transfer processed. However, a series of phone calls made by Cheng suggested he did not actually expect to be paid interest on the same day as the transfer. The district court observed that Cheng's circumstances presented a "key problem" not shared by other members of the proposed class. *Id.* at *2. As a result, the district court declined to certify the class because of Cheng's inadequacy as a class representative. On appeal, the Second Circuit opined that the district court misplaced its focus on Rule 23(a)'s adequacy prong, rather than on the typicality requirement. The court further determined that the district court misapplied the adequacy test by considering Cheng's susceptibility to unique defenses, which is a more proper consideration for typicality.

Typicality requires that the "claims or defenses of the representative [party] are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This prong allows courts to consider "unique defenses which threaten to become the focus of the litigation." *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2nd Cir. 2000).

The adequacy test, on the other hand, contains two parts: the "representative (1) must have an interest in vigorously pursuing the claims of the class, and (2) must have no interests antagonistic to the interests of other class members." *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2nd Cir. 2006). The Second Circuit held that the district court's failure to identify a basis other than Cheng's "susceptibility to unique defenses" when determining he could not adequately represent the class was an error that warranted the Second Circuit vacating the judgment.

Upon considering Cheng's circumstances under the Rule 23(a) typicality requirement, the Second Circuit found that the record did not support the denial of class certification. The Second Circuit reasoned that Cheng's subjective understanding of his contractual rights was not a defense that would be uniquely applicable to him. The subjective understanding of the contract was irrelevant to the rights of Cheng and the absent members of the class, because a party's subjective understanding would not be relevant to interpreting a standardized agreement.

The ruling in *Cheng* contributes to the ongoing circuit split regarding the treatment of unique defenses in class certification. Here, the Second Circuit joins the Ninth and Third Circuit Court of Appeals in treating unique defenses as a typicality issue. *See DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1238–39 (9th Cir. 2024); *Duncan v. Governor of Virgin Islands*, 48 F.4th 195, 209 (3rd Cir. 2022). In contrast, the Seventh Circuit treats unique defenses as an adequacy of representation issue. *See Santiago v. City of Chicago*, 19 F.4th 1010, 1018–19 (7th Cir. 2021). This divide may lead the Supreme Court to step in to establish a uniform approach to addressing unique defenses within Rule 23's framework.

First Circuit Endorses Narrow Definition of "Servicing" Under RESPA

Late last year, in *Fustolo v. Select Portfolio Servicing, Inc.*, 123 F.4th 528 (1st Cir. 2024), the First Circuit held that loss mitigation correspondence is not "covered" by RESPA, because loss mitigation is not within RESPA's definition of "servicing." In so holding, the First Circuit joined the Fourth and Ninth Circuits in refusing to construe RESPA's definition of "servicing" expansively.

In *Fustolo*, the plaintiff alleged that his mortgage servicer violated RESPA when it refused to correct an allegedly incorrect valuation in the servicer's response to a loss mitigation application. In analyzing whether the plaintiff had stated a claim, the First Circuit noted that RESPA requires servicers to respond only to certain enumerated errors. The plaintiff argued that the alleged error fell within the implementing regulation's catchall: "Any other error relating to the servicing of a borrower's mortgage loan." 12 C.F.R. § 1024.35(b)(11).

The First Circuit's analysis focused on the statutory definition of "servicing": "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan…and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." *Fustolo*, 123 F.4th at 533 (quoting 12 U.S.C. § 2605(i)(3)). Applying the definition as written in affirming the dismissal of the RESPA claim, the court held that "challenges to the merits of a servicer's evaluation of a loss mitigation application do not relate to the 'servicing' of the loan and so are not covered errors under RESPA."

While some courts have interpreted "relating to the servicing" of a loan broadly, *Fustolo* comes as good news for servicers defending novel RESPA theories.

Third Circuit Rejects First Amendment Defense, Denies Class Certification in TCPA Fax Case

In *Steven A. Conner, DPM, P.C. v. Fox Rehab. Servs., P.C.*, No. 23-1550, 2025 WL 289230 (3rd Cir. Jan. 24, 2025), the Third Circuit issued a split decision: it denied class certification but rejected a First Amendment challenge to the Telephone Consumer Protection Act (TCPA). The case underscores the risk companies face when sending informational faxes without clear consent and the importance of individualized consent in defeating class claims.

Fox Rehabilitation, a therapy provider for older adults, sent a fax during the COVID-19 pandemic assuring referring providers that its services remained fully operational. The fax included descriptions of therapy services and an invitation to refer patients. Although sent to only eight recipients, the message triggered a class action under 47 U.S.C. § 227(b)(1)(C), which prohibits unsolicited advertisements to fax machines without prior express invitation or permission.

Plaintiff Steven Conner argued that the fax was a promotional advertisement. Fox responded that the fax was merely informational and, alternatively, that the TCPA's restrictions on such communications violated the First Amendment.

The Third Circuit disagreed. Applying the intermediate scrutiny standard for commercial speech from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the court found that the TCPA directly advanced substantial government interests—namely, protecting consumer privacy and preventing unwanted cost-shifting. The law, the court held, was not more extensive than necessary and thus survived constitutional review. The court also declined to apply strict scrutiny, emphasizing that strict scrutiny applied to content-based exceptions, not the commercial speech at issue here.

Fox's more successful argument was procedural. The Third Circuit affirmed the denial of class certification, agreeing that individual inquiries into whether each recipient gave consent would overwhelm common issues and preclude predominance under Rule 23(b)(3). The district court had noted that determining consent would require parsing each unique relationship.

The decision highlights two key lessons. First, businesses should not rely on constitutional arguments to defeat TCPA claims. Courts continue to view the TCPA's restrictions as permissible regulation of commercial speech. Second, maintaining individualized records of consent remains a powerful tool to defeat class certification and contain potential liability. As TCPA litigation remains active, companies should continue to vet all communications—faxes included—for both content and compliance.

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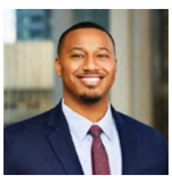

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