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Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes

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WRECKING BALL DISGUISED AS LAW REFORM: ALEC'S MODEL ACT ON PRIVATE ENFORCEMENT OF CONSUMER PROTECTION STATUTES

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ABSTRACT

The consumer protection statutes of every state are currently under attack by a proposed model law that would effectively eliminate the critical private enforcement provisions that give these laws their power. The American Legislative Exchange Council ("ALEC") has produced a purported law reform vehicle that is actually a wrecking ball to destroy one of the building blocks of consumer protection, namely the private enforcement of state unfair and deceptive practices statutes. ALEC's proposed law does this by systematically weakening each provision of the current consumer protection laws, such as those providing for lower burdens of proof for consumer plaintiffs, special damages, and attorney's fees, that were designed to give consumers access to justice for small economic wrongs. This article examines the history and goals of the state consumer protection statutes, with their private enforcement mechanisms. It then critiques the arguments and flawed studies put forward in support of weakening the private right of action. Finally, in a section-by-section analysis, the article demonstrates how the ALEC model act differs from current law and would, if passed, undermine the original goals of these state statutes. The article concludes that the ALEC model legislation is an ill-conceived attempt to effectively repeal the private enforcement of state consumer protection statutes.

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I.
INTRODUCTION

State consumer protection statutes are under attack.[1] In the guise of state law reform, influential business-funded think tanks led by the American Legislative Exchange Council ("ALEC") have begun a campaign to effectively abolish the private right of action to enforce state consumer protection statutes.[2] Their shiny new weapon is a model law that, if enacted in any state, would effectively eliminate consumers' right to sue for a violation of that state's consumer protection laws. Although ALEC and others have presented this law as a modest "reform," this article shows it is in fact aimed at gutting a particularly useful and long-standing type of consumer protection, thereby shielding businesses from liability for unfair or deceptive trade practices. While critics have raised some legitimate issues regarding current consumer protection laws, their proposed solutions go beyond the justifications offered, and turn back the clock to the days of "caveat emptor." In short, the ALEC Model Act on Private Enforcement of Consumer Protection Statutes (the "ALEC Model Act" or "Model Act") purports to suggest a few modest repairs, while aiming a wrecking ball at consumer protection statutes, a move that would be a disaster for the average consumer seeking justice in the marketplace.

State lawmakers should be extremely wary of the ALEC Model Act and similar proposals, which are loaded with provisions that undermine consumers' existing rights. Legislators, and their constituents and lobbyists as well, should consider the history and policy behind the existing state consumer protection statutes, which have resulted in years of successful consumer protection cases. This article attempts to provide such a perspective.

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1. These statutes are also referred to in this article as state unfair and deceptive acts and practices ("UDAP") laws, state little FTC acts, state consumer protection laws or state consumer protection acts.

2. *See* Paul M. Barrett, *Business Gears Up for Assault on Consumer-Protection Laws*, BLOOMBERG BUSINESSWEEK (Apr. 24, 2014), http://www.businessweek.com/printer/articles/196333-business-gears-up-for-assault-on-consumer-protection-laws.

Part II provides a historical introduction to the current landscape of state consumer protection laws. I assert that one of the central goals of these statutes is the establishment, through private rights of action, of a cadre of "private attorneys general" to supplement government enforcement and provide access to the courts for small consumer claims that might otherwise not be adequately addressed.[3] Part III discusses the arguments and studies put forward in support of the ALEC model with its diminution of the private right of action, and concludes that they are seriously flawed.[4] Part IV analyzes and critiques the provisions of the ALEC Model Act, which is at the heart of the movement to diminish the effectiveness of the laws discussed in Part II.[5]

II.
PRIVATE ENFORCEMENT OF STATE UDAP LAWS: HISTORY & POLICY

State consumer protection statutes (commonly referred to as state unfair and deceptive acts and practices or "UDAP" laws) originated in the late 1960s and early 1970s as a way to expand the consumer protection policies and powers of the Federal Trade Commission ("FTC") to the state level. These laws extended enforcement power to consumers filing private suits in state court in order to supplement the enforcement efforts of the federal and state governments through the use of "private attorneys general." The drafters of this private right of action aspect of the state laws also sought to help individual consumers with relatively small claims gain access to justice through the court system.[6] The various model laws on which the state UDAPs were based featured provisions that specifically carried out these goals. This Part discusses, in turn, each aspect of the history and policy of private enforcement of state UDAP laws.

The state UDAP statutes, enforced by private suits, stemmed from the plight of consumers seeking justice in the 1960s. Prior to the enactment of the state UDAP laws, consumers were legally protected only by resort to weak common law causes of action in tort or contract and by the intervention of the FTC, a relatively limited alternative.[7] The FTC's limitations are rooted in its own history. The FTC had been on the scene since 1914, with a specific mandate to protect consumers against "unfair and deceptive acts or practices" since 1938.[8] The FTC is an independent regulatory agency run by a five-person commission

3. *See infra* text accompanying notes 6–74.

4. *See infra* text accompanying notes 75–113.

5. *See infra* text accompanying notes 114–71.

6. *See* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972).

7. The limitations of the common law tort and contract actions by individual consumers are discussed *infra* Part I(b).

8. Federal Trade Commission Act, 45 U.S.C. § 45(a)(1) (2012). For a general history of the FTC, see Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761 (2005).

that enforces the FTC Act through an administrative process.[9] Traditionally, the FTC could sue merchants for deceptive practices that had a "tendency or capacity to deceive" "the ignorant, and the unthinking and the credulous."[10] The FTC also has the authority to prohibit "unfair" trade practices.[11] The FTC has been and remains constrained, however, by a duty to take action only if it is in the public interest and affects interstate commerce.[12]

The FTC Act itself has never featured a private right of action to enforce the federal prohibition against unfair and deceptive trade practices, and the courts have been unwilling to infer one.[13] Based on the legislative history of the FTC Act, the D.C. Circuit Court of Appeals in the leading case of *Holloway v. Bristol-Myers* reasoned that Congress favored public enforcement by an expert agency that could try to educate businesses, seek voluntary compliance, and issue prospective remedies, such as cease and desist orders.[14] The *Holloway* court also expressed concern that private lawsuits to enforce the FTC Act, with its broad mandate to curb "unfair and deceptive trade practices," would result in "piecemeal" rulings by state court judges who might not be constrained by the overall enforcement goals of the FTC itself.[15]

A. Expanding FTC Enforcement Through Private Attorneys General

The drafters of the state UDAP laws envisioned them as a way to fill the void left by both the limited capacity of the FTC and the restricted scope of state common law. The FTC actively encouraged enactment of state UDAP laws as a way to expand efforts to protect consumers during a time when the Commission itself was being attacked as weak and inefficient.[16] Then-FTC Commissioner Paul Rand Dixon stated in the late 1960s that the Commission was seeking to facilitate a "cooperative effort with state and local officials in order to increase protection of the consuming public from unfair and deceptive commercial

9. The FTC has both an antitrust and a consumer protection mission. *Id.* at 761–62. This article focuses on the latter.

10. FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963). In 1983, the FTC issued a policy statement that changed the definition of "deceptive trade practices" to "material representations, omissions, or practices that are likely to mislead the consumer acting reasonably under the circumstances." FTC Policy Statement on Deception, § 1 (October 14, 1983), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

11. This prong of the FTC's jurisdiction was rarely used until the 1970s and 1980s, however. *See In re* Int'l Harvester Co., 104 F.T.C. 949 (1984) (one of the first major FTC cases applying the FTC Unfairness Policy Statement, later codified at 15 U.S.C. § 45(n)).

12. 15 U.S.C. §§ 44, 45(a)–(b).

13. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988 (D.C. Cir. 1973).

14. *Id*. at 998–1000.

15. *Id*. at 997.

16. *See, e.g.*, EDWARD COX, ROBERT FELLMETH & JOHN SCHULZ, THE CONSUMER AND THE FTC (1969) (commonly known as the "Nader Report"). *See also* Report of the ABA Commission to Study the FTC (1969), *reprinted in* Antitrust & Trade Reg. Rep. Supp. (BNA) No. 427, at 49–55 (Sept. 16, 1969).

practices."[17] He also said that the Commission was "continuing to work closely with the Council of State Governments in the development of a model Unfair Methods and Deceptive Practices Law for the states," which he believed "would greatly assist the effort to reach local unfair trade practices on a uniform basis."[18]

While it first seemed that state laws would rely on the enforcement powers of the state governments alone, the need to also utilize private litigants eventually became clear to both state legislatures and their allies in the state and federal governments. The incorporation of private rights of action to the state UDAP laws took place gradually, mostly occurring during the period of 1970-1980.[19] In 1969, the state attorney general of Massachusetts said that while state attorney generals' offices could provide expertise and manpower to enforce consumer protection statutes, "another significant step would be the implementation of an effective private consumer remedy."[20] He noted that with an effective remedy for private litigants, the public would see

> . . . a host of new consumer protectors: the lawyers of the Commonwealth. It was, after all, primarily the failure of the legal system to provide adequate remedies that led to the great consumer movement of the past decade with the resultant deluge of new laws. Here is an opportunity to affirm the principle that government should do only what the people cannot do for themselves, by placing in the private sector the power to obtain redress for consumer frauds.[21]

Former FTC Bureau of Consumer Protection Director, Albert H. Kramer, similarly expressed his support for a private right of action to enforce state UDAP laws. In a 1979 speech, Kramer said:

> As the federal role changes, the need for private actions becomes all the greater. If states, because they are closer to the people, can be more responsive and tailor remedies to individual areas better than the federal government can, individual consumers are even better at that. Also, obviously, there is an even greater deterrent effect on wayward businesses.[22]

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17. Paul Rand Dixon, *Government, Consumers and Retailers: Togetherness or Conflict*, 4 NEW ENG. L. REV. 75, 77 (1969).

18. *Id.*

19. *See* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 522 (1980); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 6:2, and sources cited therein (2014–2015 ed.).

20. Robert H. Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 NEW ENG. L. REV. 71, 72 (1969).

21. *Id.*

22. Albert H. Kramer, Remarks Before the Annual Meeting of the State Bar of Texas Consumer Law Section, An FTC Rite for Private Rights: Federal and Nonfederal Role in Consumer Protection (June 27, 1979) (on file with author).

Thus, one major goal of these state "little FTC Acts" was to supplement the enforcement activities of the FTC by enlisting the help of a potentially large cohort of consumer victims or "private attorneys general" empowered to bring their own cases by virtue of the private right of action under the state laws.[23] Indeed, the use of private enforcement mechanisms as an extension of administrative agency regulation is a hallmark of the American regulatory system that is by no means unique to the FTC and its complementary state consumer protection acts.[24] The federal antitrust laws, for instance, provide for private enforcement under the Clayton Act, with treble damages and attorney's fees.[25] This provision has been so successful that ninety-five percent of all antitrust cases are brought by private plaintiffs.[26] Most federal environmental protection statutes also have provisions for "citizen suits" to supplement government enforcement.[27] The statutory framework for consumers seeking a remedy for unfair or deceptive trade practices is unique, however, in that the FTC prohibition against unfair or deceptive trade practices relies on state statutory enactments that indirectly apply federal law, rather than a direct private right of action in the federal statute. The state laws known as "little FTC Acts" use the wording of the federal FTC Act and include a private right of action in state court. Most of the state statutes provide that FTC jurisprudence will guide state courts applying state consumer protection statutes, giving the FTC continuing power over the states' definitions of "unfair and deceptive" trade practices.[28]

This indirect expansion of the enforcement of the FTC Act through a private right of action under state law, rather than by federal enactment or court implication of a private right of action under the FTC Act itself, came about for practical reasons. At the time, the courts were adamant in refusing to imply a private right of action under the FTC Act.[29] In addition, Congress had not attempted to amend the FTC Act in this regard because in the period after these state laws were enacted, the political force of the consumer movement at the federal level had ebbed.[30] Rather than waiting for either the courts or Congress to

23. The term "private attorney general" has a continuum of meanings, but as used here, it is the concept that private lawsuits can supplement the enforcement activities of a federal agency, such as the FTC. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2147 (2004).

24. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

25. 15 U.S.C. § 15 (2012).

26. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 16.1 (4th ed. 2011).

27. *See* Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192.

28. *See* PRIDGEN & ALDERMAN, *supra* note 19, ch. 3 app. 3B.

29. *See supra* text accompanying notes 13–15.

30. MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 73 (1982).

move forward, the state legislatures filled the gap. Thus, the indirect extension of the FTC's consumer protection mission through the state UDAP statutes is well-established, and therefore unlikely to change unless state statutes are amended. Given this important role of the private right of action under the state UDAP statutes, attempts to undermine this enforcement avenue could be highly destructive to consumers' access to justice.

B. Giving Consumers Access to Court

The second major goal of the state UDAP private right of action was to give consumers meaningful access to the courts for relatively small claims against merchants who engaged in unfair or deceptive practices. Prior to this development under state law, consumers could in theory sue merchants who defrauded them under common law tort theory, but the consumer was required to prove the merchant's false representation of fact (rather than opinion) and intent to deceive, as well as her own justifiable reliance.[31] This was quite burdensome.[32] The element of justifiable reliance was especially difficult for the average consumer to overcome, because many judges at that time believed that buyers and sellers were on the same footing with regard to information about products, and that the buyer had a duty to question and seek independent verification for any important statements or opinions of the seller.[33]

Under the common law of contracts (in tandem with the Uniform Commercial Code), consumers could also try to persuade judges to refuse to enforce contracts based on misrepresentations,[34] or unconscionable provisions.[35] However, plaintiffs rarely succeeded in consumer cases using a contract law-based approach. A merchant could limit his or her liability for misrepresentations by including an "as is" clause in the contract, for example.[36] Also, voiding a contract based on unconscionability was typically reserved for practices that were both procedurally and substantively unconscionable, a

31. The elements of the cause of action for common law fraud (also called "deceit") have been stated by Prosser and Keeton as including: false representation (not omission) of fact (not opinion) made by the defendant; knowledge or belief on the part of the defendant that the representation is false; intention to induce the plaintiff to act; justifiable reliance upon the representation on the part of the plaintiff; and resulting damage to the plaintiff from such reliance. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984) (describing elements of cause of action for common law fraud or "deceit").

32. *See, e.g.*, Parker v. Arthur Murray, Inc., 295 N.E.2d 487, 490 (Ill. App. Ct. 1973) (finding that false representations of plaintiff's supposedly exceptional dancing ability were not actionable because "mere expression of opinion will not support an action for fraud").

33. *See, e.g.*, Williams v. Rank & Son Buick, Inc., 44 Wis. 2d 239 (1969) (holding that dealer's representation that a car had air conditioning was not justifiably reliable because plaintiff had had an hour and a half to look at the car).

34. RESTATEMENT (SECOND) OF CONTRACTS §§ 162–64 (1979).

35. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

36. *See, e.g.*, O'Connor v. Scott, 533 So. 2d 241 (Ala. 1988).

relatively high bar for most consumer plaintiffs.[37] In addition to the difficulty of proof, the contract approach provided only a way to avoid contract enforcement, but did not provide damages to the defrauded or unfairly treated consumer.[38]

In addition to the high burden of proof for individual fraud claims, the high cost of litigation itself stymied consumer cases involving relatively small claims. Most consumer goods are not so expensive that the injury to the consumer of having been misled as to its value (purely economic loss) would justify the expense of hiring an attorney and going to court.[39] Thus, it became apparent to state legislatures enacting UDAP statutes that consumers needed a mechanism to attain access to justice for their relatively small, and individually costly to litigate, claims against merchants and other marketplace participants.[40]

C. Sources and Provisions of State UDAP Laws

In order to fulfill the objectives discussed above, i.e., to expand the enforcement of FTC consumer protection policies, and provide individual consumers with access to viable remedies for unfair or deceptive trade practices, state legislators drafted their UDAP laws with reference to a number of different model acts. Mainly three bodies—the National Conference of Commissioners on Uniform State Laws ("NCCUSL," now known as the Uniform Law Commission or "ULC"), the American Law Institute ("ALI") and the Council of State Governments—developed these model acts. NCCUSL was established in 1892 to provide states with "non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[41] It is state-supported and consists of commissioners appointed from each state.[42] All commissioners are members of the bar and are practitioners, judges, or law professors.[43] They receive no salaries or fees for their work.[44] NCCUSL has

37. *See, e.g.*, Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775 (D.C. 1971). *See also Williams v. Walker-Thomas*, 350 F.2d 445 (establishing test for unconscionability of consumer contracts under the Uniform Commercial Code).

38. Under contract law, damages are a remedy for breach of contract, whereas the remedy for a contract that was based on misrepresentation or that contains unconscionable provisions, would be to rescind the contract or the offending provision only. RESTATEMENT (SECOND) OF CONTRACTS § 376 (1979). In a consumer sales situation, consumers who were victims of deception or unfairness would typically not be pleading a breach of contract (except perhaps for breach of a warranty), but instead would be alleging the contract was a result of deception or unfairness. *See* U.C.C. § 2-302 (2014) (providing for non-enforcement of unconscionable contracts or contract clauses).

39. *See* David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transactions Problems*, 48 B.U. L. REV. 559, 569 (1968).

40. *See* Leaffer & Lipson, *supra* note 19, at 546–53.

41. *About the ULC*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited Feb. 14, 2015).

42. *Id.*

43. *Id.*

44. *Id.*

promulgated many model and uniform laws that have been published and made available to state legislatures for recommended adoption.[45] The ALI was founded in 1923 by a group of prominent American judges, lawyers and teachers "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[46] The ALI is best known for its work on the Restatements of the Law. Both NCCUSL and ALI conduct their work in a relatively open manner and attempt to maintain a non-partisan and balanced approach to their work. Where they err, they have been perceived to err in favor of business; some writers have accused the model code drafting process of shutting out consumer advocates, particularly during the emendation of Article Two on sales of the Uniform Commercial Code.[47] The NCCUSL has worked with the ALI on certain projects, such as the Uniform Commercial Code, perhaps the most successful model or uniform law in the United States. Both NCCUSL and ALI have been called "mainstream" legal organizations whose drafts, proceedings and model laws (as well as other projects) are widely available to researchers.[48] The Council of State Governments is a non-partisan non-profit organization funded by states that provides information and ideas for state legislatures, executive offices and state courts. It was founded in 1933.[49] The Council of State Governments does not actually draft legislation but reviews proposals for publication in its annual Suggested State Legislation.[50]

NCCUSL issued the first model state consumer protection law, the Uniform Deceptive Trade Practices Act, in 1966.[51] The law listed eleven specific deceptive practices.[52] When NCCUSL's model law proved too competition-oriented to have much bite in consumer cases, a second model law gained traction—the Uniform Consumer Sales Practices Act adopted in 1971 by NCCUSL and the ALI. The jointly produced Uniform Consumer Sales Practices Act, however, was adopted in only three states, namely Kansas, Ohio and Utah.[53]

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45. *See generally* ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION app. E (2013), *available at* http://www.uniformlaws.org/Shared/Publications/ULC%20History%20Book/Forming%20a%20More%20Perfect%20Union.pdf.

46. *Certificate of Incorporation,* AMERICAN LAW INSTITUTE (1923), *available at* http://www.ali.org/doc/charter.pdf.

47. *See* Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997).

48. Mary Whisner, *There Oughta Be a Law—A Model Law*, 106 LAW LIBR. J. 125, 126–28 (2014) (noting that both ALI and NCCUSL are part of the "legal establishment").

49. COUNCIL OF STATE GOVERNMENTS, http://www.csg.org/about/default.aspx (last visited Mar. 28, 2015).

50. *Id.* at 130.

51. UNIF. DECEPTIVE TRADE PRACTICES ACT (1966). This Act was withdrawn from recommendation for enactment by NCCUSL in 2000 due to it being obsolete.

52. *Id.*

53. PRIDGEN & ALDERMAN, *supra* note 19, § 2:10.

The FTC, in collaboration with the Council of State Governments, developed the prevalent model for state consumer protection laws. This was the Uniform Trade Practices and Consumer Protection Law, issued initially in 1967, and amended in 1970. Most state consumer protection laws are based on this model law in one of three variations. The first variation is truly a "little FTC Act" that incorporates the FTC Act's broad prohibition on "unfair methods of competition and unfair or deceptive acts or practices." The second variation leaves out the prohibition against unfair practices. The third alternative, known as the "laundry list," enumerates thirteen prohibited practices and provides a "catch-all" prohibition against "any other practice that is unfair or deceptive."[54] A few states enacted Consumer Fraud Acts, which prohibit deceptive or unconscionable acts or practices and fraud.[55] Using these various model laws for guidance, within a few years every state had passed such a state consumer protection statute, and over time almost all of them featured a private right of action.[56]

By incorporating the elements of the FTC Act into state laws that included a private enforcement mechanism, these laws allowed consumers to draw from the FTC's enforcement actions and guidance in pressing their own claims.[57] Lowering the legal bar was not enough, however, to get consumer cases through the courtroom door. In addition, most state statutes that included a private right of action also provided attorney's fees paid by the defendant to the prevailing consumer plaintiff.[58] This type of provision, called statutory fee-shifting, replaces the normal "American rule" that each party in a lawsuit must bear its own costs, including attorney's fees.[59] The rationale for the fee-shifting provisions of the consumer protection statutes is that the damages in most consumer cases—e.g., the loss in value on the used car purchased from a dealer where the car did not live up to the claims made about it—would not be enough to cover the average cost of an attorney to represent the consumer in court. If the default "American rule" applied, consumers would not bring even meritorious cases to court because the recovery would not cover their litigation costs and the

54. *Id.*

55. *Id.*

56. *See supra* text accompanying notes 16–22.

57. *See, e.g.*, Marshall v. Miller, 276 S.E.2d 397, 399 (N.C. 1981) (holding that "federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of" North Carolina's UDAP statute); Comm. by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812, 818 (1974) (holding that since the FTC Act covered residential leasing practices, the state consumer protection law modeled on the FTC Act did likewise).

58. PRIDGEN & ALDERMAN, *supra* note 19, app 6A. There are some variations in the provisions for attorney's fees under the state statutes, with some states leaving the award to the discretion of the court, and others making it mandatory for prevailing consumer plaintiffs. Some states also provide for fee awards to prevailing defendants, usually in cases where the suit was frivolous, brought in bad faith, or harassing. *Id.*

59. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

consumer injury would go uncompensated and undeterred. If consumers and their attorneys could not afford to go to court, the "private attorneys general" aspect of private enforcement would be eliminated.

Statutory minimum or multiple damages are also a common feature of state UDAP statutes. Statutory minimum damages are meant to provide some type of recovery even in cases where the injury to the consumer is more difficult to prove, such as the damage from purchasing an item that is not as valuable as represented in some difficult-to-quantify way, or even responding to an advertisement without purchasing anything. For instance, consumer plaintiffs in Hawaii who were "baited" by a deceptive advertisement for an automobile financing deal recovered the minimum statutory damages despite the fact that they did not actually purchase a vehicle, but simply wasted their time pursuing the elusive bargain.[60] Statutory minimum damages range from $50 to $2,000.[61] Multiple damages, either double or triple, are modeled on the treble damage provisions of the federal antitrust laws, specifically the Sherman and Clayton Acts.[62] This type of provision is another way to make an individual consumer action more economically feasible even if the amount of actual damages is relatively small. Statutory damages can also increase the deterring effect of an individual suit.[63] For instance, in a Kansas case a creditor who used an unfair (and unenforceable) clause in a consumer credit contract had to pay $2,000 in penalty damages to the consumer.[64] A Kentucky car dealer who sold the potential buyers' trade-in vehicle prior to the approval of financing, and who committed various misrepresentations in negotiations with the inexperienced customers, was subject to $50,000 in punitive damages under the Kentucky Consumer Protection Act.[65] In a West Virginia case, in which a creditor was found liable for using unfair debt collection practices, the state Supreme Court approved an award of civil penalties totaling over $30,000.[66]

While critics of the state consumer protection statutes, with their lower burdens of proof and added remedies, may be concerned about the potential flood of litigation they may spawn, it should be noted that such statutes are usually limited to consumer plaintiffs in the context of consumer transactions.[67] The theory was that consumers needed this additional legal boost because they

60. Zanakis-Pico v. Cutter Dodge, Inc., 98 Haw. 309, 47 P.3d 1222 (2002).

61. PRIDGEN & ALDERMAN, *supra* note 19, app. 6A.

62. Section 4 of the Clayton Act reads as follows: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (2012).

63. For a recent discussion of the arguments for and against the deterrent effect of punitive and statutory damages in the context of tort law, see Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2011–2012).

64. Thomas v. Leaseland U.S.A., 790 P.2d 964 (Kan. Ct. App. 1990).

65. Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 900–01 (Ky. 2008).

66. Vanderbilt Mortg. & Fin., Inc. v. Cole, 740 S.E.2d 562, 573 (W. Va. 2013).

67. PRIDGEN & ALDERMAN, *supra* note 19, ch. 4 app. 4A.

are not on the same footing as the businesses with which they deal. Businesses dealing with other businesses were presumed to have equal resources to hire attorneys and negotiate at arm's length for favorable contract terms. While some states have extended coverage under their state UDAP statutes to business plaintiffs, especially small business plaintiffs,[68] the general rule remains that these special laws are for the benefit of consumers only, in line with the original objectives of these laws, as discussed above.[69]

Over the years since their inception, the state UDAP statutes, with their private rights of action, have been instrumental in achieving justice for consumers. The litigated cases have been numerous, numbering in the thousands each year, with some states such as Texas, Washington, Massachusetts, and California, being particularly active.[70] Many of the litigated cases decided under the state consumer protection laws have been catalogued in reference books, although an exact count has not been attempted.[71] Clearly, however, FTC consumer protection cases are still pursued, and consumer cases under the state UDAPs have increased, thus increasing the total number of cases that work toward fulfilling the deterrence and compensation goals of the drafters of the state UDAP statutes. In numerous cases individual consumers have been able, thanks to the state UDAP statutes, to gain legal representation, go to court, and be compensated for their injury, all the while providing legal precedents and strong remedies that are hoped to deter similar violations.

In addition to individual cases, many class action suits have been approved under state consumer protection statutes in situations where individual cases, even with the advantages of the state UDAP laws, might not have been pursued due to the small stake of each individual consumer.[72] This class action vehicle has benefited consumers in many states. Class actions can compensate individual class members, and deter unfair or deceptive practices. Nonetheless, consumer class actions, both in the state UDAP context and in other areas of law, such as tort cases, have come under criticism as being excessively burdensome to

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68. *See, e.g.*, Ly v. Nystrom, 615 N.W.2d 302, 310 (Minn. 2000) (viewing individual purchaser of a small business as a "consumer" for purposes of applying the state Consumer Fraud Act, although concluding that he was not entitled to attorney's fees under the state's "Private Attorney General" statute because it was an isolated transaction).

69. *See supra* text accompanying notes 16–41.

70. PRIDGEN & ALDERMAN, *supra* note 19, § 3:1, n.1.

71. *See, e.g.*, *id.* at ch. 3–7; CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR & DECEPTIVE ACTS AND PRACTICES (8th ed. 2012).

72. As the New Jersey Supreme court put it early on,

> The subject of consumer fraud has emerged as a major problem of our commercial scene. . . . If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief. Thus the wrongs would go without redress, and there would be no deterrence to further aggressions. If there is to be relief, a class action should lie unless it is clearly infeasible.

Riley v. New Rapids Carpet Center, 294 A.2d 7, 10 (N.J. 1972) (approving use of class action suit under the state consumer fraud act).

businesses and excessively beneficial to the class action attorneys.[73] As a result, in the last two decades, consumer class actions have been subject to significant legislative reforms as well as limited through the use of class action waivers in consumer contracts.[74]

These critiques of class actions join critiques of the individual private right of action to prop up the model law being promoted by ALEC, a proposed piece of legislation that will, if passed, undermine the very foundations of the private right of action under the state UDAP statutes. In the next part, I discuss the main objections that have been voiced by critics of private suits under state UDAP laws and demonstrate the flaws in these justifications for cutting back or eliminating the existing private right of action under state UDAP statutes.

III.
FLAWED JUSTIFICATIONS FOR ALEC'S MODEL ACT

If state legislatures were to pass the ALEC Model Act, or even certain aspects of it, they would be doing so in response to the criticisms of state UDAP private enforcement that have mounted over the past decade regarding alleged increases in private UDAP litigation.[75] In this Part, I examine several of the arguments raised against the status quo of private enforcement of state UDAP statutes. First, critics argue that decisions by state courts in private consumer cases are unpredictable and go beyond what the FTC would do, and thus are unfair to businesses trying in good faith to obey the law. Second, a Searle Civil Justice Institute study claimed to find that increasing consumer protection litigation would increase the prices of consumer products, such as automobile insurance. Third, the American Tort Reform Foundation has argued that the use of lower burdens of proof and enhanced remedies for consumer plaintiffs under the state consumer protection laws has resulted in an unwarranted increase in litigation that benefits professional litigators more than it protects consumers. Each of these critiques is considered in turn below.

A. State Courts Not Following FTC?

First, critics allege that recent state court consumer protection decisions have gone beyond the initial impetus to make litigation under state "little FTC Acts" an extension of the efforts of the overburdened FTC. Thus, the argument goes, rather than supplementing FTC enforcement of an established law of unfair and deceptive trade practices, private litigants have persuaded receptive state courts to overshoot the mark and have gone well beyond the initial goal of filling

73. *See, e.g.*, John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441 (2005).

74. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2 (codified as amended in scattered sections of 28 U.S.C.) (expanding federal jurisdiction over class actions and making it easier to remove class actions filed in state court). *See also infra* text accompanying notes 109–13.

75. As shown in this Part, the sources that claim a large increase in UDAP private enforcement are subject to question. *See infra* text accompanying notes 98–99.

the gap of cases that the FTC might have brought had they had sufficient resources.[76]

A 2009 study by the Searle Civil Justice Institute, a conservative think tank based at Northwestern University School of Law, provides the main empirical support for this argument.[77] This project assembled a random sample of state appellate court consumer protection decisions from a database encompassing thousands of such decisions from all fifty states and the District of Columbia decided between 2000 and 2007.[78] These decisions were then summarized and presented to a "Shadow FTC" composed of five still unnamed individuals said to include persons with substantial experience at or with the FTC Bureau of Consumer Protection.[79] The case summaries were presented to the "shadow FTC" who concluded that seventy-eight percent of the sample state UDAP claims would not be considered unfair or deceptive under FTC policy statements, and that thirty-eight percent of the successful claims at trial would not constitute illegal conduct under the FTC standards.[80] From this data, the authors concluded that the recent state consumer protection decisions that were studied went beyond "filling the gap" of cases that the FTC would have enforced had they had the resources to do so.[81] They also concluded that the statutory standards for defining unfair and deceptive practices under the state laws were too vague and that the litigation provisions were too consumer-friendly, leading to an increase in private consumer protection litigation over the study period of 2000-2007.[82]

The use of empirical research to support calls for public policy reform is usually helpful and should be welcomed by policy-makers.[83] In this case, however, the research methods and the resulting report are questionable. For

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76. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163 (2011). Note that since the publication of the cited article, author Joshua Wright was appointed and confirmed as one of the five Federal Trade Commissioners. *See* www.ftv.gov/about-ftc/commissioners.

77. JOSHUA D. WRIGHT, STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION (2010) (preliminary report of the Searle Civil Justice Institute's 2009 study), *available at* http://www.masonlec.org/site/rte_uploads/files/CPA%20Prelim%20Report%20Dec%202009.pdf [hereinafter Searle Shadow FTC Report]. The study is also summarized and analyzed in Butler & Wright, *supra* note 76.

78. Searle Shadow FTC Report, *supra* note 77, at 15–16.

79. *Id.* at 35.

80. *Id.* at 49.

81. *See supra* text accompanying notes 16–30 (explaining that the FTC and others supported the idea of state UDAPs and private enforcement because the FTC alone did not have the capability of litigating all the potential unfair and deceptive trade practices that merited action, thus creating an enforcement "gap").

82. Searle Shadow FTC Report, *supra* note 77, at 49–50.

83. At least one author, however, has questioned the ability of judges and lawyers to use empirical research to inform policy judgments due to their lack of training in or knowledge of scientific methods. *See* David L. Faigman, *Judges as "Amateur Scientists,"* 86 B.U. L. REV. 1207 (2006).

instance, the "shadow FTC" members, whose decisions form the basis for the claim that most of the cases brought in state courts under state UDAP statutes would not have been brought by the FTC, are never identified, and no reason is given for this secrecy. Thus, it is impossible for scholars to determine whether or not those individuals were qualified or perhaps biased in their decisions. Also, the opinions of the "shadow FTC" members are little more than hypothetical conjecture. This is at best subjective evidence, and not objective fact, since the FTC did not actually review or decide any of the cases that were involved in the study. Second, the database of cases, i.e., the random sample of cases chosen and the summaries used, were also never released. Only two examples were given, and the specific cases on which they were based were not identified. Thus, it is impossible for others to try to replicate or critique the results. It is a basic tenet of scientific research that researchers should make their data available to others to confirm their analysis and results.[84] It is also a disservice to policy makers to put forward research based on a subjective opinion survey, and present it as empirical findings.

The ALEC Model Act (as discussed in the next Part) addresses the issue of state courts straying from FTC law by reducing or effectively eliminating private suits. This is unnecessary because most of the state UDAP laws already refer to FTC jurisprudence for guidance, and the state courts applying these laws have adhered to this statutory directive as best they can.[85] Because this principle of reference to FTC jurisprudence is embedded in most state laws, the defendants in state UDAP cases could use (and have used) FTC precedent in their own defense.[86] Thus, it is not clear that there is a need to cut back on consumers' access to the courts under the state UDAP laws based on an alleged straying from FTC jurisprudence, since adherence to FTC law is already incorporated into most state laws.

The Searle Shadow FTC Study is also off the mark because, while these statutes were indeed modeled on and sanctioned by the FTC when they were originally passed, they are still state laws. The state legislatures and courts are technically free to go beyond what the FTC has or would do. The fact that some states may choose to be guided by, but not bound by, FTC precedent is not necessarily a fault, but may be a virtue in allowing the states to address consumer issues unique to their constituents.[87] Also, in our federal system of

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84. PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION § 1.08 (6th ed. 2010) ("Data Retention and Sharing").

85. PRIDGEN & ALDERMAN, *supra* note 19, ch. 3 app. 3B.

86. *See, e.g.*, State v. American TV & Appliance of Madison, Inc., 430 N.W.2d 709 (Wis. 1988) (using FTC "bait and switch" guidelines to buttress its conclusion that the practices cited in the state's complaint did not violate Wisconsin law).

87. *See, e.g.*, ASRC Energy Servs. Power & Commc'ns, LLC v. Golden Valley Elec. Ass'n, Inc., 267 P.3d 1151, 1161 (Alaska 2011) (applying the traditional FTC standard for unfairness, rather than an updated one, to avoid overturning state court precedents and because they did not want to use a standard that might result in "less protection for Alaska consumers and business people").

government, states have long been seen as public policy "laboratories," where new ideas could be tested on a small scale prior to being adopted in federal law.[88] Some variations from FTC policy may in fact be a healthy sign of the evolution of consumer protection.

B. Consumer Protection Litigation Raises Prices?

Another study by the Searle Civil Justice Institute, released in 2012, purports to show that the proliferation of private enforcement under state consumer protection acts has led to an increase in automobile insurance premiums.[89] This is another example of a flawed empirical study that could be used to influence state legislatures considering cutbacks in their state UDAP statutes. First, the study looks only at the costs of litigation under state consumer protection acts. It does not even purport to look at the benefits to the consumers who brought the cases, and other consumers who may benefit from the deterrent effect on unfair and deceptive practices. Also, the study is said to measure the impact of state consumer protection liability on the costs of automobile insurance. It does this by showing a correlation between the changes in the laws and the costs of the insurance. Correlation does not, however, necessarily equal causation. Second, the singling out of the cost of automobile insurance is rather striking in that many state consumer protection statutes specifically exempt insurance matters from their coverage on the basis that insurance is already a state-regulated industry.[90] In other states, insurance has been exempted by state court interpretation under a general statutory exemption for regulated industries.[91] Thus, the impact of private enforcement of state consumer protection laws on insurance prices would be indirect at best, since in many states the insurance company could not be sued directly under these laws. Also, litigation involving automobile insurance providers is just one small part of the overall litigation under consumer protection statutes, and litigation costs may represent only a small part of the costs of providing insurance.

The Searle automobile insurance cost study was done by analyzing the provisions of the state laws, identifying statutory amendments promulgated over

88. For instance, prior to the FTC adoption of a rule virtually abolishing the "holder-in-due course" doctrine from consumer credit transactions, some forty states had enacted their own legislation on the subject. Federal Trade Commission, Trade Regulation Rule, *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose*, 40 Fed. Reg. 53,506, 53,508 (Nov. 18, 1975).

89. SEARLE CIVIL JUSTICE INSTITUTE, GEORGE MASON UNIVERSITY SCHOOL OF LAW, LAW & ECONOMICS CENTER, STATE CONSUMER PROTECTION ACTS AND COSTS TO CONSUMERS: THE IMPACT OF STATE CONSUMER ACTS ON AUTOMOBILE INSURANCE PREMIUMS (2011), *available at* http://www.masonlec.org [hereinafter Searle Auto Insurance Study].

90. PRIDGEN & ALDERMAN, *supra* note 19, §§ 4:28–29.

91. *See, e.g.*, Wilder v. Aetna Life & Cas. Ins. Co., 433 A.2d 309 (Vt. 1981); Taylor v. S. Farm Bureau Cas. Co., 954 So. 2d 1045 (Miss. Ct. App. 2007); Ferguson v. United Ins. Co. of Am., 293 S.E.2d 736 (Ga. Ct. App. 1982); Britton v. Farmers Ins. Group, 721 P.2d 303 (Mont. 1986).

a period of time that would encourage or discourage potential plaintiffs from filing suit, and then constructing a Consumer Protection Acts Index ("CPA Index") that would supposedly track a plaintiff's willingness or ability to file suit over time.[92] Changes in the CPA Index for each state were then correlated to changes in automobile insurance premiums in the state to determine the impact of different consumer protection act provisions on automobile insurance premiums by state over time.[93] While the state statutes themselves are public information, the study's analysis and scoring of the various provisions of each state law was presented in summary form, making it difficult to evaluate the soundness of the analysis. For instance, one of the attributes that made up the index was whether or not the statute required a "public interest impact" for a private cause of action.[94] Yet this aspect, or something like it, may be read into the law by court decision and might not be apparent on the face of the statute.[95] It appears from the description of the Searle Auto Insurance Study that the Index was compiled by looking only at the language of the statutes, and did not examine state court interpretations.

C. Too Much Litigation?

The third justification for cutting back on the private right of action under state UDAP statutes is that the laws have somehow morphed from being consumer protection statutes into "consumer litigation statutes" exploited by unethical attorneys.[96] One article notes that between 2000 and 2007, state

92. Searle Auto Insurance Study, *supra* note 89.

93. *Id.*

94. *See id.* (listing "Does the CPA require a 'public interest impact' analysis for a private cause of action?" among the attributes surveyed). *See also id.* at 32 fig.14 (listing "CPA Has Public Interest Requirement" among variables).

95. *Compare, e.g.*, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (N.Y. 1995) (requiring that challenged business practices be "consumer-oriented"—i.e., plaintiffs "must demonstrate that the acts or practices have a broader impact on consumers at large"), *with* N.Y. GEN. BUS. LAW § 349(a) (McKinney 2012) ("Deceptive 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."). *Compare also* Hall v. Walter, 969 P.2d 224, 234 (Colo. 1998) ("While the public interest component is longstanding, we now recognize that a more precise reading of the statute's function requires an impact on the public as consumers of the defendant's goods, services, or property." (internal quotations omitted)), *with* COLO. REV. STAT. § 6-1-105(1)(a) (2014) ("A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person: (a) Knowingly passes off goods, services, or property as those of another . . . .").

96. *See* AM. TORT REFORM FOUND., STATE CONSUMER PROTECTION LAW UNHINGED 7 (2013), *available at* http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf ("In the absence of an explicit distinction between public enforcement and private lawsuits, courts in some states have interpreted consumer protection statutes to simply extend the broad authority of the attorney general or state consumer protection official to private lawyers with their own agendas."). *See also id.* at 3 ("The Problem: Plaintiffs' lawyers have become the primary beneficiaries of state consumer protection laws. While settlements provide consumers with no more than a few dollars, the lawyers who invent such cases get millions in fees."); JOANNA M. SHEPHERD-BAILEY, AM.

appellate courts saw a forty-three percent increase in the volume of litigation under these state laws, and federal courts saw their decisions triple in size.[97] Whether the increase in cases is a sign that the statutes are finally being used to consumers' benefit, or a sign that there is "too much litigation" cannot be determined merely by looking at such broad statistics. One possible reason that cases may have increased is that it took a long period of time for consumers and their advocates to realize their potential. In 1980, one commentator noted, "the value of UDAP statutes in private consumer protection litigation has been severely underestimated."[98] In 1989, another scholar noted that state UDAP statutes potentially affected some core contracts doctrines, but had gone largely unnoticed, especially by contracts scholars.[99]

Now that state UDAP litigation appears to have increased in popularity, thus having some bite in the affected business sectors, the critics and the ALEC Model Act support new legislation to eliminate or hamstring the pursuit of private litigation. There is no need to undermine the state UDAP laws, however, even if some cases truly are out of line. Overreaching lawsuits will remain few, and are unlikely to cause much long-term damage to business, because they are heavily policed under the current statutes. State court judges can and do interpret and apply their own state laws in such a way as to avoid expansions not authorized by the state legislature. These judges play an important role in guarding against abuses, and are not hesitant to intervene. For instance, some state courts have inferred a "public interest" requirement to rein in overzealous litigation.[100] Some courts have also read a "reasonable reliance" standard into the applicable state consumer protection act.[101] Twenty-eight states' statutes contain an explicit reference to the need to adhere to "guidance" by the FTC's policy on

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TORT REFORM FOUND., CONSUMER PROTECTION ACTS OR CONSUMER LITIGATION ACTS?—A HISTORICAL AND EMPIRICAL EXAMINATION OF STATE CPAS 4, *available at* http://atra.org/sites/default/files/documents/Shepherd-Bailey%20White%20Paper%20-%20FINAL_0.pdf (last visited Mar. 28, 2015) ("But in recent decades, this tradition of incremental change and thoughtful balancing has given way to surprising legislative and judicial overcorrections with a common theoretical mistake: the notion that additional consumer protection litigation necessarily protects consumers more.").

97. Henry N. Butler & Jason S. Johnston*, Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 6 (2010) (citing Searle Auto Insurance Study, *supra* note 89, at 36–40).

98. *See* Leaffer & Lipson, *supra* note 19, at 522.

99. Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 575 (1989) ("Contracts teachers have paid little attention to unfair and deceptive trade practices acts and consumer protection statutes.").

100. *See supra* cases cited in note 95.

101. *See, e.g.*, Zeeman v. Black, 273 S.E. 2d 910, 916 (Ga. Ct. App. 1980) ("Since the Act contemplates notice of the deception relied upon as the prerequisite to a suit for recovery of damages resulting from that deception, we construe [the Georgia UDAP law] as incorporating the 'reliance' element of the common law tort of misrepresentation into the causation element of an individual claim under the FBPA.").

unfair and deceptive trade practices.[102] Nine states provide for the awarding of attorney's fees to the "prevailing party," so that the consumer could end up paying the defendant's attorney's fees if the case is lost,[103] a powerful deterrent to frivolous suits. More states have a provision to award attorney's fees to a prevailing defendant if the court finds that the consumer suit was "groundless," "frivolous," or brought in "bad faith."[104] If state legislatures are concerned about unfounded lawsuits brought under the state UDAP statutes, these more targeted measures could be adopted if states do not currently have them in their laws.[105] Thus there is no need for the sweeping legislation suggested by ALEC in their Model Law.

In response to the perception that private litigation under the state consumer protection laws has increased over the past decade,[106] the ALEC Model Act puts forward a proposed "reform" statute that in fact eviscerates the use of these laws by "private attorneys general." This comes at a time when the potential for consumer access to the courts is being hampered by increasing limits on class actions, as well as the increasing use and enforcement of arbitration clauses and class action waivers in consumer contracts.[107] Thus, the private enforcement of state UDAP statutes becomes all the more important for consumers damaged by unfair or deceptive practices.

Critics of class actions, especially those filed under the state UDAP laws, have argued that requiring a showing of individualized reliance is necessary to curb abuses, such as overcompensation of uninjured plaintiffs.[108] By definition, it

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102. PRIDGEN & ALDERMAN, *supra* note 19, ch. 3 app. 3B.

103. These states are Colorado, Delaware, Florida, Georgia, Indiana, Kentucky, Missouri, Mississippi and Montana. *See* PRIDGEN & ALDERMAN, *supra* note 19, § 6:21, n.2.

104. These states are Alabama, Georgia, Idaho, Kansas, Louisiana, Minnesota, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas and Utah. *See* PRIDGEN & ALDERMAN, *supra* note 19, § 6:22, n.2.

105. *See, e.g.*, Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices"*, 90 N.C. L. REV. 2033, 2071 (2012) ("It is time for the North Carolina courts to add more rigorous content to the standards for unfairness, as the FTC and the courts of several other states have already done. Specifically, the North Carolina courts should supplement the current standards for unfairness under section 75-1.1 with the 'not reasonably avoidable' test that the FTC has applied since the 1980 Statement.").

106. *See* Butler & Johnston*, supra* note 97, at 6.

107. *See* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012) (discussing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)).

108. *See, e.g.*, Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance As an Essential Element*, 43 HARV. J. ON LEGIS. 1, 5 (2006) ("Requiring reliance for private suits achieves the proper balance of public and private resources: allowing government agencies to seek restitution and injunctive relief where there is no consumer reliance and letting private litigants seek damages where reliance provides a causal connection between the defendant's conduct and the injury."). *But see* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1633 (2000)

may appear that compensating a consumer who cannot prove reliance on a false claim or cannot prove that they have suffered direct harm from an unfair practice is a case of overcompensation. Also, if advertisers can be answerable for misrepresentations that were not actually relied on by all consumers in the plaintiff class, commercial speech may be chilled.[109] Some scholars also argue that deterrence of deceptive or unfair trade practices can be best achieved by relying on government agencies alone, such as the FTC and the state attorneys general, such that the private attorneys general function of bringing consumer class actions is no longer needed.[110]

As to the reliance issue, under FTC jurisprudence, on which state UDAP statutes were based, there is no requirement for showing individual reasonable reliance on deceptive practices, but rather the standard is an objective showing that the practice is "likely to mislead the consumers acting reasonably in the circumstances."[111] Actual consumer injury is not required for FTC actions, and thus proof of actual injury, reliance, and ascertainable loss for consumer class actions under "little FTC Acts" should also not be required. Using an objective standard such as "likely to mislead consumers acting reasonably," the courts in consumer class actions under state law can determine whether a practice is indeed a proper subject for remediation, without the need to burden class actions unnecessarily with additional showings of fact.

The notion that government agencies should be the sole enforcers of the prohibition against unfair and deceptive practices, thus eliminating the need for consumer class actions, is also ill founded. The original philosophical underpinning of the movement toward consumer class actions was not only to provide a more efficient and less burdensome gateway to the court system for injured consumers, but also to harness the resources of "private attorneys general" to expand enforcement beyond the government and to deter corporations from engaging in unfair and deceptive trade practices.[112] In these days of unrelenting calls for restraints on government spending, both federal and state, there is no concrete evidence that government consumer protection resources are any more plentiful today than they were when UDAP class actions were conceived. The whole point of the consumer class action is to allow a grouping together of numerous similar small claims against a single defendant, or group of defendants, in situations where individual lawsuits would be

(arguing that in some situations reliance can be inferred in consumer class actions rather than proved for each individual plaintiff).

109. Butler & Johnston, *supra* note 97, at 47–53.

110. Scheuerman, *supra* note 108, at 33.

111. *See* PRIDGEN & ALDERMAN, *supra* note 19, § 10:3; FTC Policy Statement on Deception, *supra* note 10. Twenty-two states use the FTC's traditional "tendency or capacity to deceive" standard in their state UDAP statues. *See* PRIDGEN & ALDERMAN, *supra* note 19, ch. 3 app. 3B.

112. *See* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008).

impractical.[113] Thus, the move to clamp down on consumer class actions could mean that such small claims will go un-redressed and mass infliction of small consumer injuries will go undeterred.

IV.
THE ALEC MODEL ACT ON PRIVATE ENFORCEMENT OF CONSUMER PROTECTION STATUTES—A DISASTER IN THE MAKING

A. The Genesis of the ALEC Model Act

The attack on the state UDAP private right of action has been slowly building up over the past ten to fifteen years. The studies and scholarship critiqued in Part II of this article tend to prop up the collection of provisions that constitute the ALEC Model Act. In this Part, I describe the origins of the ALEC Model Act and the group that promulgated it. This Part also contains a section-by-section analysis, which describes what each provision would do if enacted and how it differs from current law, and discusses why each section is ill founded and unnecessary, as appropriate.

ALEC, formed in the mid-1970s, is an "association for state lawmakers who share a common belief in limited government, free markets, federalism, and individual liberty."[114] The membership of ALEC is composed of interested state legislators (who join for free or for a nominal fee) and "private sector" members who must pay from $5,000 to $50,000 to join.[115] ALEC works mostly behind closed doors, and was relatively unknown until 2011 when the Center for Media and Democracy obtained copies of eight hundred of ALEC's model bills.[116] ALEC has been described as "an organization hiding in plain sight, yet one of the most influential and powerful in American politics."[117]

ALEC has formed various task forces that publish reports and issue model laws on a wide variety of issues, hundreds of which now appear on their public website.[118] There is apparently no means for consumer advocates to participate in its activities. Only corporate sponsors and legislators are members of ALEC,

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113. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010).

114. *History*, AM. LEGISLATIVE EXCH. COUNCIL, http://www.alec.org/about-alec/history/ (last visited Jan. 29, 2015).

115. Andrew N. Ireland Moore, *Caging Animal Advocates' Political Freedoms: The Unconstitutionality of the Animal and Ecological Terrorism Act*, 11 ANIMAL L. 255, 258 (2005) (internal citation omitted).

116. Ellen Dannin, *Privatizing Government Services in the Era of ALEC and the Great Recession,* 43 U. TOL. L. REV. 503, 506–08 (2012) (citing Lisa Graves, *About ALEC Exposed*, PRWatch Center for Media & Democracy, http://www.prwatch.org/news/2011/07/10883/about-alec-exposed (last visited Feb.11, 2015)).

117. *United States of ALEC* (Moyers & Company Sept. 28, 2012), *available at* http://billmoyers.com/episode/full-show-united-states-of-alec.

118. *See generally* AM. LEGISLATIVE EXCH. COUNCIL, http://www.alec.org (last visited Feb. 6, 2015).

and the resulting legislative proposals are, unsurprisingly, rather skewed toward business interests.[119] Recall that by contrast, the state UDAP statutes originated in model legislation promulgated by either the NCCUSL and ALI, or the FTC in partnership with the Council of State Governments.[120] The model legislation that ALEC develops is channeled to receptive state legislators who are encouraged to introduce the model bills in their individual states.[121]

The Model Act has been in circulation for several years and has a good chance of being passed in any number of state legislatures.[122] One indication of the growing influence of the Model Act was the amendment by the Tennessee State Legislature in 2011 of the state Consumer Protection Act to eliminate the private right of action for all "unfair or deceptive acts or practices" other than those specifically enumerated in the statute.[123] This will greatly circumscribe the breadth of activities that will be subject to private suit under the Tennessee law.

The ALEC Model Act is relatively short and specifically focused on the private enforcement provisions of the existing state consumer protection statutes.[124] It does not overtly seek to eliminate the private right of action to enforce state "little FTC Acts." However, the collection of various requirements and limitations, if enacted, would have the effect of significantly reducing or altogether eliminating the level of private enforcement of the existing statutes.[125] The Model Act also undermines the original goals of the statutes: it reduces enforcement of consumer protection laws at the state level through private litigation, and blocks consumers' access to the courts for smaller claims. Indeed, I believe that the Model Act is intended to cripple the state consumer protection

119. *See generally* Moore, *supra* note 115 (ALEC proposed Animal and Ecological Terrorism in America Act to restrain animal rights activists who took undercover video to expose animal cruelty in corporate farming operations, a bill favored by corporate agriculture. This law or aspects of it passed in several states.). *But see* Terry Carter, *One Hundred Years of Law*, ABA JOURNAL, Jan. 2015, at 53 (explaining that when ALEC opposed renewable energy laws on the basis that humans may not be responsible for climate change, a number of large corporations, including Google and Yahoo, left the organization).

120. *See supra* text accompanying notes 42–77.

121. *See* Allison Boldt, *Rhetoric vs. Reality: ALEC's Disguise as a Nonprofit Despite Its Extensive Lobbying*, 34 HAMLINE J. PUB. L. & POL'Y 35, 36–37 (2012).

122. *See* AM. LEGISLATIVE EXCH. COUNCIL, http://www.alec.org/about-alec/history/ (last visited Feb. 14, 2015) (ALEC itself estimates that an average of twenty percent of the "close to 1,000 bills, based at least in part on ALEC Model Legislation . . . introduced in the states" each year have become law.).

123. James M. Davis, *Less Protection: Revisions Narrow Scope of Tennessee Consumer Protection Act*, 49-FEB TENN. B. J. 12, 13 (Feb. 2013) (discussing amendments to Tenn. Code Ann. § 47-18-104).

124. *Model Act on Private Enforcement of Consumer Protection Statutes*, AM. LEGISLATIVE EXCH. COUNCIL, http://www.alec.org/model-legislation/model-act-on-private-enforcement-of-consumer-protection-statutes (last updated Jan. 9, 2014) [hereinafter *Model Act*]. It does not address government enforcement by state attorneys general.

125. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 67–68 (2005) (advocating for the adoption of the ALEC Model Act because it would limit private actions).

statutes under the guise of "reforming" them or correcting abuses. It does this in several ways. It resurrects from common law the outmoded requirement of individual proof of "reasonable reliance" for consumer plaintiffs, thus increasing the burden of proof.[126] It limits consumers' damages to out-of-pocket loss, thus making it impossible for consumers to collect other more expansive types of damages that were added to make consumers whole in ways that out-of-pocket damages could not.[127] The Model Act effectively eliminates attorney's fees for prevailing consumer plaintiffs by requiring an unnecessarily burdensome prerequisite of showing that the unlawful act or practice was "willful with the purpose of deceiving the public."[128] These and other aspects of the Model Act individually chip away at consumers' rights under existing law, but the sum total of all the proposed provisions of the ALEC Model Act would result in the demolition of the private right of action for state consumer protection laws. An analysis of the potential adverse effects on consumer litigants for each of the various provisions of the Model Act is set forth in detail below.

B. Section-by-Section Analysis

The Model Act, as published on the ALEC website, does not contain any section-by-section analysis or present any rationale for the various provisions. This article will attempt to provide such an analysis, as well as a critique, beginning first with a discussion of the potential effects of the various aspects of the Model Act. The analysis is summarized in the table.

Table 1. ALEC Model Law vs. Current Law

Type of Provision	**ALEC**	**Current Law**
Reliance requirement	1(A): individual "reasonable reliance" required	Most states do not require reasonable reliance; FTC deception policy condemns practices "likely to mislead consumers acting reasonably under the circumstances"
Damages for prevailing consumer plaintiff	1(A) & 1(G): only out-of-pocket loss measured by difference in value	Most states allow actual damages, as well as consequential, mental anguish and sometimes punitive damages
Statutory damages for	1(C), (D) & (E): optional	Most states allow

126. *See infra* text accompanying notes 129–38.
127. *See infra* text accompanying notes 147–50.
128. *See infra* text accompanying notes 159–66.

prevailing consumer plaintiff	provision for treble damages capped at $500	minimum damages, multiple damages, or both, sometimes only for willful violations; no $500 cap
Ascertainable loss	1(A): plaintiff must suffer "ascertainable loss of property or money"	Thirty-four states have ascertainable loss provision, but not limited to loss of property or money
Prior notice	1(B): plaintiff must give defendant ten-day prior notice before filing suit	Eleven states have similar provision
Class actions	1(F): class actions limited to persons showing individual reasonable reliance and ascertainable loss; damages limited to out-of-pocket loss	Normal procedural rules for class actions
Attorney's fees for prevailing consumer plaintiff	2(A): Fees available only for cases where violation was "willful" and "with the purpose of deceiving the public"	Most states provide attorney's fees for the prevailing consumer plaintiff, sometimes in the discretion of the court
Attorney's fees for prevailing defendant	2(B): Fees available only for suits that were groundless, brought in bad faith or harassing	Most states have similar provision
Statute of limitations	3: One year from date of discovery and no action more than four years after first instance of the act or practice at issue	Ranges from one year (six states), to two years (ten states) to three to four years (fifteen states); no state has limit on suits brought a certain number of years after "first instance"
Exemption for regulated activities	4(A)(1): exempts "acts or practices required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative	Most states exempt acts or practices "specifically required or permitted by state or federal law"

	decision, or formal or informal agency action"	

First, under Section 1(A), the private right of action could be asserted only by a person who "reasonably relies upon an act or practice declared unlawful by [another section of the state UDAP statute]."[129] This language of reasonable reliance appears to hark back to the common law requirement that a plaintiff show "justifiable reliance" on the seller's misstatement. No state consumer protection statute currently contains such a requirement, although there have been a few state court cases requiring this or something like it.[130]

A prerequisite of "reasonable reliance" can make for factual and legal quagmires about whether or not an individual consumer plaintiff was "reasonable" to rely on a particular statement or practice. It also increases litigation costs by adding fact-showing requirements to the consumer's burden of proof. For example, how could a consumer prove it was "reasonable" to rely on a real estate broker's gross overestimation of the amount for which they could sell their home?[131] Consumers vulnerable to exploitation or fooled by a seller's exaggerations or opinions could be precluded from bringing suit altogether, if not viewed as credibly "reasonable" consumers.[132] Also, if a standard form contract contradicts the salesperson's oral falsehoods or includes a disclaimer against reliance on any prior assertion made by a salesperson, the consumer may lose their opportunity to get redress for even a deliberately false statement, because it may be deemed "unreasonable" to rely on such an oral statement contradicted or denied by the written contract.[133] Unfortunately, it is well known that consumers do not read standard form contracts and are not likely to notice a contradiction of an oral representation in the written contract.[134]

Some may try to defend ALEC's proposed requirement of "reasonable" reliance by all consumer plaintiffs as simply a reference to the FTC Deception Policy, which defines a deceptive act or practice as one that is "likely to

129. *Model Act*, *supra* note 124.

130. *See, e.g.*, Toy v. Metro. Life Ins. Co., 928 A.2d 186 (Pa. 2007); Zeeman v. Black, 273 S.E.2d 910 (Ga. Ct. App. 1980).

131. *See* Duhl v. Nash Realty, Inc., 102 Ill. App. 3d 483, 429 N.E.2d 1267 (1981) (finding for the consumer, despite fact that reliance on opinion would be considered unreasonable or unjustifiable under common law).

132. *See* Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977) (holding that New York's consumer protection law protects vulnerable consumers and not just the average person).

133. *See* Wiegand v. Walser Auto. Groups, Inc., 683 N.W.2d 807 (Minn. 2004) (applying the Minnesota consumer protection act and rejecting the argument that reliance on oral statements was unreasonable because of a contradiction in the written contract).

134. Consumer behavioral studies find that average consumers routinely disregard contract statements that contradict oral assurances made by a trusted figure, such as a salesperson. *See, e.g.*, Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 681 (2009); Jessica M. Choplin, Debra Pogrund Stark & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 LAW & PSYCHOL. REV. 61, 65 (2011).

mislead" a consumer "acting reasonably under the circumstances."[135] However, there is a major difference between a statutory requirement that an individual prove reasonable reliance as a prerequisite to private suit and the FTC policy defining a deceptive practice. Neither the FTC Act itself nor the Deception Policy requires an individual consumer to have reasonably relied on a particular deceptive practice. Rather, the policy couches the standard in terms of whether a practice is "likely to mislead" consumers "acting reasonably under the circumstances," which can include irrational actions by particularly vulnerable consumers.[136]

The ALEC Model Act's "reasonable reliance" requirement would be all the more problematic in the case of unfair practices. An unfair practice does not necessarily involve a misrepresentation that can be relied on in the same way that deceptive practices might.[137] For example, state consumer protection laws have been applied to abusive debt collection, as well as systematic breach of contract or price gouging, but such cases could be precluded by a "reasonable reliance" requirement because such unfair practices are not "relied on" by the consumer but instead are simply foisted upon the consumer without their consent.[138]

Section 1(A) of the Model Act also specifies that a person seeking to pursue a private right of action must have suffered an "ascertainable loss of money or property" as a result of their reasonable reliance on an unlawful act or practice. A general "ascertainable loss" requirement is present in the state consumer protection statutes of thirty-four states.[139] The ALEC version of "ascertainable loss," however, is much narrower than the existing laws because it is limited to losses of money or property.[140] This definition of "ascertainable loss" might not recognize losses suffered by consumers from invasion of privacy, security breaches involving personal information, or harassment. Even hard-to-quantify injuries have been sufficient to meet the generally prevailing "ascertainable loss" provisions, as applied by state courts under existing law. For example, a Utah customer who alleged that a health club had caused unsubstantiated negative information to be placed in his credit report suffered an ascertainable loss because it could result in the consumer paying higher interest

135. FTC Policy Statement on Deception, *supra* note 10. This requirement is quite different from a requirement of proof of individual reasonable reliance, which is what the ALEC Model Act seems to require.

136. *Id.*

137. *See* Rebecca Eschler Russell, *Unlawful Versus Unfair: A Comparative Analysis of Oregon's and Connecticut's Statutes Encouraging Private Attorneys General to Protect Consumers*, 47 WILLAMETTE L. REV. 673, 681–82 (2011).

138. *See, e.g.*, Kett v. Cmty. Credit Plan, Inc., 228 Wis. 2d 1, 596 N.W.2d 786 (1999) (abusive debt collection); Schuchmann v. Air Servs. Heating & Air Conditioning, Inc., 199 S.W.3d 228 (Mo. App. S.D. 2006) (systematic contract breach); Perry Homes v. Alwattari, 33 S.W.3d 376 (Tex. App. 2000) (price gouging).

139. PRIDGEN & ALDERMAN, *supra* note 19, ch. 5 app. 5A.

140. *Model Act*, *supra* note 124.

on credit cards or other credit transactions.[141] As a practical matter, most plaintiffs bring a lawsuit to collect damages, and thus proof of ascertainable loss is not necessarily an unreasonable requirement for bringing a suit. It is basically an issue of standing, which need not be interpreted harshly against the consumer who suffers a small loss, and should not be limited to a specific loss of money or property.

Section 1(B) provides for a ten-day prior notice requirement to "give the prospective defendant an opportunity to confer," and presumably to attempt to settle the case.[142] Currently, only eleven states have such an advance notice requirement.[143] Advance notice requirements may sound reasonable, but constitute a special burden on consumer suits not present for other lawsuits. Failure to provide the notice within the specified time period may result in dismissal of an otherwise meritorious lawsuit.[144] Also, such prior notice allows businesses engaged in unlawful practices to "pick off" the plaintiffs by providing restitution to consumers only in those instances when the consumer chooses to sue.[145] Most consumers who suffer relatively small injuries from deceptive or unfair trade practices do not bother to file a lawsuit.[146] With the advance notice provision proposed by ALEC, a business engaged in systematic law violations affecting many consumers in small ways can continue its illegal activities until an actual lawsuit is filed, and then avoid incurring wider liability or establishing a legal precedent by a pre-suit settlement with the named plaintiff(s). In such a situation, the individual plaintiff or named plaintiff in a class action may be compensated, but the other affected consumers are left high and dry because the potential class relief or deterrent effect of the actual filing of a suit may be lost.

The ALEC Model Act contains several provisions on remedies for violations that are more restrictive than analogous provisions under existing laws. For instance, Section 1(A) would limit suits to those seeking to recover as damages the "out-of-pocket loss the person sustained as a result of such act or practice."[147] "Out-of-pocket loss" is defined as "no more than the difference between what the person paid for the product or service and what the product or

141. Andreason v. Felsted, 137 P.3d 1 (Utah Ct. App. 2006).

142. *Model Act*, *supra* note 124.

143. PRIDGEN & ALDERMAN, *supra* note 19, ch. 5 app. 5A.

144. Typically, the dismissal allows the consumer plaintiff to re-file the lawsuit after giving proper notice, but there may be problems with the statute of limitations if the suit is filed close to the end of the period, which many lawsuits are.

145. CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 20 (2009).

146. *See* Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 303 (2012).

147. *Model Act*, *supra* note 124, § 1(A).

service was actually worth in the absence of the unlawful act or practice."[148] This provision, as well as the outright ban on punitive damages contained in Section 1(G), eliminates the availability of meaningful damages to deter future wrongdoing by the same or other enterprises, even in cases of willful fraud against the public. It also eliminates the possibility of consequential damages, which could be quite important in consumer cases where the actual loss in value of the product or service is far less than the damage caused by the unfair or deceptive practice. For instance, if exterior siding is sold and installed pursuant to a misrepresentation that it is waterproof, but in fact is leaky, then under the ALEC formulation of damages, the consumer would get only the loss in value of the price of the siding, and would not be compensated for having to remove and replace the siding and repair the damage caused by the leaks.[149] This approach to damages also completely eliminates the possibility of compensation for mental anguish, or pain and suffering. While it is rare for consumers to collect damages for mental anguish or pain and suffering under current state UDAP statutes, some states will award such damages in cases of deliberate fraud.[150] Thus, the ALEC Model Act unnecessarily takes away the flexibility for courts to adequately compensate consumers in extreme cases.

An alternative section in the ALEC model act (Sections 1(C), (D) and (E)), provides an option for state legislatures to retain treble damages, but limited to cases where the unlawful act or practice was "willful with the purpose of deceiving the public," and with a ceiling of $500 per person.[151] Many existing state UDAP statutes currently provide for multiple or minimum damages.[152] Some provisions are tied to a showing of a willful violation, or a particularly vulnerable class of victims.[153] However, they are not capped at levels as low as the ALEC provision. The Model Act's limitations on damages are such that any damage award would be only a "slap on the wrist" that would not be effective for deterring future unfair or deceptive practices or for adequately compensating consumers. By contrast, the existing statutory damage provisions (and punitive

148. *Id.*

149. *See, e.g.*, Robinson Machinery Co. v. Davis, 689 S.W.2d 286 (Tex. App. 1985) (finding consequential damages for consumer when faulty car repair caused continuing damage). *See also* CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR & DECEPTIVE ACTS AND PRACTICES § 12.3.3 (8th ed. 2012).

150. *See, e.g.*, Dan Boone Mitsubishi, Inc. v. Ebrom, 830 S.W.2d 334 (Tex. App. 1992) (finding a truck driver who was deprived of his livelihood and humiliated by the inability to repay his debts because of the purchase of a defective truck from an intentionally misrepresenting dealer entitled to recover mental anguish damages under the Texas consumer protection law).

151. *Model Act*, *supra* note 124, § 1(C).

152. PRIDGEN & ALDERMAN, *supra* note 19, ch. 6 app. 6A.

153. Cal. Civ. Code § 1780(b) provides for up to a $5,000 damage remedy to elderly or handicapped consumers.

damages in some states) can be used for punishment or deterrence of wrongdoers.[154]

Section 1(F) provides for class actions under the state consumer protection act, but limits such actions to those who show both individual reasonable reliance on the challenged act or practices and ascertainable loss.[155] Also, the section eliminates statutory damages for class actions, even in states that adopt the option for $500 maximum statutory damages in Section 1(C), because Section 1(F) specifically limits class action damages to actual out-of-pocket loss.[156] Most state courts dealing with class actions under their state UDAP statutes, however, have held that where a common scheme is alleged, there is no need for an individual showing of reliance. Rather the class may show that a reasonable person would have relied on the alleged misrepresentations.[157] By requiring a showing of individual reasonable reliance and ascertainable loss for class actions under the ALEC model law, the law virtually guarantees that no class actions will be viable because these elements will vary from individual to individual and the class may not be able to satisfy the requirement of the predominance of common questions of law and fact. ALEC's proposed limit of class damages to out-of-pocket losses would also severely discourage class actions in situations where large numbers of consumers were defrauded in ways that resulted in relatively small individual losses.[158] If each member of a class would thus be entitled to collect perhaps $1.00 each, the costs of processing such awards might outweigh any benefits. And yet if class actions were prevented under the ALEC Model Act due to the small size of the individual losses, the enterprise engaging in a series of small deceptions would be able to pocket the sum total of the small losses, which could be substantial.

Section 2(A) of the ALEC Model Act allows for attorney's fees to a prevailing consumer plaintiff, but only if the court or "trier of fact" (e.g., arbitrator) finds that the defendant's use or employment of the unlawful act or practice was "willful with the purpose of deceiving the public."[159] This provision alone is likely to greatly reduce the utility of the state consumer protection laws

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154. Nine consumer protection statutes specifically authorize the award of punitive damages, including those of California, Connecticut, District of Columbia, Georgia, Idaho, Kentucky, Missouri, Oregon and Rhode Island. *See* PRIDGEN & ALDERMAN, *supra* note 19, § 6:16.

155. The reasonable reliance and ascertainable loss requirements are incorporated into the class action by language stating that persons bringing a class action have to be entitled to bring an action under Subsection A, which requires those elements. *Model Act*, *supra* note 124, § 1(E).

156. *Id*. § 1(F).

157. *See, e.g.*, Dix v. Am. Bankers Life Assurance Co. of Florida, 415 N.W.2d 206 (Mich. 1987) (involving fraudulent sale of tax-sheltered annuity policies); Latman v. Costa Cruise Lines, N.V., 758 So.2d 699 (Fla. Dist. Ct. App. 2000) (finding reliance and damages did not have to be shown individually, but only that a "reasonable consumer" would have been deceived, in case involving misrepresentation of "port charges" by cruise line).

158. *See, e.g.*, Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981) (involving actual out-of-pocket loss of fifty cents for handling and postage for 180,000 consumers who did not receive the promised prize from the advertiser).

159. *Model Act*, *supra* note 124, § 2(A).

to consumer plaintiffs, especially individual plaintiffs. Presently, forty-five state consumer protection statutes provide for attorney's fees to the prevailing consumer plaintiff.[160] Twenty-one of these statutes actually mandate that the court award attorney's fees to a prevailing plaintiff, while twenty-three provide that the court award attorney's fees to the prevailing plaintiff at the court's discretion.[161] A 2008 study asked groups of both consumers and attorneys whether they would be discouraged from bringing what they viewed as strong meritorious claims if the attorney's fee award was discretionary rather than mandatory. The results showed that both groups would be less willing to bring such claims if the attorney's fee provision was discretionary rather than mandatory.[162] Requiring that plaintiffs show a willful act intended to deceive the public to recover attorney's fees will place an even higher barrier to meritorious suits than merely having a discretionary fee award and thus would likely be even more discouraging to potential attorneys for consumer plaintiffs.

ALEC's proposed attorney's fee award, contingent on a showing of willfulness and intent to deceive the public, is tantamount to no fee award at all, without which private consumer UDAP suits are not likely to be filed.[163] The requirement of a willful act increases the burden of proof.[164] It would be very difficult to prove a "willful" act because the consumer has no access to a merchant's intent without costly discovery. This requirement also increases the risk to the attorney who takes a consumer plaintiff's case. Such attorneys will have to weigh the possibility that they could win the suit and yet still not get paid if they cannot prove the requisite willfulness with intent to deceive the public. The Model Act's provision on attorney's fees appears to be a back door method of incorporating a "public interest" requirement into the statute, since a plaintiff who wants attorney's fees would have to show a "purpose of deceiving the public" and not just an individual.[165] Requiring demonstration of a purpose to deceive the public, analogous to the general public interest requirement, tends to eliminate individual suits by consumers harmed in one-on-one transactions.[166]

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160. CARTER, *supra* note 145.

161. *See* Debra Pogrund Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 484–85 (2008).

162. *See id.* at 514–15.

163. For instance, the Wyoming state UDAP statute provides for attorney's fees to the prevailing plaintiff only in class actions, not for individual suits. Wyo. Stat. Ann. § 40-12-108. Although the statute has been on the books since 1973, there has been only a single reported case of a private suit under this statute. *See* St. John v. Wagner, 302 P.3d 906 (Wyo. 2013) (determining applicable statute of limitations).

164. North Carolina is the only state that has deemed it necessary to limit consumer plaintiff attorney's fee provisions to cases of willful unlawful acts. Marshall v. Miller, 276 S.E.2d 397 (N.C. 1981) (discussing N.C. Gen. Stat. 75-16.1).

165. Only a few states currently require consumer plaintiffs in state UDAP cases to show that their case will benefit the "public interest." *See* PRIDGEN & ALDERMAN, *supra* note 19, § 5:5.

166. For a discussion of the adverse effect of the general public interest requirement, see Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota*

The requirement of a finding of intent to "deceive" the public may also eliminate attorney's fees for cases that involve unfair, but not necessarily deceptive practices.

Section 3 of the ALEC Model Act has a limitation of actions (statute of limitations) of one year from the date of discovery by the person bringing the action.[167] The existing state consumer protection statutes have statutes of limitation ranging from one year (six states) to two years (ten states) to three or four years (fifteen states).[168] ALEC's suggested one year from discovery limit is harsh enough in itself, yet the ALEC statute of limitations section contains an additional restriction that states: "in no event may any action be brought under this chapter more than four years after the first instance of the act or practice giving rise to the cause of action."[169] Thus, a consumer who had been harassed by a debt collector for more than four years would not be able to bring a suit even though the same party was still currently harassing her. Also, a natural reading of this phrase leads to the conclusion that the statute of limitations starts to run when the seller first instituted the practice, even though it may not have affected the individual bringing suit until much later, possibly later than four years. This unusual way of applying a statute of limitations means that a merchant who escaped suit for more than four years for the same illegal practice would in effect get a "free pass" from private suits.

Section 4 of the ALEC model law provides for some exemptions to the scope of the act. While these types of exemptions are common in some form or another in many state UDAP statutes, the ALEC exemption for regulated practices is so sweeping that it comes close to providing immunity for almost any business practice. Many state laws currently exempt acts or practices "specifically required or permitted" by state or federal law.[170] ALEC's Section 4(A)(1), however, would exempt "[a]cts or practices required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action."[171] This could be interpreted to exempt any activity not addressed by current law, since by definition, such a practice would be permitted. The reference to judicial or administrative decisions would also provide legal cover for any practice that has been permitted, even indirectly, by any court or agency decision involving similar practices by different entities. Finally, the exemption based on "informal agency action"

Consumer Protection Laws, 33 WM. MITCHELL L. REV. 163, 210–11 (2006); Prentiss Cox, CONSUMER FRAUD AND DECEPTIVE TRADE REGULATION IN MINNESOTA § 4.1C2(a) M.S.B.A. (2009).

167. *Model Act*, *supra* note 124, § 3.

168. PRIDGEN & ALDERMAN, *supra* note 19, ch. 6 app. 6A.

169. *Model Act*, *supra* note 124, § 3.

170. *See, e.g.*, N.M. STAT. ANN. § 57-12-7, as applied in Quynh Truong v. Allstate Ins. Co., 227 P.3d 73 (N.M. 2010) (using the modified language "expressly permitted"). *See generally* PRIDGEN & ALDERMAN, *supra* note 19, §§ 4:32–33, app. 4A.

171. *Model Act*, *supra* note 124, § 4(A)(1).

opens the door to claims that unfair or deceptive actions were blessed by a statement made by low-level agency staff, and are thus exempt.

V.
CONCLUSION

I have asserted in this article that the Model Act on Private Enforcement of Consumer Protection Statutes put forth by the industry-funded think tank ALEC is unnecessary to correct abuses, real or perceived, and in fact would undermine over forty years of consumer protection embodied in the state unfair and deceptive trade practices acts. The state UDAP statutes, which originated in the late 1960s and were passed by most states in the early 1970s, function as extensions of the enforcement power of the FTC through state legislation. The laws provide consumers who have relatively small claims with access to the courts for redress against unfair and deceptive trade practices. Yet in the past decade, some critics have come forward to question the wisdom of the state UDAP laws, particularly the private enforcement aspect. These "reform" proponents argue that state consumer litigation has strayed from what the FTC would have done, has resulted in costs to businesses which then raised consumer prices, and triggered an explosion of litigation.

In response to this wave of criticism, the ALEC Model Act contains a wide array of limitations to private suits, each of which favors the business defendant and constrains the consumer plaintiff. The section-by-section analysis in this article demonstrates how the Model Act differs from current law on almost every count, and in ways that undermine the private right of action, rather than just eliminating abuse. The analysis also demonstrates that the justifications for this cutback of the state statutes are spurious. On the other hand, ALEC's proffered "fix" will gut the consumer protection provisions under these well-founded state statutes that underlie the access to justice that consumers have benefitted from for nearly fifty years.

It may be tempting for state legislators to respond to these calls to "reform" their state consumer protection acts. After all, each provision, when viewed in isolation and without probing by consumer advocates, may seem tolerable or justifiable, i.e., just some minor repairs or tidying up. Perhaps one could argue that requiring a showing of "reasonable" reliance is indeed reasonable and prevents any possibility of overcompensation. Perhaps an "ascertainable loss" requirement seems logical since no one is in favor of frivolous suits, and the ALEC version of ascertainable loss of money or property at first seems harmless. A ten-day notice requirement could be viewed as preventing ill-considered suits and encouraging settlements. Limiting damages to consumers' out-of-pocket loss? It could tamp down outrageous verdicts. Putting a low limit on statutory damages? Again, some would say, "why not?" as statutory damages by definition are not the same as actual damages. Slamming the brakes on consumer class actions could be seen as a way of pushing back against greedy lawyers. Along those lines, a provision requiring a showing of public harm in order to make the defendant pay the consumer plaintiff's attorney's fees could seem

reasonable, because if the suit only helps one consumer then some may argue that the consumer should pay for her own attorney. A one-year limit on bringing suit may seem like plenty of time, and if no one has sued the merchant for four years, then maybe the merchant has come to think his or her actions are lawful. And if an action is permitted by another law or by implication, then why should a business enterprise be penalized?

However, I have shown in the section-by-section analysis that these suggested reforms significantly undermine the consumer's ability to sue and to achieve adequate compensation under state consumer protection law. Virtually every one of the suggested ALEC provisions tends to favor business defendants and function to the detriment of potential consumer plaintiffs.[172] If all of the ALEC Model provisions were enacted, the result would be to gut private UDAP actions, with their benefits to consumers and to society, while not requiring state legislators to transparently explain a repeal of the consumer's right to sue. This sledgehammer approach is both uncalled for and unnecessary.

State legislators should take a moment to contemplate whether sweeping changes to their existing consumer protection statutes are in the public interest before taking any drastic actions. Rather than accepting ALEC's proposed changes carte blanche, lawmakers should engage with both business and consumer advocates to assure themselves that they understand the full implications of these proposals. They should not be fooled into thinking the ALEC Model Act is merely a law reform measure. It is in fact a wrecking ball that will demolish a critical aspect of the structure of consumer protection in the United States.

172. *See supra* Table 1: Comparison of ALEC Model Law to Current Law.