Should The FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State "Little FTC Acts"?

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Although twenty-eight states have enacted "Little FTC Acts" that, like the Federal Trade Commission Act itself, prohibit "unfair acts or practices,"[1] the great majority of states apply unfairness criteria different from those currently applied by the Federal Trade Commission under Section 5(a)(1) of the FTC Act.[2] On the one hand, the courts of only a few states have addressed that conflict, an argument that a state court should follow FTC precedent in determining whether an act or practice is "unfair" may be available to litigants in Little FTC Act states. On the other hand, there may be sound reasons for applying criteria under Little FTC Acts, where determinations are made by generalist judges and lay juries, different from those applied under the FTC Act, where determinations are made by an expert administrative agency with a staff of economists. Choice of criteria may impact the breadth and clarity of the prohibition, the level of enforcement activity, and the appropriateness of legislative action to resolve the choice of criteria for determining unfairness.

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The FTC's Criteria for Determining Unfairness

The Cigarette Rule. The FTC Act was amended by the Wheeler-Lea Act[3] in 1938 to prohibit "unfair or deceptive acts or practices" to extend the protection of the Act to consumers without the necessity of proving injury to competition or competitors.[4] It was not until 1964, however, that the FTC articulated systematic criteria for determining whether an act or practice is unfair in violation of the Act. These criteria, which became known as the "Cigarette Rule" or the "*S&H* Rule," were developed in connection with the Commission's rule governing the advertising and sale of cigarettes. It identified three factors that the Commission would consider.

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

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[1] Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming. The statutes are cited in David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. B.J. 247, 249 n.2 (2006).

[2] 15 U.S.C. § 45(a)(1).

[3] Ch. 49, § 3, 52 Stat. 111 (1938).

[4] Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 234 (1981). The development of the FTC's criteria for determining unfairness began before the FTC had its unfair acts or practices authority, starting with its original authority over "unfair methods of competition."

[5] Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8325, 8355 (1964) [hereinafter Cigarette Rule Statement].

In 1978, in connection with the promulgation of a rule concerning franchising, the Commission stated that "[a] practice may be unfair because of the degree to which it meets one of the [Cigarette Rule] criteria or because to a lesser extent it meets all three."[6] The Supreme Court acknowledged the FTC's Cigarette Rule standard in *FTC v. Sperry & Hutchinson Co.*,[7] although it is unclear whether the Court actually approved the criteria.[8]

The Commission made aggressive use of its unfairness authority in the 1970s, both in seeking adjudications and in the exercise of its rulemaking authority, leading to scholarly criticism, a political backlash, and ultimately to limitations on the Commission's use of its unfairness jurisdiction. The scholarly criticism tended to focus on the Commission's failure to apply its unfairness criteria consistently and systematically rather than on inherent faults in the criteria. In connection with the Commission's adjudicatory activities, it was criticized for following a "shifting course" that seemed "characterized by its efforts to test the outer limits of its [unfairness] jurisdiction in an essentially ad hoc manner," and "utilizing multiple theories, sometimes in a single proceeding."[9] In its rulemaking, the Commission was criticized for failing to identify the sources of public policy that supported a proposed rule,[10] for failing to explain how competing interests should be balanced in addressing both the public policy and consumer injury criteria,[11] and for employing an unfairness theory that appeared to be undefined, with its content shifting "according to which undesirable trade conditions the FTC wish[ed] to regulate."[12]

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The political backlash against the FTC arose primarily from its rulemaking activities directed at powerful political constituencies, including the funeral and used car industries, as well as doctors and lawyers.[13] There is a consensus that the Commission's 1978 proposed rulemaking concerning advertising directed towards children was the event that led to the tremendous political outcry that resulted in limitations on the Commission's use of its unfairness authority.[14] The proposed ban on children's advertising was based on the grounds that it was "immoral, unscrupulous, and unethical" and against generalized public policies to protect children.[15]

The Unfairness Policy Statement. In a June 13, 1980 letter, the Chairman and Ranking Member of the Senate subcommittee with oversight responsibility with respect to the FTC informed the

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[6] Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59,614, 59,635 (1978).

[7] 405 U.S. 233, 244 n.5 (1972).

[8] *See* Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. Rev. 349, 408 n.275 (1988); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 Geo. Wash. L. Rev. 1, 26 (1984).

[9] Rice, *supra* note 8, at 26.

[10] Teresa M. Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 Akron L. Rev. 1, 21 (1977).

[11] *Id.* at 14, 18 ("A balancing test which does not include an explanation of the weight and interrelationship of the factors to be balanced permits excess latitude in defining unfair practices.").

[12] Schwartz, *supra* note 10, at 27–28.

[13] *See* William MacLeod et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 Antitrust L.J. 943, 952–54 (2005) (noting that between 1971 and 1980, the Commission proposed 28 industry-wide rules); J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L.J. 1057, 1064–65 (2005).

[14] *See* Braucher, *supra* note 8, at 405 n.266; MacLeod, *supra* note 13, at 755–57; Beales, *supra* note 13, at 1064–65; Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 Antitrust L.J. 911, 919–27 (2005); *see also* Children's Advertising, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967 (1978).

[15] J. Howard Beales III, The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection 2 (2007), *available at* http://www.ftc.gov/speeches/beales/unfair0603.shtm.

Commission that the subcommittee planned to hold hearings and solicited the Commission's views as to "whether the Commission's authority should be limited to regulating false or deceptive commercial advertising."[16] The Commission responded with its Unfairness Policy Statement.[17] The Commission's Unfairness Policy Statement was based on its Cigarette Rule articulation, but with three significant differences: (1) it limited the use of the public policy criterion to public policies that were "clear and well-established";[18] (2) it deleted the second criteria—whether an act or practice was "immoral, unethical, oppressive, or unscrupulous";[19] and (3) it elaborated on the substantial injury criterion.[20]

The modifications of the first and second criteria were in some ways problematic. As to the first criterion, narrowing the public policy criterion not only removed the ability to rely on conduct "within at least the penumbra of some common law, statutory, or other established concept of unfairness," but also required that the Commission rely only on "clear and well established public policies."[21] As to the second criterion, the Commission stated that it had never relied upon the "immoral, unethical, oppressive or unscrupulous" criterion as an independent basis for finding unfairness.[22] However, the legislative history of the FTC Act indicates that the concept of unfairness extended to conduct violating generally recognized business ethics.[23] As to the final criterion, the Commission declared that the unjustified consumer injury criterion was the "primary focus of the FTC Act, and the most important of the *S&H* [Cigarette Rule] criteria"[24] and stated that "[t]o justify a finding of unfairness the injury must meet three tests. It must be substantial; it must not be outweighed by any counterveiling benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[25]

The concepts central to the Commission's Unfairness Policy Statement were the view that "[m]ost business practices entail a mixture of economic and other costs and benefits for purchasers" and that the Commission "will not find that a practice unfairly injures consumers unless it is injurious in its net effects."[26] Another central concept was the view that "[n]ormally, the mar-

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[16] *See* Letter dated December 17, 1980 from the FTC Commissioners to Senators Ford and Danforth, Chairman and Ranking Minority Member of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation at 1071 [hereinafter Unfairness Policy Statement]. The FTC's Unfairness Policy Statement is reprinted as an appendix to *International Harvester Co.*, 104 F.T.C. 949, 1070–76 (1984); *see also* 4 Trade Reg. Rep. (CCH) ¶ 13,203. Citations to pages of the Unfairness Policy Statement are to pages of *International Harvester*. The developments leading up to the FTC's 1980 letter are discussed in Milkis, *supra* note 14, at 924–27. *See also* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 969–70 (D.C. Cir. 1985).

[17] Milkis, *supra* note14, at 924–27; *American Financial Services*, 767 F.2d at 969–70.

[18] *Id.* To be "clear and well established," the Commission stated that the policy "should be declared or embodied in formal sources such as statutory judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values" and "should likewise be one that that is widely shared, and not the isolated decision of a single state or a single court." *Id.*

[19] Unfairness Policy Statement, *supra* note 16, at 1076.

[20] *Id.* at 1073.

[21] *Id.* at 1076.

[22] *Id.*

[23] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition"* in Section 5 of the Federal Trade Commission Act, 21 B.C. L. Rev. 227, 273. *See also* Stephen Calkins, *FTC Unfairness: An Essay*, 46 Wayne L. Rev. 1935, 1942–49 (2000); FTC v. R.F. Keppel & Bro., 291 U.S. 304, 310–13 (1934); FTC v. Algoma Lumber Co., 291 U.S. 67, 78–79 (1934).

[24] Unfairness Policy Statement, *supra* note 16, at 1073.

[25] *Id.* at 1074.

[26] *Id.* at 1073.

ketplace is expected to be self-correcting," and that the Commission would "rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market."[27] The Commission relied upon its Unfairness Policy Statement and attached a copy of it to its 1984 decision in *International Harvester*.[28]

In 1982, the Commission recommended that Congress codify the definition of unfairness set forth in its Unfairness Policy Statement.[29] Congress did not act on that recommendation, however, until 1994, when it enacted 15 U.S.C. § 45(n), denying the Commission authority to declare an act or practice as unfair "unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by counterveiling benefits to consumers or to competition."[30] The 1994 act also provided that "[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence," but that "[s]uch public policy considerations may not serve as a primary basis for such determinations."[31] Thus, in enacting 15 U.S.C. § 45(n), Congress did not simply codify the criteria of the Commission's Unfairness Policy Statement as the Commission had requested. Rather, it removed the Commission's ability to rely on public policy as a primary basis for determining unfairness altogether.

The standard set forth in the substantial injury criterion of the Commission's Unfairness Policy Statement and in 15 U.S.C. § 45(n) has been criticized for failing to give businesses charged with compliance adequate notice concerning what conduct will be proscribed as unfair. Professor David Rice observed that "the substantial-consumer-injury criterion . . . is vulnerable to a . . . fundamental objection: it provides no clue concerning the class or characteristics of the behavior it purports to proscribe."[32] Neil Averitt has concluded that "if cases are decided by a weighing of all relevant costs and benefits, companies seeking to comply with the law will not have discrete legal principles to follow" and "[t]he resulting uncertainty would impose significant burdens on honest businessmen . . . . [This] will often make cases impractical to adjudicate" because while "[a] case involving a simple bright line legal rule can be litigated with relative ease since the number of critical facts and issues are limited . . . . [i]n a general balancing test . . . all facts relating to a practice are relevant, and so the number of issues that might be briefed and argued are greatly increased."[33] Averitt observed that "[t]his tends inexorably to make litigation more time-consuming and expensive," which will be "particularly true of major trade regulation cases, in which the stakes can be so high that all parties are motivated to pursue every possible argument as fully as possible."[34] Averitt also argued that application of the balancing test will "make judicial review very difficult." Professor Stephen Calkins has noted that the Commission itself has not been consistent in how the benefits of a practice and costs are to be calculated.[35] It has also been argued

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27 *Id.* at 1074.

28 104 F.T.C. 949, 1070–76 (1984).

29 Letter from FTC to Senators Packwood and Kasten of the Senate Subcommittee on Commerce, Science and Transportation dated March 5, 1982, reprinted in H.R. REP. No. 98-156, at 27–28 (1983) [hereinafter FTC March 5, 1982 Letter].

30 Pub. L. No. 103-312 § 9 (codified at 15 U.S.C. § 45(n) (1994)).

31 *Id.*

32 Rice, *supra* note 8, at 51–52, 55–64.

33 Averitt, *supra* note 4, at 248–50.

34 *Id.* at 249.

35 Calkins, *supra* note 23, at 1983 (giving specific illustrations).

that the balancing test first set forth in the Unfairness Policy Statement and later codified in 15 U.S.C. § 45(n) is not intended to be a legal definition of unfairness which actually attempts to define an act that would violate the Act or specify the elements of a violation. Rather, it merely states the ultimate aims of the FTC Act and a guide for the Commission.[36]

Another problem with the balancing test is that the effects to be balanced were apparently not intended by the Commission to require quantification in all cases and the Commission intended that in some cases, a "far more subjective analysis could be used."[37] However, in its 1982 letter, the Commission did not specify the nature of the cases in which such an analysis would be appropriate or how it should be carried out.

It has been argued that the balancing test . . . "permits excessive latitude in defining unfair practices" and "does not subject the Commission to sufficient constraints."

Federal Enforcement of the Balancing Test. It has been argued that the balancing test itself "permits excessive latitude in defining unfair practices"[38] and "does not subject the Commission to sufficient constraints."[39] The breadth and unpredictability of this standard can be seen from the decision in *Orkin Exterminating Co. v. FTC*,[40] in which the court affirmed the Commission's ruling[41] that a company's unilateral breach of over 200,000 termite control contracts by raising guaranteed annual renewal fees was an unfair practice. The Commission's unfairness determination was based solely on the unjustified consumer injury criterion as elaborated in the Unfairness Policy Statement and now embodied in 15 U.S.C. § 45(n).[42] The Commission concluded that the unilateral breaches caused substantial injury, which the customers could not reasonably have avoided.[43] The Commission rejected Orkin's argument that if it was forced to maintain the guaranteed rates to some customers, its remaining customers could carry the full burden of escalating cost of service.[44] Orkin argued that courts interpreting identical language in state Little FTC Acts had determined that a mere breach of contract without more, did not constitute an unfair act or prac-

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[36] Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 114 (1981). *See also* Averitt, *supra* note 4, at 248.

[37] *See* FTC March 5, 1982 Letter, *supra* note 29, at 33. ("As to the element pertaining to the weighing of benefits and costs, however, the Commission believes that there is an associated problem to consider, namely the risk that the analysis might unnecessarily complicate and delay an investigation or an ultimate litigation. For this reason, the Commission believes that a highly quantitative benefit/cost analysis may not be appropriate in each and every individual case, and that in some cases a far more subjective analysis would be the reasonable approach. We believe any legislative history of a refined definition of unfairness should reflect this view."); *see also* S. Rep. 103–130, 1st Sess. 1993, 1993 WL 322671 (Leg. Hist.) at *10 ("In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of unfairness authority, gathering and considering reasonably available evidence."); Am. Fin. Servs Ass'n v. FTC, 767 F.2d 957, 986 (D.C. Cir. 1985) (rejecting argument that the Commission's conclusions must be based on "rigorous, quantitative economic analysis"); Pennsylvania Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 87, 91 (3d Cir. 1994) (holding that the FTC's cost-benefit analysis need not be tied to any quantitative data and noting that "much of a cost-benefit analysis requires predictions and speculation, in any context").

[38] Schwartz, *supra* note 10, at 14.

[39] Averitt, *supra* note 4, at 248.

[40] 849 F.2d 1354 (11th Cir. 1988).

[41] *Orkin Exterminating Co.*, 108 F.T.C. 263, 1986 WL 722153 (1986).

[42] *Id.* at *70–*80; *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1364–66.

[43] *Orkin Exterminating*, 1986 WL 722153, at *69–*78; *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1364–66.

[44] *Orkin Exterminating*, 1986 WL 722153, at *76–*78, *80–*81.

tice.[45] Both the Commission and the Eleventh Circuit rejected this argument, noting that there is "nothing which constrains it to follow judicial interpretations of state statutes in construing the agency's section 5 authority."[46] As to public policy considerations, the Commission noted the "basic tenet of contract law . . . that private contracts should be enforced according to their terms"[47] and that Orkin's actions "threaten[ed] the integrity of contracts and their vital role in value exchanges," with the result that "[m]arketplace confidence will be lost and competition will suffer."[48]

Other than *Orkin*, and a few cases like it, apparently in part because of concern about congressional reaction, the FTC used its unfairness jurisdiction sparingly after 1980.[49] The Commission used unfairness as the basis of decision in fewer than thirty cases between 1980 and 2000,[50] and the Commission's Unfairness Policy Statement was addressed in only three appellate decisions.[51] Beginning in 2001, the Commission revived use of its unfairness jurisdiction by bringing Internet-related enforcement actions directed at such abuses as misuse of pop-up windows to post advertisements and making it appear that bulk, unsolicited commercial emails came from a third party and by bringing enforcement actions concerning unauthorized billing of credit cards, delays in sending rebate checks, and breaches of the rules of the automated check-clearing system to enable fraudulent transactions.[52]

Unfairness Criteria Applied Under State Little FTC Acts

While the FTC's unfairness criteria have changed, states have, for the most part, continued to apply the unfairness standards of the 1960s and 1970s, the period during which the FTC applied the Cigarette Rule criteria and the Little FTC Acts were first enacted.[53] Thus, of the 28 states having Little FTC Acts that prohibit "unfair acts or practices,"[54] sixteen continue to apply some version of the Cigarette Rule criteria, while only four apply the balancing test set forth in 15 U.S.C. § 45(n) as the sole criterion. One state, Maryland, has adopted the criteria of the FTC's 1980 Unfairness Policy Statement. The courts of six states have not articulated criteria for determining

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[45] *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1363–64 (citing Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc, 752 F.2d 10 (1st Cir. 1985) (construing Mass. Gen. Laws Ann. ch. 93A § 2)) and United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981) (construing N.C. Stat. § 75-1.1(a)). *See also* Boulevard Assocs. v. Sovereign Hotels, Inc., 72 F.3d 1029, 1039 (2d Cir. 1995) (a post-*Orkin* decision holding that a breach of contract to avoid losing money did not violate public policy and, therefore, did not violate the Connecticut act. The court noted that a contrary holding would turn every contract dispute into an unfair trade practice and that it could not "assume that the Connecticut legislature . . . intended such an extraordinary alteration of the common law"). *Cf.* Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 62–63 (2d Cir. 1985) (explaining why punitive damages are not recoverable for breach of contract, even when intentional).

[46] *Id.* at 1363.

[47] *Orkin Exterminating*, 1986 WL 722153, at *81.

[48] *Id.* at *76.

[49] Beales, *supra* note 15, at 1066.

[50] *See* Calkins, *supra* note 23, at 1958–59; Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1877 (2000).

[51] Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985); Harry and Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984).

[52] *See* Beales, *supra* note 15, at 1066–67; *see also* Dara J. Diomande, *The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases*, Antitrust, Summer 2004, at 53, 54–55.

[53] *See* Greenfield, *supra* note 50, at 1895–97.

[54] *See supra* at note 1.

unfairness[55] and the lower appellate courts in California are divided concerning the criteria to be applied.

The Great Majority of States Continue to Apply the Cigarette Rule Criteria. Courts of eleven states have adopted the Cigarette Rule.[56] Oklahoma has adopted the Cigarette Rule by statute.[57] Missouri has adopted a variant of that standard by regulation.[58] The Connecticut and Washington courts have developed a hybrid standard that adopts the Cigarette Rule standard but applies the FTC's Unfairness Policy Statement to elaborate the third, or substantial injury, criterion.[59] The South Carolina Supreme Court has articulated a standard including only the first two Cigarette Rule criteria, omitting the test set forth in 45 U.S.C. § 45(n).[60]

These sixteen states continue to apply the Cigarette Rule criteria despite provisions in most Little FTC Acts directing courts to give some degree of deference to federal interpretations of Section 5(a)(1) of the FTC Act in interpreting the parallel language in the state act, although most states that have considered the issue have held that deference to federal precedent is not mandatory.[61] The reason these states have not adopted the changed federal standard is unclear. Among the courts applying the Cigarette Rule criteria, only the recent decision by the Montana Supreme Court explicitly adopts the Cigarette Rule standard rather than that of 15 U.S.C. § 45(n) and in that case the court appears to have done so based on the fact that most other state courts have continued to do so.[62]

The continued application of the Cigarette Rule criteria rather than those of 15 U.S.C. § 45(n) may be a result of the fact that state courts were not aware of the change in the FTC's criteria when they first adopted the Cigarette Rule and the tendency of litigants and state courts to follow their own precedents once an appellate court in the jurisdiction decided the issue.[63] Almost all of the state Little FTC Acts were enacted in the 1960s and early 1970s. The Cigarette Rule was articulated by the Commission in 1964 and quoted in the Supreme Court's decision in *FTC v. Sperry &*

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[55] Georgia, Mississippi, Nebraska, West Virginia, Wisconsin, and Wyoming.

[56] *See, e.g.*, Alaska v. O'Neil Investigations, Inc., 609 P.2d 520, 535 (Alaska 1980); PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So.2d 773, 777 (Fla. 2003); Hawaii Community Federal Credit Union v. Keka, 11 P.3d 1, 16 (Haw. 2000); Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 961 (Ill. 2002); Jefferson v. Chevron U.S.A. Inc., 713 So.2d 785 (La. Ct. App. 1998); Morrison v. Toys "R" Us, Inc., 806 N.E.2d 388, 392 (Mass. 2004); Rohrer v. Knudson, 203 P.3d 759, 763–64 (Mont. 2009); Milford Lumber Co., Inc. v. RCB Realty, Inc., 780 A.2d 1259, 1262–63 (N.H. 2001); Johnson v. Beverly-Hanks & Assocs., 400 S.E.2d 38, 42 (N.C. 1991); McInerney v. Pinehurst Area Realty, Inc., 590 S.E.2d 313, 316 (N.C. Ct. App. 2004); Ames v. Oceanside Welding and Towing Co., 767 A.2d 677, 681 (R.I. 2001); Christie v. Dalmig, Inc., 396 A.2d 1385, 1387–88 (Vt. 1979).

[57] Okla. Stat. Ann. § 15-752.14 (West 2009).

[58] Mo. Code State Regs. tit. 15 § 60-8.020 (2009).

[59] *See, e.g.*, Glazer v. Dress Barn, Inc., 873 A.2d 929, 959–60 (Conn. 2004); Hartford Elec. Supply Co. v. Allen-Bradley Co., 736 A.2d 824, 842–43 (Conn. 1999); Cheshire Mortgage Servs. v. Montes, 612 A.2d 1130, 1147 (Conn. 1992); McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1192 (Conn. 1984); Blake v. Fed. Way Cycle Ctr., 698 P.2d 578, 583 (Wash. App. 1985).

[60] *See, e.g.*, Gentry v. Yonce, 522 S.E.2d, 137, 143 (S.C. 1999); Wright v. Craft, 640 S.E.2d 486, 500 (S.C. App. 2006).

[61] *See* Belt, *supra* note 1, at 249–50, 252.

[62] Rohrer v. Knudson, 203 P.3d 759, 763–64 (Mont. 2009). Dictum in an earlier Montana Supreme Court decision had criticized a jury charge based on the criteria set forth in 15 U.S.C. § 45(n) as not stating "what, exactly, in lay terms, constitutes an unfair trade practice." Harne v. Deadmond, 954 P.2d 732, 734 (Mont. 1998). The Connecticut Appellate Court rejected an argument based on the current FTC criteria without discussion in *Johnson Electric Co. v. Salce Contracting Associates*, 805 A.2d 735, 738, 744 (Conn. App. 2002). The Connecticut Supreme Court has recognized the issue in several cases but has not addressed it because the issue was not raised on appeal. *See, e.g.*, Am. Car Rental, Inc. v. Comm'r of Consumer Protection, 869 A.2d 1198, 1205 n.6 (Conn. 2005).

[63] *See* Belt, *supra* note 1, at 304–05; Paul Sobel, *Unfair Acts or Practices Under CUTPA—The Case for Abandoning the Obsolete Cigarette Rule and Following Modern Unfairness Policy*, 77 Conn. B.J. 105, 106–07, 112, 125, 130, 138 (2003).

Hutchinson Co.[64] in 1972. Although the FTC's Unfairness Policy Statement was set forth in a December 1980 letter from the Commission to members of the Senate,[65] it was not cited in an FTC decision until *International Harvester Co.*[66] in December 1984 and was not cited in a judicial decision until July 1985.[67] By this time, appellate courts in a number of states had already adopted the Cigarette Rule criteria.[68] It has also been conjectured that the failure of state courts to adopt the current FTC unfairness criteria is a consequence of the discomfort state court judges may feel in engaging in the complex process of identifying the costs and benefits of a challenged practice.[69]

The failure of state courts to rely solely on the unfairness criteria set forth in 15 U.S.C. § 45(n) may . . . be influenced by significant differences in the enforcement mechanisms and remedies between the state and federal acts.

The failure of state courts to rely solely on the unfairness criteria set forth in 15 U.S.C. § 45(n) may also be influenced by significant differences in the enforcement mechanisms and remedies between the state and federal acts. Unlike the FTC Act,[70] most state Little FTC Acts provide for a private right of action,[71] in some cases by private parties that are neither competitors nor consumers.[72] Little FTC Act claims are adjudicated by generalist judges or lay juries[73] rather than by an expert administrative agency supported by a staff of economists.[74] The statutes of almost all states provide for the recovery of actual damages[75] and many provide for the recovery of

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[64] 405 U.S. 233, 244 n.5 (1972).

[65] Unfairness Policy Statement, *supra* note 16.

[66] 104 F.T.C. 949, 1070–76 (1984).

[67] *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 970 (D.C. Cir. 1985).

[68] *See* Conaway v. Prestia, 464 A.2d 847, 852 (Conn. 1983); Johnson v. Ins. Co., 266 S.E.2d 610, 621–22 (N.C. 1980); Meyers v. Chapman, Inc. v. Thomas G. Evans, Inc., 374 S.E.2d 385 (N.C. 1988); Alaska v. O'Neil Investigations, Inc. 609 P.2d 520, 535 (Ala. 1980); Christie v. Dalmig, Inc., 396 A.2d 1385, 387–88 (Vt. 1979); PMP Assocs. v. Globe Newspaper Co., 321 N.E. 2d 915, 917 (Mass. 1975); People *ex rel.* Fahner v. Hedrich, 438 N.E.2d 924, 928 (Ill. App. 1972).

[69] *See* Greenfield, *supra* note 50, at 1933; *see also* Belt, *supra* note 1, at 304.

[70] *See, e.g.*, Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974).

[71] ABA Section of Antitrust Law, Consumer Protection Law Developments 383 (2009) [hereinafter Consumer Protection Law Developments].

[72] *See, e.g.*, Beacon Property Mgmt., Inc. v. PNR, Inc., 890 So.2d 274, 278 (Fla. App. 2004); Milford Lumber Co. v. RCB Realty, Inc., 780 A.2d 1259, 1264 (N.H. 2001); ATS Southeast, Inc. v. Carrier Corp., 18 S.W.3d 626 (Tenn. 2000); Binette v. Dyer Library Assn., 688 A.2d 898 (Me. 1998); Martin Marietta Corp. v. Wake Stone Corp., 432 S.E.2d 428, 436 (N.C. Ct. App. 1993); Vermont v. Int'l Collection Serv., Inc., 594 A.2d 426, 543 (1991); Anthony's Pier Four, Inc. v. HBC Assocs., 583 N.E.2d 806, 821–22 (Mass. 1991); McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 485, 1190 (1984); Illinois ex rel. Fahner v. Walsh, 461 N.E.2d 78,82 (Ill. Ct. App. 1984).

[73] A number of states permit jury trials of unfair trade practice claims. *See, e.g.*, Conn. Gen. Stat. § 42-110g(a) (2009); Me. Rev. Stat. Ann. tit. 5, § 213(1) (West, 2009); Vt. Stat. Ann. tit. 9 § 2461(c) (2009); Hoffman v. Stamper, 867 A.2d 276, 279 (Md. 2005); Stires v. Carnival Corp., 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002); Snow v. Am. Horse Ass'n, Inc., 686 A.2d 1168 (N.H. 1996); Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. 1990); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 381 S.E.2d 903 (S.C. 1989); Gollwitzer v. Theodoro, 576 S.W.2d 109, 111 (Mo. Ct. App. 1984).

[74] *See* Greenfield, *supra* note 50, at 1933 ("The Federal Trade Commission, with its staff of economists, is much better able to conduct the necessary inquiry than is a consumer seeking a private remedy or a court determining whether the consumer is entitled to that remedy."). The Supreme Court has noted that the FTC "was created with the avowed purpose of lodging the administrative functions committed to it in a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected . . . ." FTC v. Keppel & Bro., 291 U.S. 304, 314 (quoting S. Rep. No. 597, 63d Cong., 2d Sess. 9, 11 (1914)) (internal quotation marks omitted). It was intended that the meaning of and application of "unfair methods of competition," was to "be arrived at by what . . . has . . . [been] called the gradual process of judicial inclusion and exclusion." FTC v. Raladam Co., 283 U.S. 643, 648 (1931) (internal quotation marks omitted). This process has also been used to describe the interpretation of unfair and deceptive acts or practices in state unfair trade practices acts. *See, e.g.*, Panag v. Farmers Ins. Co. of Washington, 204 P.2d 885, 894–95 (Wash. 2009); Associated Inv. Co. Ltd. Partnership v. Williams Associates IV, 645 A.2d 505, 509–10 (Conn. 1994).

[75] *See* Consumer Protection Law Developments, *supra* note 71, at 383–84.

enhanced damages and the award of attorneys' fees.[76] In contrast, as the FTC itself has noted in response to concerns that its definition of "unfair" in its 1980 Unfairness Policy Statement was too imprecise to give adequate notice of what conduct will be considered improper, a finding by the Commission that an act or practice is unfair leads to the imposition of limited remedies.[77]

As discussed in connection with the Unfairness Policy Statement and 15 U.S.C. § 45(n), significant uncertainty exists concerning how to apply the required cost-benefit balancing test.[78] The problem posed by this uncertainty is exacerbated in private litigation allowed by most Little FTC Acts in that the interests to be balanced must be identified[79] and, in a case tried to a jury, the jury must be instructed concerning how to apply the test. Applying the criteria of 15 U.S.C. § 45(n) in private litigation also appears to place upon the plaintiff the burden of proving that the injury could not reasonably have been avoided. Although consistent with the FTC's approach of limiting enforcement to situations where the market is not self-correcting,[80] in the context of private litigation, placing this burden on the plaintiff seems inconsistent with the general abandonment by the states of the contributory negligence defense in tort actions[81] and may create a significant barrier to establishing a violation.[82]

There are, of course, elements of ambiguity in the Cigarette Rule criteria. The first criteria permits a finding of unfairness based on conduct that "is within least the penumbra of some common law, statutory, or other established concept of unfairness. . . ."[83] Although frequently recited, this

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[76] *Id.* at 388, 391–92, 397–98, 410, 414, 421–22, 425, 429, 439, 459, 463, 466, 474.

[77] Companion Statement on the Commission's Consumer Unfairness Jurisdiction (1980), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,003 at 20,909-3 to 20,910 at 20,090-5. The remedies available to the FTC are reviewed in CONSUMER PROTECTION LAW DEVELOPMENTS, *supra* note 71 at 257–85.

[78] *See supra* notes 36–38.

[79] For example, is the cost-benefit analyses limited to the parties or does it extend to non-party consumers or competitors? *See, e.g.*, McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1885, 1192 (Conn. 1984) (holding that the trial court "could reasonably have concluded that [the plaintiff's] . . . loss [as a result of a franchise being awarded to a nearby competitor] was outweighed by continuing benefits to consumers arising from competition."). After *McLaughlin Ford*, but not in reaction to that decision, the Connecticut legislature amended the statute to provide that "[p]roof of public interest or public injury shall not be required . . . ." CONN. PUB. ACT 84-468, § 2 (1984).

[80] *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 976 (D.C. Cir. 1985).

[81] *See* Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 978 n.4 (2003) (noting that "only four states have retained contributory negligence rules"). In *Williams Ford, Inc. v. Hartford Courant Co.*, 657 A.2d 212, 228 (Conn. 1995), the court held, as a matter of law, that a plaintiff which had been found 10 percent contributorily negligent could not recover for injury caused by an unfair act or practice.

[82] *See, e.g.*, Davis v. Ford Motor Credit Co., 101 Cal. Rptr. 3d 697, 710 (Cal. App. 2009) (holding that any injury suffered by borrower from lender's practice of applying payments received to allegedly delinquent installments could have been avoided by making timely payments); Tietsworth v. Sears, Roebuck and Co., 2009 WL 3320486, at *7 (N.D. Cal. Oct. 13, 2009) (suggesting that plaintiffs could reasonably have avoided injury from defective product by purchasing an extended warranty); Legg v. Castruccio, 642 A.2d 906, 918 (Md. Ct. Spec. App. 1994) (holding that tenant who was charged for utilities used by another tenant could have avoided the injury because the tenant learned of the utility situation early in her tenancy and she could have moved to another location).

[83] Cigarette Rule Statement, *supra* note 5, at 8355.

[84] Dahlberg v. Middleborough Trust Co., 452 N.E.2d 281, 286 (Mass. App. Ct. 1983) (holding that knowingly permitting a former trustee to withdraw funds to discharge a personal debt owed bank lies well within the penumbra of some common law concept of unfairness); Massachusetts Eye and Ear Infirmary v. QLT, Inc., 495 F. Supp. 2d 188, 215 (D. Mass 2007), *aff'd*, 532 F.2d 47, 69–70 (lst Cir.), *clarified on denial of reh'g*, 559 F.3d 1 (lst Cir. 2009) (holding that conduct was unfair because it fell within the penumbra of an unjust enrichment claim); General Elec. Co. v. Lyon, 894 F. Supp. 544, 551–52 (D. Mass. 1995) (holding that spreading false rumors, harassing former employees and exerting improper influence on a third party to terminate a business relationship "might well fall within the 'penumbra' of an established concept of unfairness."); Shell Oil Co. v. Wentworth, 822 F. Supp. 878, 885 (D. Conn. 1995) (holding that selling non-Shell gasoline without adequate debranding signage was "within at least the penumbra of some common law, statutory or other established concept of unfairness").

criteria has only seldom been relied upon by state courts to find unfairness.[84] The difficulty of determining or explaining to a jury the boundaries of the "penumbra" of an "established concept of unfairness" are obvious. Aspects of the "immoral, unethical, oppressive or unscrupulous" criterion of the Cigarette Rule may be less than crystal clear. However, except for immorality,[85] these are concepts that courts apply in other contexts[86] and state courts have applied the prohibition of "unethical,"[87] "oppressive,"[88] and "unscrupulous"[89] conduct in a number of cases.

Only Five States Apply Post-Cigarette Rule Unfairness Criteria. One state, Maryland, applies criteria of the FTC's Unfairness Policy Statement[90] and four apply the unfairness criteria set forth in 15 U.S.C. § 45(n).[91] All of these states were influenced by the directive in the state statutes to give deference to federal interpretations of section 5 (a)(1) of the FTC Act.[92] However, in two cases, the state courts appeared also to be influenced by a mistaken understanding of the unfairness criteria being applied in other states.[93]

Some States Have Not Conclusively Articulated a Standard. The seven remaining states have not reached any final determination concerning the criteria for determining unfairness. As noted,[94] six have not spoken to it; and the California lower appellate courts are divided concerning what criteria to apply to determine whether acts or practices, other than those that cause competitive injury, are unfair. Before 1999, the lower California appellate courts developed two different standards, one similar to the Cigarette Rule[95] and one that balanced the utility of the defendant's con-

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85 No state court decision has been found in which conduct was determined to be unfair only on the basis that it was immoral.

86 For example, the corporation statutes of many states permit the dissolution of a closely held corporation based on oppression of minority shareholders. *See* James D. Cox & Thomas Lee Hazen, Cox & Hazen on Corporations §14.13, at 856 (2d ed. 2003).

87 *See, e.g.*, Votto v. Am. Car Rental, Inc., 871 A.2d 985 (Conn. 2005) (holding that use of plaintiff's signature on blank credit card slip to charge more than twice the amount of the estimated cost of a repair was unscrupulous, immoral and oppressive); Johnson Elec. Co. v. Salce Contracting Assocs., 805 A.2d 735, 738, 744 (Conn. App. 2002) (holding that "bid shopping" was unethical in that it failed to conform to the established trade practice in the construction industry).

88 *See, e.g.*, Bertassi v. Allstate Ins. Co., 522 N.E.2d 949, 952 (Mass. 1988) (holding that coercive insistence on plaintiff signing agreement capitulating to defendant's subrogation rights as a precondition to defendant's compliance with its contractual obligations was unfair); Dubey v. Pub. Storage, Inc., 918 N.E.2d 265, 278 (Ill. App. 2009); Centerline Equip. Corp. v. Banner Personnel Serv., Inc., 545 F. Supp. 2d 768, 780 (N.D. Ill. 2008) (holding that "[c]onduct is oppressive only if it imposes a lack of meaningful choice or an unreasonable burden on its target.").

89 *See, e.g.*, Sunbelt Rentals, Inc. v. Head & Engquist Equip. L.L.C., 620 S.E.2d 222, 230 (N.C. App. 2005); Moore v. Marty Gilman, Inc., 965 F. Supp. 203, 220 (D. Mass. 1997).

90 *See* Legg v. Castruccio, 642 A.2d 906, 914–17 (Md. Ct. Spec. App. 1994).

91 *See* Tucker v. Sierra Builders, 180 S.W.3d 109, 116–17 (Tenn. Ct. App. 2005); Maine v. Weinschenk, 868 A.2d 200, 206 (Me. 2005) (citing 15 U.S.C. § 45(n)); Swiger v. Terminix Int'l Co., 1995 WL 396467, at *5–*6 (Ohio Ct. App. June 28, 1995); Iowa Code Ann. § 714.16. I n (West 2009).

92 *See, e.g.*, Tucker v. Sierra Builders, 180 S.W.3d 109, 116–17 (Tenn. Ct. App. 2005) (holding that "[w]hile other states may have decided to use other criteria, we have determined that Tenn. Code Ann. § 47-18-115 requires us to use the criteria currently used by the Commission"); Legg v. Castruccio, 642 A.2d 906, 917–18 (Md. Ct. Spec. App. 1994).

93 *See Legg*, 642 A.2d at 917–18 (stating that "our research has not uncovered any jurisdiction that continued to follow the superseded 1964 standards); *Tucker*, 180 S.W.3d 109, 117 n.11 (recognizing that "[n]ot all states used the Commission's current unfairness criteria to guide their interpretation of their own Little FTC Act," but misleadingly stating that Connecticut and Washington used the 15 U.S.C. § 45(n) criteria). As noted *supra* note 59, the courts of Connecticut and Washington use substantial consumer injury criteria in the Commission's Unfairness Policy Statement only to elaborate the third Cigarette Rule criteria and otherwise apply the other Cigarette Rule criteria.

94 *See supra* note 55.

95 *See, e.g.*, People v. Casa Blanca Convalescent Homes, Inc., 206 Cal. Rptr. 3d 164, 177 (Cal. Ct. App. 1984).

duct against the gravity of the harm to the victim.[96] In a 1999 case involving unfair competition, the California Supreme Court rejected both of those standards. The court expressly stated, however, that its decision did not apply to actions by consumers or competitors alleging other types of unfair practices.[97] Subsequent California lower appellate courts have continued to apply different criteria. In *Camacho v. Automobile Club of Southern California*,[98] the court adopted the criteria set forth in 15 U.S.C. § 45(n) despite the urging of the California Attorney General to apply the Cigarette Rule test. The court relied on the criticism of the Cigarette Rule test in *Cel-Tech* and concluded that the 15 U.S.C. § 45(n) test "is more focused, less dependent on subjective notions of fairness and for these reasons, easier to administer."[99] The court rejected an argument that the 15 U.S.C. § 45(n) test did not establish a "normative" standard.[100] Some other recent California appellate decisions have, however, declined to follow *Camacho*.[101]

The choice of criteria . . . will affect . . . the clarity and scope of the unfairness prohibition . . . the level of enforcement activity and the precedential value of cases decided using different criteria.

Effects of the Choice of Criteria

The choice of criteria for determining unfairness will affect both the clarity and scope of the unfairness prohibition and may also affect the level of enforcement activity and the precedential value of cases decided using different criteria. By requiring public policy to be clear and well-established before it could provide an independent basis for a finding of unfairness and by deleting the "immoral, unethical, oppressive, or unscrupulous" criteria, the Commission's 1980 Unfairness Policy Statement removed significant potential ambiguity from the criteria for determining unfairness. The elaboration of the substantial injury criteria in the Unfairness Policy Statement, now embodied in 15 U.S.C. § 45(n), also provided standards for making a determination based on that criteria.

However, when 15 U.S.C. § 45(n) eliminated the ability to rely on even a clear and well-established public policy as a primary basis for determining unfairness and allowed public policy to be considered only along with all other evidence, it significantly reduced the role of legal standards external to the FTC Act in determining unfairness, thereby requiring a balancing of cost and benefit to be made in every case before unfairness can be determined. Thus, 15 U.S.C. § 45(n) made the determination of unfairness both more clear and less clear: It made the standard more clear by eliminating potentially ambiguous elements of the Cigarette Rule standard; it made it less clear by requiring application of the balancing test in every case. Because of the relatively small body of law applying this standard, either in the states or in the Commission, the "gradual process of judicial inclusion and exclusion"[102] does not give many concrete examples of the kind of conduct that will be considered unfair under these criteria. Moreover, the use of 15 U.S.C. § 45(n) as the

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[96] *See, e.g.*, Motors Inc. v. Times Mirror Co., 162 Cal. Rptr. 3d 543, 546 (1980) (holding that in determining whether a practice is unfair, "the utility of the defendant's conduct [is weighed] against the gravity of the harm to the [alleged victim]").

[97] Cel-Tech Commc'ns., Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 545–44 (Cal. 1999).

[98] 48 Cal. Rptr. 3d 770 (Cal. App. 2006).

[99] *Id.* at 777.

[100] *Id.* at 777–78.

[101] *See, e.g.*, Buller v. Sutter Health, 74 Cal. Rptr. 3d 47, 55 (Cal. App. 2008) (applying a test requiring alleged unfair practice to be "tethered" to a legislatively declared policy or some actual or threatened impact on competition); Lorano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735–36 (9th Cir. 2007) (affirming a decision of the district court which applied a balancing test and discussing the conflicting California precedents); McKell v. Washington Mut., Inc., 49 Cal. Rptr. 3d 227, 240–41 (Cal. Ct. App. 2006) (applying a combination of the Cigarette Rule criteria and a balancing test).

[102] *See supra* note 74.

sole criterion for determining unfairness casts into doubt the precedential value of numerous state court decisions (and many decisions applying the FTC Act before 1980) that did not apply this standard in predicting what kinds of specific conduct will be considered unfair. The wide range of facts potentially relevant under the 15 U.S.C. § 45(n) criteria are likely to increase the complexity and cost of establishing unfairness.[103]

Were the majority of states to move away from the Cigarette Rule and instead apply the criteria set forth in the FTC's Unfairness Policy Statement or those set forth in 15 U.S.C. § 45(n), it seems likely that there would be a significant reduction in enforcement activity, particularly private enforcement activity, with respect to unfair acts and practices. This conclusion is supported by: (1) one of the apparent purposes of adopting the 1980 Unfairness Policy Statement and enacting 15 U.S.C. § 45(n) was to restrict the FTC's use of its power to regulate unfair practices;[104] (2) the significant reduction in FTC enforcement activity concerning unfair acts and practices after it issued its 1980 Unfairness Policy Statement;[105] and (3) the significantly higher number of cases brought based on claims of general unfairness in states that apply some form of the Cigarette Rule criteria in contrast to those that apply the criteria in the Unfairness Policy Statement or in 15 U.S.C. § 45(n).[106] One consequence of this, and the limited use by the FTC of its unfairness authority since 1980, is that the body of case law interpreting the criteria of 15 U.S.C. § 45(n) is meager, although some California appellate courts have, since 2006, begun to develop case law applying those criteria. It also seems likely that the adoption of the criteria set forth in 15 U.S.C. § 45(n) would increase the difficulty of establishing a violation. The standard in 15 U.S.C. § 45(n) sets forth three criteria, all of which must be established in order to establish a violation.[107] Thus, a change in the criteria employed from those of the Cigarette Rule to those of the Unfairness Policy Statement or 15 U.S.C. § 45(n) seems likely to reduce the amount of enforcement, particularly private enforcement, of statutes prohibiting "unfair acts and practices." Significantly, before 15 U.S.C. § 45(n) was adopted, "State attorneys general . . . expressed concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State law"

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[103] *See* Averitt, *supra* note 4, at 248–50 (noting that use of the balancing cost would "tend[ ] inexorably to make litigation more time-consuming and expensive.").

[104] *See, e.g.*, Braucher, *supra* note 8, at 409 ("The Policy Statement clearly had a political purpose—to keep Congress from stripping the FTC of part or all of its power to regulate unfair practices. The language of the Policy Statement shows the Commission striving to appease free-marketeers . . . .").

[105] *See supra* notes 49–52. Of course, it is possible that the decline in the FTC's use of its unfairness jurisdiction after 1980 was also affected by the Commission's concern about congressional reaction to its use rather than the modification of the criteria.

[106] Based on the number of reported decisions (both officially and electronically), the largest number of decisions employing the Cigarette Rule test have been rendered in Connecticut, Massachusetts, North Carolina, California, Louisiana, Illinois, Washington, and Florida. The relatively small number of decisions based on general unfairness in other Cigarette Rule states might be explained by other provisions of the particular statutes, each as provisions limiting private remedies to consumers (e.g., Hawaii, Missouri, Rhode Island, and Vermont), or by the fact that a number of state statutes also specifically identify conduct deemed to be unfair (e.g., New Hampshire, North Carolina, Rhode Island, Vermont, Oklahoma, and Missouri), thereby creating less need to rely on the general prohibition of unfairness. There are relatively few decisions involving claims of unfair acts or practices in states applying the criteria of the Unfairness Policy Statement or 15 U.S.C. § 45(n), although, as with states applying the Cigarette Rule criteria, there are other possible explanations for the small number of decisions, such as the absence of any private remedy (Iowa did not provide for a private remedy until 2009), private remedies limited to consumers (e.g., Maryland and Ohio) or the inclusion in the act of provisions specifically identifying conduct deemed to be unfair (e.g., Maryland, Maine, Tennessee, and Iowa).

[107] *See, e.g.*, Davis v. Ford Motor Credit. Co., 101 Cal. Rptr.3d 697, 709–10 (Cal. App. 2009); Tietsworth v. Sears, Roebuck and Co., 2009 WL 3320486, at *7 (N.D. Cal. Oct. 13, 2009).

and Congress expressly disclaimed any such intention.[108] State attorneys general have also opposed judicial adoption of the criteria in the FTC's Unfairness Policy Statement or 15 U.S.C. § 45(n) and urged application of the Cigarette Rule criteria.[109] The effect of reduced enforcement activity resulting from adoption of the 15 U.S.C. § 45(n) criteria would likely be felt most strongly in those states in which unfairness is now determined under the Cigarette Rule criteria and in California,[110] where the state's highest court has not yet established a standard.

A Legislative Solution?

Adoption of the criteria set forth in 15 U.S.C. § 45(n) rather than those of the Cigarette Rule may have significant policy implications, including the level of enforcement, particularly private enforcement, for the ease or difficulty in establishing a violation, and the clarity with which persons charged with compliance are informed concerning what conduct violates the act. Consequently, the articulation of a standard for determining "unfairness" under state unfair trade practices acts may appropriately be a subject for legislative rather than judicial determination. This was the approach taken by Congress at the urging of the FTC when it enacted 15 U.S.C. § 45(n) and is the approach taken by the legislatures of Iowa and Oklahoma.[111]

A state legislature would not necessarily weigh relevant policy considerations in the same way as did Congress in 1994 or, indeed, as do other state legislatures. But, they may be in the best position to determine the appropriate degree of deference that should be given to precedents interpreting the FTC Act. When the Little FTC Acts were enacted in the 1960s and 1970s, there were sound reasons to direct that states could use FTC precedents, there being no body of state law interpreting unfair acts and practices. However, since that time, a number of states have developed substantial bodies of case law interpreting unfairness, and the need for reliance on federal precedent has diminished.[112] Arguably, multistate businesses might benefit from the application of a uniform federal and state unfairness standard, but the differences among the substantive prohibitions, remedies, and enforcement mechanisms among the state acts would significantly erode any such benefit.

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[108] The Senate Report on the amendment stated:

> The Committee is aware that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law. . . . Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts, including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices. The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the future development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decision-making. Sound principles of federalism limit the impact of this section to the FTC only.

Sen. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994).

[109] *See* Camacho v. Auto. Club of So. Cal., 48 Cal. Rptr.3d 770, 777 (Cal. App. 2006); Legg v. Castruccio, 642 A.2d 906, 914 (Md. Ct. Spec. App. 1994).

[110] As discussed *supra* in the text accompanying notes 95–101, the California lower appellate courts are divided concerning the standard that should be applied to determine unfairness.

[111] As is illustrated by the statutes of Iowa (Iowa Code Ann. § 714.16(1)(n) (West 2009)), adopting the criteria of 15 U.S.C. § 45(n), and Oklahoma (Okla. Stat. Ann. § 15-752-14 (West 2009)), adopting the Cigarette Rule criteria, not all legislatures would reach the same conclusion concerning the appropriate criteria.

[112] *See* Belt, *supra* note 1, at 318–19.

State legislatures may also be in the best position to strike the appropriate balance among the need for clarity; the complexity, and cost of enforcement; and the desired level of public and private enforcement activity, all of which may be affected by the choice of criteria. For example, a state legislature may choose, as did the Commission in its Unfairness Policy Statement, to limit the public policy criterion to clear and well-established public policies. It may choose to eliminate reference to immorality as a basis for unfairness, but allow unfairness to be based on unethical, oppressive, or unscrupulous conduct. It may retain the substantial injury criterion or not,[113] determine whether the ability to avoid an injury would preclude the establishment of a violation, define the costs and benefits to be considered, and decide whether a finding of unfairness requires a consideration of all or some of the criteria[114] or may be based on consideration of only one.[115]

Legislative action would have the potential advantage of resolving more quickly whether a state should apply the current FTC standard for determining unfairness or whether it should modify the Cigarette Rule or other criteria formerly applied by the FTC. Decades have passed without the highest court of all but a few states resolving whether the FTC's current unfairness standard or some other criteria should be applied. Unless and until the state legislature defines unfairness criteria, the issue of what criteria to apply in a state where the highest court has not yet rejected the current FTC standard is a potentially fruitful litigation option. A defendant whose business practice is claimed to violate a public policy or ethical standard may seek to have a court apply the current FTC criteria to avoid a finding of liability based on the expansive and in some respects vague Cigarette Rule criteria. A defendant may also seek to have the current FTC criteria applied so it can argue that its practice has counterveiling benefits, that the plaintiff's injury was not substantial, or to shift the burden to the plaintiff to prove that it could not reasonably have avoided injury. A plaintiff who cannot point to a clear violation of a public policy or ethical standard (e.g., a plaintiff claiming injury as a result of a breach of contract) may seek to have the current FTC criteria applied so it can argue that the defendant's business practice caused it substantial injury. The issue concerning what criteria to apply can be raised in all but a few of the states with a Little FTC Act prohibiting "unfair acts or practices." ●

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[113] For example, the substantial injury criterion is not included among the criteria articulated by the South Carolina Court of Appeals. *See, e.g.*, McInery v. Pinehurts Area Realty, Inc., 590 S.E.2d 313, 316 (N.C. Ct. App. 2004).

[114] *See, e.g.*, Mo. Code State Regs. § 60-8.020 (2006) (appearing to require the substantial injury criterion as well as one of the other criteria).

[115] *See, e.g.*, Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 952 161 (Ill. 202 (citing Cheshire Mortgage Serv., Inc. v. Montes, 612, A.2d 1139, 1143 (Conn. 1992).