

The State of Tennessee joins Plaintiff Tammy Ganzevoort’s Petition for Rehearing on the grounds that the Court’s opinion conflicts with the Tennessee Consumer Protection Act and established principles of consumer protection law. The opinion states or implies that in order to establish a deceptive act or practice under the Act, a plaintiff must establish some degree of fault—either intent or negligence—and knowledge of the deception. The opinion could also be read to recognize good faith and compliance with industry standards as valid affirmative defenses, and to adopt the “reasonable consumer” standard for evaluating deception claims. In the context of this case, these holdings may not appear revolutionary, but the opinion adds elements to a Consumer Protection Act claim that were purposefully excluded by the legislature, and it significantly impairs consumers’ ability to obtain redress for injuries caused by deceptive business practices.

The Tennessee Consumer Protection Act is based upon a widely-adopted uniform statute modeled after the Federal Trade Commission Act.¹ In the 1970s, the Federal Trade Commission encouraged the adoption of “mini-FTC” acts by the states in order to increase enforcement efforts against unfair and deceptive business practices.² The language in the Tennessee Act prohibiting “[u]nfair or deceptive acts or practices” affecting the conduct of any trade or commerce³ mirrors the FTC Act, and the Tennessee Act provides that interpretation of the phrase “unfair or deceptive acts or practices” shall be consistent with interpretations given by the FTC

¹See M. Leaffer & M. Lipson, Consumer Actions Against Unfair and Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521, 531, 563 (1980).

²Id. at 521-22.

³Tenn. Code Ann. § 47-18-104(a).

and the federal courts.⁴ Interpretations of the FTC Act consistently reject any implication that proof of deception requires proof of intent⁵ or knowledge.⁶

When the Consumer Protection Act was passed, the FTC standard for establishing a “deceptive act or practice” required proof that the practice had a “tendency or capacity to mislead” a significant number of vulnerable or credulous consumers.⁷ In 1984, the FTC issued a controversial policy statement, over the dissent of two of the five commissioners, setting a new standard for establishing a deceptive act or practice. Under the new standard a plaintiff must prove that (1) the practice is likely to mislead consumers, (2) consumers would be misled even when acting reasonably under the circumstances, and (3) the deception is material to consumers.⁸ The federal courts have not embraced the new standard,⁹ and no Tennessee court has taken a

⁴Tenn. Code Ann. § 47-18-115.

⁵FTC v. Amy Travel Service Inc., 875 F.2d 564 (7th Cir. 1989); Equitable Life Assurance v. Porter-Englehart, 867 F.2d 79, 89 (1st Cir. 1989); Rousseau v. Eshleman, 519 A.2d 243, 249 (N.H. 1986); Swanson v. Bankers Life Co., 450 N.E.2d 577, 580 (Mass. 1983); Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981).

⁶Regency Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990) (quoting W. Rothschild, A Guide to Georgia’s Fair Business Practices Act of 1975, 10 Ga. L. Rev. 917, 926 (1976)); Equitable Life Assurance, 867 F.2d at 89.

⁷E.g., FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934); American Home Products Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982); Williams v. Bruno Appliance & Furniture Mart, Inc., 379 N.E.2d 52, 54 (Ill. App. 1978); Guggenheimer v. Ginsburg, 372 N.E.2d 17, 19 (N.Y. 1977).

⁸International Harvester Co., 104 FTC 949 (1984); Thompson Medical Co., 104 FTC 648 (1984).

⁹The Tenth Circuit has held that the new standard is not binding on the FTC, AMREP Corp. v. FTC, 769 F.2d 1171 (10th Cir. 1985), and the Supreme Court has held that the meaning of the phrase “deceptive practices” should be determined by judicial construction. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

position on the issue. Neither standard, however, requires that a plaintiff prove bad faith, intent to deceive, or knowledge that a misrepresentation or omission is deceptive.

In setting out the standard for establishing deception, this Court’s opinion relies upon definitions of “deceptive acts or practices” found in two opinions from other state courts. The Illinois definition requires proof of “intent that others rely on the concealment.” This language is a direct quotation from the Illinois statute,¹⁰ but the Tennessee Consumer Protection Act and the FTC Act do not contain similar language. Even the Illinois statute states that the phrase “deceptive acts or practices” includes, but is not limited to, conduct that meets the definition quoted in this Court’s opinion.¹¹ Tennessee courts have recognized that the concept of deception is often thought to include an element of intent¹²—but they have rejected any conclusion that proof of deception under the Consumer Protection Act requires proof of intent.¹³

This Court’s opinion also relies on a definition of deceptive practices from the Vermont Supreme Court that does not require proof of intent, but that appears to adopt the “reasonable consumer” standard. As is discussed above, this standard comes from a policy statement issued by the FTC in 1984. The “reasonable consumer” standard contradicts years of case law recognizing the importance of protecting unsophisticated and vulnerable consumers. The United State Supreme Court explained the basis for this concern as early as 1937:

Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive

¹⁰Ill. Stat. Ann. ch.815, sec. 505/2 (formerly ch.121 1/2).

¹¹Id.

¹²Groover v. Torkell, 645 S.W.2d 403, 409 (Tenn. Ct. App. 1982)

¹³Smith v. Scott Lewis Chevrolet, Inc., 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992).

enterprises and that the rule of caveat emptor should not be relied upon to reward fraud and deception.¹⁴

Since that time, courts have considered whether an act or practice is deceptive not just to the average “reasonable consumer,” but also whether it is deceptive to a significant number of unsophisticated or vulnerable consumers.¹⁵ The Tenth Circuit has held that the FTC’s new deception standard is not binding on the FTC itself,¹⁶ and the U.S. Supreme Court has held that the meaning of the phrase “deceptive practices” should be determined by judicial construction.¹⁷ The State submits that it would be inappropriate to overturn years of federal court precedent, which is to guide interpretation of the Consumer Protection Act, based upon a non-binding policy statement issued by a split panel of FTC Commissioners.

The central problem with this Court’s opinion is not, however, that it could be read as an endorsement of the “reasonable consumer” standard, but that it appears to read elements of common law causes of action into the Consumer Protection Act. The FTC Act and the state consumer protection statutes were passed because of a consensus that traditional common law remedies such as fraud and negligent misrepresentation did not provide sufficient protection to consumers.¹⁸ Thus, statutes based upon the FTC model “substantially reduce[] the requirements

¹⁴FTC v. Standard Education Society, 302 U.S. 112, 116 (1937).

¹⁵See Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961); Guggenheimer, 372 N.E.2d at 19.

¹⁶AMREP Corp. v. FTC, 769 F.2d 1171 (10th Cir. 1985).

¹⁷FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

¹⁸See generally, M. Leaffer & M. Lipson, *supra* note 1 at 521-534.

of proof consumers must meet to achieve redress for ‘consumer fraud.’”¹⁹ Two of the most important elements of proof that were removed were scienter and intent to deceive.²⁰ Thus, the Consumer Protection Act changes the focus from determining who is at fault to determining the effect of a particular action on consumers.²¹ In effect, then, contrary to this Court’s opinion, the Consumer Protection Act does impose a form of strict liability²² because it requires no proof of fault.

In some cases, it may seem unfair to hold a merchant responsible for misleading representations or omissions for which the merchant is not at fault. But where there is an innocent seller and an innocent buyer, one of the parties must bear the burden of any loss. When a consumer is deceived by a business acting in good faith, the Consumer Protection Act places

¹⁹Id. at 534; see also, Heller v. Silverbranch Constr. Corp., 382 N.E.2d 1065, 1069-70 (Mass. 1978) (“[C]onsumer protection statutes created new substantive rights by making conduct unlawful which was not previously unlawful under the common law or any prior statute. The statutory language is not dependent on traditional tort or contract law concepts for its definition.”).

²⁰Regency Nissan, Inc. v. Taylor, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990) (quoting W. Rothschild, A Guide to Georgia’s Fair Business Practices Act of 1975, 10 Ga. L. Rev. 917, 926 (1976)).

²¹Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981) (“[T]he intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor’s conduct on the consuming public.”).

²²See Allais v. Donaldson, Lufkin & Jenrette, 532 F. Supp. 749, 751 (S.D. Tex. 1982) (“Since its enactment in 1973, the DTPA has been a strict liability statute.”); Beslity v. Manhattan Honda, 450 N.Y.S.2d 278, 280 (N.Y. Civ. Ct. 1982) (“a form of strict liability is imposed on advertisers”); T. Holdych, Standards for Establishing Deceptive Conduct Under State Deceptive Trade Practices Statutes that Impose Punitive Remedies, 73 Or. L. Rev. 235, 343 (1994) (“Perhaps the greatest difficulty with deceptive trade practices statutes and their enforcement is the use of strict liability for remedies other than injunctive and restitutionary relief.”); M. Lynn, Anatomy of a Deceptive Trade Practices Case, 31 Sw. L.J. 867, 882 (1977) (arguing that without a strong bona fide error exception, “[s]ubstantive misrepresentations would still be condemned without regard to fault or the intent of the merchant; the Act would remain one which essentially imposes strict liability on the person who makes a misrepresentation.”).

the burden on the business to make the consumer whole. There are good reasons that the legislature has chosen this allocation of responsibility. Most importantly, a business is usually in a better position to prevent consumer deception and injury. The mini-FTC acts

attempt[] to place on more equal terms seller and consumer. These remedial statutes are all predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace. Instantly, the Legislature strove, by making certain modest adjustments, to ensure the fairness of market transactions.²³

Mini-FTC acts like the Tennessee Consumer Protection Act focus upon the effect of a practice on the marketplace rather than upon a determination of fault²⁴ because the statutes are concerned primarily with preventing and redressing consumer injury, not with punishing wrongdoers.

Because fault is not an issue in a Consumer Protection Act case, it follows that good faith is not a defense.²⁵ Nor is it a defense that a certain practice is accepted within an industry,²⁶ or that a defendant has met a generally accepted standard of care.²⁷ These principles are not only well established in FTC and state consumer protection case law, they are clear from the Tennessee statute. First, the Act exempts “[a] retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that such

²³Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 816 (Pa. 1974).

²⁴Marshall v. Miller, 276 S.E.2d at 403.

²⁵Allais v. Donaldson, Lufkin & Jenrette, 532 F. Supp. 749, 751 (S.D. Tex. 1982); Short v. Demopolis, 691 P.2d 163, 172 (Wash. 1984); Marshall v. Miller, 276 S.E.2d at 403.

²⁶E.g., Commonwealth v. DeCotis, 316 N.E.2d 784 (Mass. 1974).

²⁷See Rousseau v. Eshleman, 519 A.2d 243, 249 (N.H. 1986) (“liability can result regardless of the degree of care used in providing the service”); Equitable Life Assurance v. Porter-Englehart, 867 F.2d 79, 89 (1st Cir. 1989) (“an act might be deceptive under § 9 even absent any showing of negligence”); Swanson v. Bankers Life Co., 450 N.E.2d 577, 580 (Mass. 1983).

claims violated this part.”²⁸ If either good faith or lack of knowledge were a defense to a claim under the Act, this exemption would be unnecessary. The treble damages provision would also make little sense. It provides for treble damages for “a willful or knowing violation,”²⁹ and states that in determining whether to award treble damages a court should consider “the good faith of the person found to have violated” the Act.³⁰ Again, if good faith or lack of knowledge were defenses, the legislature would not need to distinguish between willful or knowing violations and other violations.

For the foregoing reasons, the State respectfully joins in Plaintiff’s petition asking the Court to reconsider the following portions of its opinion:

- The adoption of definitions of “deceptive acts or practices” from the courts of Illinois and Vermont;
- The statement that the Act imposes an obligation of good faith;
- The statement that the Act does not impose duties beyond those generally accepted in a business as good practice; and
- The statement that the Act does not impose strict liability.

²⁸Tenn. Code Ann. § 47-18-111(a)(4) (emphasis added).

²⁹Tenn. Code Ann. § 47-18-109(a)(3).

³⁰Tenn. Code Ann. § 47-18-109(a)(4)(D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Michael W. Edwards, 177 East Main Street, Hendersonville, TN 37075-2542, and John R. Bradley, 311 East Main Street, Hendersonville, TN 37075-2522 on this _____ day of June, 1997.

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