

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

WIN MYINT and wife,)	
PATTY K. MYINT,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
METROPOLITAN GOVERNMENT OF)	
NASHVILLE AND DAVIDSON COUNTY,)	
TENNESSEE, MAYOR PHIL BREDESEN,)	
and THE METROPOLITAN CODES)	
DIRECTOR TERRY COBB; and)	
ALLSTATE INSURANCE COMPANY,)	
)	
Defendants-Appellees.)	S. Ct. No. 01S01-9612-CH-00238

WIN MYINT and wife,)	Davidson Chancery No. 92-3159-II
PATTY K. MYINT,)	
)	
Appellants,)	
)	
v.)	
)	
ALLSTATE INSURANCE COMPANY,)	
)	
Appellee.)	

REPLY BRIEF OF AMICUS CURIAE STATE OF TENNESSEE

JOHN KNOX WALKUP
Attorney General & Reporter

STEPHEN C. KNIGHT
Assistant Attorney General
500 Charlotte Avenue
Nashville, TN 37243-0491
(615) 741-3533
B.P.R. No. 15514

[Oral Argument Requested]

TABLE OF CONTENTS

ARGUMENT

I.	<u>The question whether the Tennessee Insurance Trade Practices Act preempts the Consumer Protection Act with respect to unfair and deceptive insurance practices is not presented by this case</u>	1
II.	<u>The language of the Insurance Trade Practices Act and the Consumer Protection Act indicates that the statutes provide concurrent jurisdiction over unfair and deceptive insurance practices</u>	2
III.	<u>The exemption in the Tennessee Consumer Protection Act for acts or transactions required or specifically authorized by other laws, rules or regulations does not exempt practices deemed unlawful by the Insurance Trade Practices Act</u>	7
IV.	<u>Under traditional rules of statutory construction, if two statutes are not irreconcilable they must each be given effect. The Consumer Protection Act and the Insurance Trade Practices Act are fully compatible, and are in fact designed to avoid any conflict, and so each must be given full effect</u>	13
A.	<u>Allstate is unable to identify any conflict between the Consumer Protection Act and the Insurance Trade Practices Act</u>	14
B.	<u>The Consumer Protection Act and the Insurance Trade Practices Act are designed to avoid any conflict between the statutes</u>	17
CONCLUSION	20
TABLE OF AUTHORITIES	21
CERTIFICATE OF SERVICE	26

ARGUMENT

- I. The question whether the Tennessee Insurance Trade Practices Act preempts the Consumer Protection Act with respect to unfair and deceptive insurance practices is not presented by this case.

Amicus Curiae, State of Tennessee, filed a brief in this case urging the Court to reverse the ruling of the Court of Appeals that the Consumer Protection Act does not apply to unfair or deceptive insurance claims practices if those practices also violate the bad faith insurance statute. In its response, Allstate does not defend the Court of Appeals ruling, but instead asks this Court to decide whether the Insurance Trade Practices Act displaces the Consumer Protection Act with respect to unfair and deceptive insurance practices. This question is not properly before the Court.

First, as Allstate admits in its brief, the issue was not raised by any of the parties before the trial court or the Court of Appeals.¹ The Rules of Appellate Procedure state that an appellate court is not required to grant relief to a party “responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”² This Court has stated that the “general rule” is that “questions not raised in the trial court will not be entertained for the first time on appeal.”³ The Court is, of course, free to disregard this general rule when equitable considerations dictate otherwise, or where the resolution of an issue is sufficiently clear “to obviate the necessity for any discussion.”⁴ But whatever else might be

¹Appellee’s Brief at 7 n.7.

²Tenn. R. App. P. 36(a).

³City of Elizabethtown v. Carter County, 321 S.W.2d 822, 827 (Tenn. 1959).

⁴Id.

said of the merits of Allstate's proposed interpretation of the Consumer Protection Act, it is certainly not so obvious as to obviate the necessity for any discussion.

Second, questions about the proper interplay between the Insurance Trade Practices Act and the Consumer Protection Act are not raised in this case because the Insurance Trade Practices Act does not apply. This is an action by a private party under the Consumer Protection Act alleging unfair and deceptive insurance claim settlement practices. The Insurance Trade Practices Act does not provide for a private right of action, and explicitly excludes private actions under the Act for unfair or deceptive claim settlement practices.⁵ Thus, there is no possibility that the two statutes will overlap or conflict in this case. Even under Allstate's theory of the case, the Myints' Consumer Protection Act claims would be excluded by the bad faith statute, not the Insurance Trade Practices Act.⁶

II. The language of the Insurance Trade Practices Act and the Consumer Protection Act indicates that the statutes provide concurrent jurisdiction over unfair and deceptive insurance practices.

The Consumer Protection Act applies to many areas of commerce that are specifically regulated by other statutes. In Morris v. Mack's Used Cars, this Court held that the existence of another specific regulatory statute does not affect the applicability of the Consumer Protection

⁵Tenn. Code Ann. § 56-8-104(8)(A).

⁶Appellee's Brief at 12.

Act.⁷ The Court adopted the reasoning of Skinner v. Steele,⁸ in which the Court of Appeals held that the Insurance Trade Practices Act does not exempt the insurance industry from the Consumer Protection Act. Tennessee decisions holding that the Consumer Protection Act is intended to supplement other specific regulatory statutes, including the Insurance Trade Practices Act, are based primarily upon the language of the statutes.

The Consumer Protection Act states that the powers and remedies provided “shall be cumulative and supplementary to all other powers and remedies provided by law.”⁹ The Act also provides that it is to be “liberally construed to protect consumers and others from those who engage in deceptive acts or practices.”¹⁰ The Act recognizes that other laws, rules or regulations may apply to conduct proscribed by the Consumer Protection Act, but the statute exempts only “[a]cts or transactions required or specifically authorized under laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers.”¹¹ From these provisions, the Skinner court concluded that “[t]he Act itself indicates that the provisions of the insurance code and those of the Act are to be applied concurrently.”¹²

The only specific provision of the Consumer Protection Act upon which Allstate relies is Tenn. Code Ann. § 47-18-115, which states that the Act is to “be interpreted and construed

⁷824 S.W.2d 538, 539-40 (Tenn. 1992) (“the mere existence of one regulatory statute does not affect the applicability of a broader, non-conflicting statute”).

⁸730 S.W.2d 335 (Tenn. Ct. App. 1987).

⁹Tenn. Code Ann. § 47-18-112.

¹⁰Mack’s Used Cars, 824 S.W.2d at 540 (citing Tenn. Code Ann. § 47-18-102).

¹¹Tenn. Code Ann. § 47-18-111(a)(1) (emphasis added).

¹²730 S.W.2d at 337.

consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act.” From this language Allstate concludes that the Tennessee Consumer Protection Act is not intended to apply to the business of insurance because the FTC Act does not apply to insurance.¹³ But the reason the FTC Act does not apply to insurance practices has nothing to do with section 5(A)(1) of the FTC Act. Insurance is excluded from the FTC Act, in those states that have undertaken to regulate insurance practices, by the McCarran-Ferguson Act.¹⁴ Section 5(A)(1) of the FTC Act simply states that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”¹⁵ Thus, Tenn. Code Ann. § 47-18-115 is intended to adopt federal definitions of the concepts of unfair and deceptive acts and practices. The statute does not indicate an intent to model the government of the State of Tennessee upon the federal government, or even to duplicate the functions of the Federal Trade Commission in the Tennessee Division of Consumer Affairs.

Allstate’s interpretation of the Insurance Trade Practices Act is also at odds with the plain meaning of that statute. The Act declares its purpose as follows:

The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the [McCarran-Ferguson Act] by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or

¹³Appellee’s Brief at 20-22.

¹⁴15 U.S.C. § 1012; Ray v. United Family Life Ins. Co., 430 F. Supp. 1353, 1356 (W.D.N.C. 1977).

¹⁵15 U.S.C. § 45(a)(1).

unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined.¹⁶

This language indicates the legislature’s intent to oust federal antitrust jurisdiction, not state consumer protection jurisdiction.¹⁷ Yet Allstate’s interpretation of this provision focuses not upon the statute’s reference to the McCarran-Ferguson Act, but upon the phrase “all such practices.” Allstate confuses this indication of breadth with a declaration of exclusivity. To the contrary, the Insurance Trade Practices Act is broad because the McCarran-Ferguson Act excludes federal jurisdiction only “to the extent” that the business of insurance is regulated by state law.¹⁸ As summarized by a federal court construing the same statement of purpose in North Carolina’s Insurance Trade Practices Act, the purpose of the Act is to “define or provide for the determination of ‘all such practices’ in order to oust federal antitrust jurisdiction as completely as [McCarran-Ferguson] allows; the purpose is not to make those sections the exclusive [state] remedy for unfair trade practices in the insurance industry.”¹⁹

Not only is there no indication in the Insurance Trade Practices Act that the Act is intended to protect insurance companies from private actions under the Consumer Protection

¹⁶Tenn. Code Ann. § 56-8-101.

¹⁷Ray, 430 F. Supp. at 1356; Beatty v. State Farm Mutual Automobile Ins. Co., 262 Cal. Rptr. 79, 84 (not officially published by order of the California Supreme Court).

¹⁸15 U.S.C. § 1012. The statute reads in relevant part:

[T]he Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

¹⁹Ray, 430 F. Supp. at 1356; see also Beatty, 262 Cal. Rptr. at 84 (rejecting the argument that “use of the phrase ‘all such practices’ evinces a legislative intent that Insurance Code regulations of unfair business practices in the insurance industry supersede any other regulation”).

Act, the Insurance Trade Practices Act presumes that other laws may penalize conduct proscribed by the Act. The Act states that “[n]o order of the commissioner under [this chapter] or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.”²⁰ This provision presumes that there are “other laws” that might impose “liability” for conduct that could be subject to a commissioner’s order or court order under the Act.²¹ The Insurance Trade Practices Act also states that “the powers vested in the commissioner by this chapter, shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.”²² Again, the Act presumes that there are other laws that may impose penalties for unfair or deceptive insurance practices, indicating that the Act was not intended to be exclusive.²³

²⁰Tenn. Code Ann. § 56-8-110(d).

²¹See Skinner, 730 S.W.2d at 338; see also Mead v. Burns, 509 A.2d 11, 17 (Conn. 1986); Dodd v. Commercial Union Ins. Co., 365 N.E.2d 802, 804-05 (Mass. 1977).

²²Tenn. Code Ann. § 56-8-114.

²³See Skinner, 730 S.W.2d at 338.

III. The exemption in the Tennessee Consumer Protection Act for acts or transactions required or specifically authorized by other laws, rules or regulations does not exempt practices deemed unlawful by the Insurance Trade Practices Act.

Tennessee's Consumer Protection Act and its Insurance Trade Practices Act are both based upon model statutes that have been widely adopted, and the question of the proper interplay between these statutes has arisen in many other states. The answer to the question whether the acts are complementary or mutually exclusive is usually decided by reference to the specific language of the exclusion section of a state's consumer protection act. In some states, the business of insurance is explicitly exempted from the consumer protection act.²⁴ Other states' consumer protection acts exempt practices "regulated" by other laws.²⁵ These exemption provisions are generally interpreted to exclude practices regulated under a state's insurance code.²⁶ In states such as Tennessee, however, where the Consumer Protection Act exempts only practices "specifically authorized" under other laws, most courts, including the Tennessee Court of Appeals in Skinner, have concluded that their insurance code and consumer protection act both apply to unfair and deceptive insurance practices.²⁷

This conclusion is based upon the plain meaning of the term "specifically authorized" and, in Tennessee, "required." Just because a company may be subject to regulation under the

²⁴E.g., Ala. Code § 8-19-7; Fla. Stat. Ann. § 501.212(4); Mo. Rev. Stat § 407.020; Va. Stat. § 59.1-199.

²⁵E.g., Alaska Stat. § 45.50.481; La. Rev. Stat. Ann. § 51:1406.

²⁶E.g., O.K. Lumber Co. v. Providence Washington Ins. Co., 759 P.2d 523 (Alaska 1988); West v. Fireman's Fund Ins. Co., 683 F. Supp. 156 (E.D. La. 1987).

²⁷Skinner, 730 S.W.2d at 338; e.g., Gilmore v. Bradgate Ass. Inc., 604 A.2d 555, 557 (N.H. 1992); Mead v. Burns, 509 A.2d 11, 17-18 (Conn. 1986); Dodd v. Commercial Union Ins. Co., 365 N.E.2d 802, 805 (Mass. 1977).

Insurance Code, and may be authorized to engage in the business of insurance, does not mean that the company is “specifically authorized” or “required” to engage in unfair or deceptive practices. For example, the Internal Revenue Code requires and authorized citizens to file income tax returns -- it does not, however, authorize them to make false statements in those returns. In the same way, a business may be authorized to provide insurance under the Insurance Code -- but the Code does not specifically authorize the business to engage in unfair or deceptive practices. In fact, the Insurance Trade Practices Act *forbids* such practices.

Of course, no statute specifically authorizes “unfair or deceptive acts or practices.” This fact does not, however, mean that under the Skinner court’s interpretation the exemption is superfluous or meaningless:

While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to “[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.”²⁸

For example, compliance with the disclosure requirements of a federal statute has been held to be a defense to liability under a state consumer protection act claim for failure to make adequate disclosures.²⁹ Thus, the exemption for “specifically authorized” acts or practices creates a defense to liability under the Consumer Protection Act in situations in which application of the Act would otherwise conflict with another statute.³⁰

²⁸Attorney General v. Diamond Mortgage Co., 327 N.W.2d 805, 811 (Mich. 1982).

²⁹Lanier v. Associates Finance, Inc., 499 N.E.2d 440, 447 (Ill. 1986).

³⁰Wislow v. Wong, 713 F. Supp. 1103, 1107 (N.D. Ill. 1989) (quoting Preston v. Kruezer, 641 F. Supp. 1163, 1168-69 (N.D. Ill. 1986)).

Allstate cites three cases in which courts have held that the business of insurance is exempt from a state consumer protection act under an exemption for acts or practices “authorized” or “permitted” under other laws or regulations.³¹ Instead of supporting Allstate’s interpretation of the Consumer Protection Act, these cases demonstrate the illogic of equating general regulation with specific authorization. The cases, and other similar cases, also demonstrate that such a broad interpretation of the phrase “specifically authorized” would exclude from the scope of the Act many types of consumer transactions to which the Act is obviously intended to apply.

Allstate cites first State v. Piedmont Funding Corporation,³² in which the Rhode Island Supreme Court held that an exemption for “actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer” exempted from the state consumer protection act “all those activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers.”³³ By equating actions “permitted” under other laws with businesses “subject to monitoring,” the court unreasonably restricted the scope of the state consumer protection act. For example, following Piedmont Funding, the court later ruled that claims involving licensed real estate brokers are exempt from the state consumer protection act because “the real estate brokerage industry is regulated by the Department of Business Regulation.”³⁴

³¹Appellee’s Brief at 19 n.14.

³²382 A.2d 819 (R.I. 1978).

³³Id. at 822 (emphasis added).

³⁴Doyle v. Chihoski, 443 A.2d 1243, 1244 (R.I. 1982).

In South Carolina and New Hampshire, courts that once equated permission with regulation, as the Rhode Island Supreme Court has done, struggled for years to keep the exemption from swallowing the statute, and have now reversed themselves.³⁵ After the South Carolina Supreme Court adopted the Rhode Island interpretation and ruled that an exclusion for “permitted” practices exempted all regulated securities transactions,³⁶ subsequent courts held that practices regulated by the Comptroller of the Currency,³⁷ banking practices,³⁸ and mobile home transactions³⁹ were all exempt from the state consumer protection act because they were subject to federal or state regulation. But when the South Carolina Supreme Court was faced with the prospect of excluding all automobile sales from the scope of its consumer protection act, the court reversed its earlier holding. Relying in part upon the reasoning of Skinner, the court limited the exemption to acts specifically permitted by other law.⁴⁰ As the Skinner court recognized, Tennessee would face similar problems if this Court were to hold that regulated industries are exempt from the Consumer Protection Act because “[v]irtually every activity is regulated to some degree.”⁴¹

³⁵See Gilmore v. Bradgate Ass., Inc., 604 A.2d 234 (N.H. 1992); Ward v. Dick Dyer and Ass., Inc., 403 S.E.2d 310 (S.C. 1991).

³⁶State v. Rhoades, 267 S.E.2d 539 (S.C. 1980).

³⁷NCNB Nat’l Bank v. Tiller, 814 F.2d 931 (4th Cir. 1987).

³⁸Anderson v. Citizens Bank, 365 S.E.2d 26 (S.C. Ct. App. 1987).

³⁹Scott v. Mid Carolina Homes, Inc., 359 S.E.2d 291 (S.C. Ct. App. 1987).

⁴⁰Ward v. Dick Dyer, 403 S.E.2d at 312-13.

⁴¹Skinner, 730 S.W.2d at 337; see also Ward, 403 S.E.2d at 312.

The second case cited by Allstate for the proposition that the business of insurance is exempt from a state consumer protection act under an exemption for acts or practices “specifically authorized” under other laws or regulations is Kekel v. Allstate Insurance Company.⁴² In Kekel, the Michigan Court of Appeals held that a claim under the state consumer protection act for unfair or deceptive insurance claims settlement practices was precluded because the claim was subject to the state’s insurance trade practices act.⁴³ Three federal district courts sitting in Michigan subsequently rejected Kekel as inconsistent with Michigan Supreme Court precedent: “the Kekel case is not soundly reasoned and that the Michigan Supreme Court would decide differently if given the opportunity.”⁴⁴ The courts rejected Kekel not only because of contrary state supreme court precedent, but because of the obvious proposition that “[r]egulation and specific authorization are two vastly different concepts.”⁴⁵

This difference is made clear in the attempt of a federal court to interpret and apply Ferguson v. United Insurance Company,⁴⁶ the third case cited by Allstate. In Ferguson, the Georgia Court of Appeals held that a claim by an insurance beneficiary under the state consumer protection act was barred because “insurance transactions in Georgia are specifically authorized and regulated by Title 56, the Georgia Insurance Code,” and because “the Insurance Code

⁴²375 N.W.2d 455 (Mich. Ct. App. 1985).

⁴³Id. at 459-60.

⁴⁴Robertson v. State Farm Fire and Casualty Co., 890 F. Supp. 671, 676 (E.D. Mich. 1995) (citing two unreported district court opinions in accord).

⁴⁵Id. at 678.

⁴⁶293 S.E.2d 736 (Ga. Ct. App. 1982).

regulates unfair trade practices within the insurance industry.”⁴⁷ Ferguson was applied by the federal District Court for the Northern District of Georgia in Taylor v. Bear Stearns & Company.⁴⁸ In attempting to explain the Ferguson court’s interpretation of the phrase “specifically authorized,” the Taylor court is unable to avoid the illogic of equating “regulation” with “specific authorization”:

Under the first exemption [for conduct “specifically authorized”], two interpretations are possible. The first interpretation would exempt from the Act conduct that was specifically authorized. The second interpretation would exempt conduct that is being regulated by an administrative agency.

. . . [G]iven Ferguson, the phrase “specifically authorized” in section 6 is construed to mean specifically regulated.⁴⁹

Thus, although the Taylor court ultimately applied Ferguson as Georgia law, it could not avoid the conclusion that Ferguson interpreted the phrase “specifically authorized” to mean something other than “specifically authorized.”

The State urges this Court to adopt the reasoning of Skinner and of the other state courts that have held that the plain meaning of “specifically authorized” is “specifically authorized,” and that while the Insurance Trade Practices Act *regulates* unfair and deceptive insurance practices, it does not require or specifically authorize them.

⁴⁷Id. at 738.

⁴⁸572 F. Supp. 667 (N.D. Ga. 1983).

⁴⁹Id. at 674-75.

IV. Under traditional rules of statutory construction, if two statutes are not irreconcilable they must each be given effect. The Consumer Protection Act and the Insurance Trade Practices Act are fully compatible, and are in fact designed to avoid any conflict, and so each must be given full effect.

Allstate urges this Court to adopt an “‘enough is enough’ view”⁵⁰ and hold that Consumer Protection Act jurisdiction over unfair and deceptive insurance practices is unnecessary because such practices are also subject to regulation under the Insurance Trade Practices Act. But it is not the role of the judiciary to decide how much or what kind of regulation is “enough.” The legislature passed two acts that both, on their face, apply to unfair and deceptive insurance trade practices. If the “two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective.”⁵¹ The Insurance Trade Practices Act is primarily regulatory in nature,⁵² and as such it authorizes the Commissioner of Commerce and Insurance to investigate potentially unfair or deceptive insurance trade practices,⁵³ to determine whether a person or company has engaged in such practices,⁵⁴ and if appropriate to issue administrative cease and desist orders, impose civil

⁵⁰Appellee’s Brief at 29.

⁵¹Morton v. Mancari, 417 U.S. 535, 551 (1974); Unites States v. Spinelle, 41 F.3d 1056, 1059 (6th Cir. 1994).

⁵²Tenn. Code Ann. § 56-8-101 (“The purpose of this chapter is to regulate trade practices in the business of insurance . . .”).

⁵³Tenn. Code Ann. § 56-8-107.

⁵⁴Tenn. Code Ann. § 56-8-109.

penalties and suspend or revoke licenses.⁵⁵ The Consumer Protection Act is remedial in nature,⁵⁶ designed to reimburse consumers for losses caused by unfair or deceptive acts or practices,⁵⁷ to enjoin such practices,⁵⁸ and when appropriate to impose punishment.⁵⁹ The statutes are complementary, and are designed to avoid conflict.

A. Allstate is unable to identify any conflict between the Consumer Protection Act and the Insurance Trade Practices Act.

Allstate argues that concurrent jurisdiction of the Consumer Protection Act and the Insurance Trade Practices Act would create irrational and contradictory results, but Allstate is unable to provide any persuasive examples. Allstate’s basic argument is that it is irrational to apply the Consumer Protection Act to the business of insurance because the Act provides greater remedies for lesser wrongs than does the Insurance Trade Practices Act. This argument has two important flaws. First, although the acts provide different remedies because one is regulatory and the other is remedial, the Consumer Protection Act does not provide greater remedies for lesser wrongs. Second, because the Consumer Protection Act is “cumulative and supplemental”⁶⁰ to the Insurance Trade Practices Act, the difference in remedies is irrelevant

⁵⁵Tenn. Code Ann. § 56-8-109(a).

⁵⁶ Tenn. Code Ann. § 47-18-115 (“This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee . . .”).

⁵⁷See Tenn. Code Ann. § 47-18-107(b), 108(b)(1) & 109(a)(1).

⁵⁸Tenn. Code Ann. § 47-18-108(a) & 109(b).

⁵⁹Tenn. Code Ann. § 47-18-108(b)(3) & 109(a).

⁶⁰Tenn. Code Ann. § 47-18-112.

because an act or practice that violates both acts is subject to the rights and remedies provided by both acts.

It is true that the Consumer Protection Act and the Insurance Trade Practices Act provide different remedies, but that is because the statutes have different purposes and applications. The Insurance Trade Practices Act is primarily regulatory in nature,⁶¹ and so provides for remedies not available to private parties under the Consumer Protection Act, such as administrative cease and desist orders and license suspension or revocation.⁶² The Consumer Protection Act is primarily remedial in nature,⁶³ and so provides for remedies not available under the Insurance Trade Practices Act, such as consumer restitution in both private actions⁶⁴ and in actions brought by the State.⁶⁵

Allstate's claim that it is irrational to apply the Consumer Protection Act to the business of insurance is illustrated by the following example:

If . . . there is a treble damage claim against an insurer which, in good faith denies an insurance claim, then there would be a better remedy for one instance of failing to settle a claim in good faith than there would be where an insurance company has engaged in a practice of settling insurance claims in bad faith.⁶⁶

⁶¹Tenn. Code Ann. § 56-8-101 (“The purpose of this chapter is to regulate trade practices in the business of insurance . . .”).

⁶²Tenn. Code Ann. § 56-8-109(a).

⁶³Tenn. Code Ann. § 47-18-115.

⁶⁴Tenn. Code Ann. § 47-18-109(a)(1).

⁶⁵Tenn. Code Ann. § 47-18-108(b)(1).

⁶⁶Appellee's Brief at 49-50.

This illustration assumes, first, that treble damages are available for good faith violations of the Consumer Protection Act.⁶⁷ In fact, treble damages are only available for willful and knowing violations⁶⁸ -- and in deciding whether to award treble damages, trial courts are directed to consider whether a defendant has acted in good faith.⁶⁹ The illustration also wrongly assumes that an administrative action under the Insurance Trade Practices Act for a practice of settling insurance claims in bad faith would preclude individual actions under the Consumer Protection Act. But the Consumer Protection Act is available to consumers whether the Department of Commerce and Insurance has taken action or not.⁷⁰ Therefore, an insurance company that engaged in a practice of bad faith unfair or deceptive insurance claims practices would have much greater liability than a company that failed to settle a single claim in good faith.

⁶⁷Allstate argues elsewhere in its brief that a good faith violation of the Act is “difficult to imagine,” (Appellee’s Brief, at 48), relying on Groover v. Trokell, 645 S.W.2d 403 (Tenn. Ct. App. 1982) for the proposition that deception carries an element of intent. The Court of Appeals has since rejected this interpretation of the Consumer Protection Act, stating that “[t]he Groover Court did not intend to limit causes of action under the Act to only fraudulent and willful conduct. As such, we believe the language concerning ‘deceptive’ requiring an element of intent is merely dicta and should be limited to the facts of that case.” Smith v. Scott Lewis Chevrolet, Inc., 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992).

⁶⁸Tenn. Code Ann. § 47-18-109(a)(3).

⁶⁹Tenn. Code Ann. § 47-18-109(a)(4)(D).

⁷⁰See Tenn. Code Ann. § 56-8-112 (“The powers and remedies provided in this part shall be cumulative and supplementary to all other powers and remedies otherwise provided by law.”); Tenn. Code Ann. § 56-8-110(d) (“No order of the commissioner under this chapter or order of a court to enforce such order shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.”).

B. The Consumer Protection Act and the Insurance Trade Practices Act are designed to avoid any conflict between the statutes.

Allstate argues, erroneously, that “[i]f the Consumer Protection Act applies generally to the business of insurance, conflicting regulation is inevitable.”⁷¹ This assertion is inaccurate because the Consumer Protection Act itself and the organization of the Department of Commerce and Insurance are designed to avoid any conflict between the statutes.

As is discussed above, the Consumer Protection Act exempts from its provisions “acts or transactions required or specifically authorized under the laws administered by, or rules or regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States.”⁷² Therefore, any law in the Insurance Code or any rule or regulation promulgated by the Commissioner of Commerce and Insurance that requires or specifically authorizes conduct that might otherwise be subject to the Consumer Protection Act will exempt that conduct from the Act. The obvious purpose of the exemption provision is to avoid the conflicting regulation Allstate predicts.⁷³

Because the Division of Consumer Affairs does not promulgate substantive regulations under the Consumer Protection Act, there is no further danger of conflicting regulations. Even if some material conflict were possible, the Consumer Protection Act provides a means for any such conflict to be resolved. Enforcement action by the State under the Consumer Protection Act requires the consent of both the Attorney General and the Director of the Division of

⁷¹Appellee’s Brief at 25.

⁷²Tenn. Code Ann. § 47-18-111.

⁷³See WVG v. Pacific Ins. Co., 707 F. Supp. 70, 72 (D.N.H. 1986); Dodd, 365 N.E.2d at 804.

Consumer Affairs.⁷⁴ The Director of the Division of Consumer Affairs is appointed by, and serves at the pleasure of, the Commissioner of Commerce and Insurance,⁷⁵ who also administers the Insurance Trade Practices Act.⁷⁶ Thus, any conflicting enforcement policies under the two statutes will ultimately be resolved by the Commissioner of Commerce and Insurance.

Far from creating conflict, the State has found the overlap between the Consumer Protection Act and industry-specific regulations to be essential to its efforts to protect Tennessee consumers from unfair and deceptive business practices. For example, in State v. Rose Hill Gardens Cemetery,⁷⁷ the State filed suit against a cemetery for violations of the Consumer Protection Act and the General Cemetery Act.⁷⁸ The Consumer Protection Act allowed the State to obtain a temporary restraining order and to petition the court for restitution to injured consumers, while the General Cemetery Act set out the cemetery's specific obligations to consumers and the State and allowed the State to petition the court to transfer ownership of the cemetery to a nonprofit community organization. The State, through the Attorney General and the Division of Consumer Affairs, has also found the Consumer Protection Act to be an important enforcement tool in the insurance area. For example, the Act allowed the State to investigate allegations that Blue Cross Blue Shield of Memphis was misleading its insureds by failing to disclose discounts negotiated with health care providers and by failing to apply

⁷⁴Tenn. Code Ann. § 47-18-107(a) & 108(a)(1).

⁷⁵Tenn. Code Ann. § 47-18-5001(b).

⁷⁶See Tenn. Code Ann. § 56-8-107 & 102(1).

⁷⁷Appendix A, attached.

⁷⁸Tenn. Code Ann. §§ 46-1-101 et seq.

negotiated discounts when calculating co-payments and maximum benefit levels.⁷⁹ The State filed suit under the Consumer Protection Act and negotiated a Consent Decree that provided for consumer restitution of more than \$500,000.⁸⁰ Such a settlement would not have been possible under the Insurance Trade Practices Act because that statute does not provide for any consumer restitution.

⁷⁹In answer to arguments advanced by Allstate and Amicus Curiae State Farm Mutual Automobile Insurance Company, the Blue Cross Blue Shield case provides an example of (1) a deceptive insurance claim settlement practice, (2) that took place after the initial sale of an insurance policy, (3) that involved the “distribution” of “goods” and “services,” and that was therefore trade or commerce as defined by the Consumer Protection Act. Tenn. Code Ann. § 47-18-103(9).

⁸⁰Appendix B, attached.

CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the ruling of the Court of Appeals that the Consumer Protection Act does not apply to unfair or deceptive insurance claims practices if those practices also violate the bad faith insurance statute.

Respectfully submitted,

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General
B.P.R. No. 6440

CYNTHIA E. K. CARTER
Deputy Attorney General
B.P.R. No. 13533

STEPHEN C. KNIGHT
Assistant Attorney General
B.P.R. No. 15514
500 Charlotte Avenue
Nashville, TN 37243-0491
(615) 741-3533

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Morton v. Mancari</u> , 417 U.S. 535 (1974)	13
<u>NCNB Natl Bank v. Tiller</u> , 814 F.2d 931 (4th Cir. 1987)	10
<u>Preston v. Kruezer</u> , 641 F. Supp. 1163 (N.D. Ill. 1986)	9
<u>Ray v. United Family Life Ins. Co.</u> , 430 F. Supp. 1353, 1356 (W.D.N.C. 1977)	4
<u>Robertson v. State Farm Fire and Casualty Co.</u> , 890 F. Supp. 671 (E.D. Mich. 1995)	11
<u>Taylor v. Bear Stearns & Company</u> , 572 F. Supp. 667 (N.D. Ga. 1983)	12
<u>Unites States v. Spinelle</u> , 41 F.3d 1056 (6th Cir. 1994)	13
<u>WVG v. Pacific Ins. Co.</u> , 707 F. Supp. 70 (D.N.H. 1986)	17
<u>West v. Fireman’s Fund Insurance Co.</u> , 683 F. Supp. 156 (E.D. La. 1987)	7
<u>Wislow v. Wong</u> , 713 F. Supp. 1103 (N.D. Ill. 1989)	9

STATE CASES

<u>Anderson v. Citizens Bank</u> , 365 S.E.2d 26 (S.C. Ct. App. 1987)	10
<u>Attorney General v. Diamond Mortgage Co.</u> , 327 N.W.2d 805 (Mich. 1982)	8

<u>City of Elizabethtown v. Carter County,</u> 321 S.W.2d 822 (Tenn. 1959)	1
<u>Dodd v. Commercial Union Insurance Co.,</u> 365 N.E.2d 802 (Mass. 1977)	6, 7, 17
<u>Doyle v. Chihoski,</u> 443 A.2d 1243 (R.I. 1982)	10
<u>Ferguson v. United Insurance Company,</u> 293 S.E.2d 736 (Ga. Ct. App. 1982)	12
<u>Gilmore v. Bradgate Ass. Inc.,</u> 604 A.2d 555 (N.H. 1992)	7, 10
<u>Groover v. Trokell,</u> 545 S.W.2d 403 (Tenn. Ct. App. 1982)	16
<u>Kekel v. Allstate Insurance Company,</u> 375 N.W.2d 455 (Mich. Ct. App. 1985)	11
<u>Lanier v. Associates Finance, Inc.,</u> 499 N.E.2d 440 (Ill. 1986)	8
<u>Morris v. Macks Used Cars,</u> 824 S.W.2d 538 (Tenn. 1992)	2, 3
<u>Mead v. Burns,</u> 509 A.2d 11 (Conn. 1986)	6, 7
<u>O.K. Lumber Co. v. Providence Washington Insurance Co.,</u> 759 P.2d 523 (Alaska 1988)	7
<u>Scott v. Mid Carolina Homes, Inc.,</u> 359 S.E.2d 291 (S.C. Ct. App. 1987)	10
<u>Skinner v. Steele,</u> 730 S.W.2d 335 (Tenn. Ct. App. 1987)	3, 6, 7, 8, 10, 11, 13
<u>Smith v. Scott Lewis Chevrolet, Inc.,</u> 843 S.W.2d 9 (Tenn. Ct. App. 1992)	16

<u>State v. Piedmont Funding Corporation,</u> 382 A.2d 819 (R.I. 1978)	9
<u>State v. Rhoades,</u> 267 S.E.2d 539 (S.C. 1980)	10
<u>Ward v. Dick Dyer and Ass., Inc.,</u> 403 S.E.2d 310 (S.C. 1991)	10

FEDERAL STATUTES

15 U.S.C. § 45(a)(1)	4
15 U.S.C. § 1012	4, 5

STATE STATUTES

Ala. Code. § 8-19-7	7
Alaska Stat. § 45.50.471	7
Fla. Stat. Ann. § 501.201	7
La. Rev. Stat. Ann. § 51:1406	7
Mo. Rev. Stat. § 407.010	7
Tenn. Code Ann. §§ 46-1-101 <u>et seq</u>	18
Tenn. Code Ann. § 47-18-102	3
Tenn. Code Ann. § 47-18-103(9)	19
Tenn. Code Ann. § 47-18-107(a)	18
Tenn. Code Ann. § 47-18-107(b)	14
Tenn. Code Ann. § 47-18-108(a)	14

Tenn. Code Ann. § 47-18-108(a)(1)	18
Tenn. Code Ann. § 47-18-108(b)(1)	13, 15
Tenn. Code Ann. § 47-18-108(b)(3)	14
Tenn. Code Ann. § 47-18-109(a)	14
Tenn. Code Ann. § 47-18-109(a)(1).	13, 15
Tenn. Code Ann. § 47-18-109(a)(3).	16
Tenn. Code Ann. § 47-18-109(a)(4)(D)	16
Tenn. Code Ann. § 47-18-109(b)	14
Tenn. Code Ann. § 47-18-111	17
Tenn. Code Ann. § 47-18-111(a)(1)	3
Tenn. Code Ann. § 47-18-112	3, 15
Tenn. Code Ann. § 47-18-115	4, 14, 15
Tenn. Code Ann. § 47-18-5001(b)	18
Tenn. Code Ann. § 56-8-101	5, 13, 15
Tenn. Code Ann. § 56-8-102(1)	18
Tenn. Code Ann. § 56-8-104(8)(A)	2
Tenn. Code Ann. § 56-8-107	14, 18
Tenn. Code Ann. § 56-8-109	14
Tenn. Code Ann. § 56-8-109(a)	14, 15
Tenn. Code Ann. § 56-8-110(d)	6, 16
Tenn. Code Ann. § 56-8-112	16
Tenn. Code Ann. § 56-8-114	6

Tenn. R. App. P. 36(a)	1
Va. Stat. § 59.1-199	7

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 the following on this _____ day of June, 1997:

Joseph H. Johnston, Esq.
P.O. Box 120874
Nashville, Tennessee 37212

E. Clifton Knowles
Bass, Berry & Sims
2700 First American Center
Nashville, Tennessee 37238

Edward K. Lancaster
Tennessee Farmers Mutual Insurance Co.
P. O. Box 998
Columbia, Tennessee 38402-0998

Jon L. Fleischaker
Jean W. Bird
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Kentucky 40202

Barry Friedman
Paige Waldrop Mills
Wyatt, Tarrant & Combs
1500 Nashville City Center
511 Union Street
Nashville, Tennessee 37219-1750

John D. Schwalb
Brewer, Krause, Brooks & Mills
Suite 2600, The Tower
611 Commerce Street
Nashville, Tennessee 37203

Thomas H. Peebles, III
G. Brian Jackson
Trabue, Sturdivant & DeWitt
2500 Nashville City Center
511 Union Street
Nashville, Tennessee 37219

STEPHEN C. KNIGHT
Assistant Attorney General