

PROFESSIONAL LIABILITY

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This month's Newsletter examines consumer protection acts passed in various states, their applicability to licensed professionals, and implications for insurers of licensed professionals.

Consumer Protection Laws: Liability and Coverage Implications for Licensed Professionals and Their Insurers

ABOUT THE AUTHOR

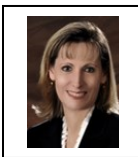


Matthew Marrone is a partner in Goldberg Segalla's Philadelphia and Princeton offices, where he co-chairs the firm's professional liability practices focused on lawyers and insurance agents and brokers. He has represented clients in many forms of complex litigation. He has tried numerous cases to verdict and argued before various courts of appeal, including the Third Circuit U.S. Court of Appeals. Matt focuses his practice primarily on the defense of lawyers, insurance agents, and other miscellaneous professionals in litigation involving alleged errors, omissions, or malpractice. His experience also includes matters involving non-profit directors' and officers' liability, governmental liability, civil rights and employment issues, product liability, trademark/copyright infringement, and death/catastrophic injury litigation. Matt also served as Chair of DRI's Professional Liability Committee from 2009 to 2011. He can be reached at mmarrone@goldbergsegalla.com.

ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

I. Introduction

The vast majority of states have consumer protection laws, and over the last several decades in particular, courts across the country have debated whether such laws should apply to licensed professionals. Although the cases throughout the country are quite similar in nature, judges considering these similar issues have created a complex web of conflicting decisions based on highly subjective and speculative parameters. This article will explore some of these decisions, and the rationale behind them. It will conclude with a number of considerations relevant to both insurers and defense counsel.

II. Background of Antitrust and Consumer Protection Laws

The study of consumer protection laws should begin with antitrust, as the Federal Trade Commission (“FTC”) Act protects consumers both from deceptive practices related to competition and unfair trade practices. Today, the FTC is entrusted with enforcement of both antitrust and consumer protection, and the consumer protection laws used in almost every state in the nation were drafted borrowing language from the FTC Act. The most important connection between antitrust and consumer protection is Section 5 of the FTC Act, which the FTC uses to discharge both its antitrust and consumer protection missions.

While broad in mission, the FTC has often taken a narrow path in choosing its enforcement actions – likely because of budgetary constraints. *See* Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 Tenn.L.Rev. 131-176 (2006) (citations

omitted). Subsequently, states began enacting their own consumer protection statutes, often referred to as “Little FTC Acts” because they contain identical language to the FTC Act forbidding, typically, “unfair competition and unfair deceptive acts and practices.” *Id.*

Despite the moniker of “Little FTC Acts,” there is actually considerable variation between state consumer protection laws. Typically, states have either (a) copied Section 5 of the FTC Act in its entirety; (b) adopted all or part of three model state consumer protection laws; (c) copied the FTC or a model act but changed some of the wording; or (d) combined two or more of these approaches. Although the states have followed different paths in trying to protect consumers, there are very significant and strong commonalities between most – if not all – of the states.

With the exception of Iowa’s Consumer Fraud Act, all state acts provide for private enforcement and private remedies. State consumer protection laws prohibit unfair or deceptive practices in the trade or commerce in goods or services. Anyone harmed by such practices may bring a private action against the offending party, and if successful, may recover costs of suit, attorney’s fees, and triple the amount of her actual damages. As such, a plaintiff’s incentive to assert such a cause of action (and the insurer’s potential exposure) is great.

III. Licensed Professionals and States’ Little FTC Acts

Whether the learned professions, such as doctors, lawyers, accountants, architects, and engineers should be included under Little FTC Acts has been debated for years.

Presently, it appears that roughly half the states in the country permit such claims to be asserted against licensed professionals, without any statutory or case law exceptions. New York and California, for example, appear to be included among these states.

The states where courts have found some or all professionals to be outside the scope of their Little FTC Act, however, have suggested more than one reason to exempt professionals.

A. Trade or Commerce Exemptions

Similar to the FTC and Sherman Acts, the majority of states require that allegedly unlawful conduct under consumer protection laws be made in “trade or commerce.” *Id.* Substantially all of the remaining states require the offending conduct arise from “trade.” *Id.* What constitutes “trade or commerce” is subject to debate.

For instance, in *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984), the Washington Supreme Court held that an attorney’s conduct in the practice of law may not be “trade or commerce.” A billing dispute arose between a law firm and client concerning both the size of the bill and whether the client had agreed that two associates – rather than a partner – would work on the case. The client alleged a violation of Washington’s Little FTC Act. The Washington Supreme Court held that the learned professions are not part of trade or commerce; ergo, the practice of law cannot constitute trade or commerce under the Washington Little FTC Act. *Id.* at 168. Although the Washington Supreme Court did hold that “certain entrepreneurial aspects of the practice of law may fall within the ‘trade or commerce’ definition” of the Little

FTC Act, it refused to recognize that all attorney conduct was trade or commerce. *Id.*

Other courts have indulged in more creative analyses. In trying to distinguish antitrust cases concerning the learned professions, the Illinois Court of Appeals in *Frahm v. Urkovich*, 447 N.E.2d 1007 (Ill. Ct. App. 1983) suggested that such cases “dealt only with the commercial aspects of the legal profession through activities which would have a direct effect on the consuming public and not with the practice of law itself.” *Id.* at 1010. Although the court failed to describe the type of activity which would involve the practice of law but not have a direct effect on the consuming public, the court held that “trade or commerce” did not include the actual practice of law. *Id.* at 1011.

B. Non-Entrepreneurial Activities Exemptions

The jurisprudence underlying the aforementioned cases perhaps set the stage for further distinction within the learned professions when determining whether consumer protection laws apply. Several state courts have created a subjective test to determine the applicability of a Little FTC Act: If the licensed professional is engaged in an “entrepreneurial activity,” then the conduct falls within the ambit of the Little FTC Act; if the activity involves the learned profession itself, then the Little FTC Act does not apply.

For instance, in *Kessler v. Loftus*, 994 F.Supp. 240 (D. Vt. 1997), a Vermont law firm represented to a divorce client that her claims against her former spouse’s land were “adequate security” for a debt that was owed, and that the firm committed to provide her with “competent

representation,” neither of which she received. *Id.* at 241. Although the court noted that it was required to construe Vermont’s law in accordance with FTC precedent, and that attorneys received no blanket exemption from the law, the court held that representations of “adequate security” and “competent representation” were legal opinions and not entrepreneurial. Therefore, no viable claim could be asserted.

In *Suffield Development Associates, L.P. v. National Loan Investors, L.P.*, 802 A.2d 44 (Conn. 2002), a debtor alleged that a law firm fraudulently and deceptively tried to collect a debt. While the Supreme Court of Connecticut agreed that the law firm abused the debt collection process, the court denied relief under relevant Connecticut law. *Id.* at 53. Although the debtor alleged that the law firm sought to recover an amount in excess of what was owed, the court concluded it was not entrepreneurial and instead may have been actionable professional misconduct.

In a Tennessee case, *Constant v. Wyeth*, 352 F.Supp. 847 (M.D. Tenn. 2003), a doctor prescribed the drug Fen-Phen to a patient, and the drug was later withdrawn from the market because of concerns about serious health effects. The court succinctly held that doctors are immune from Tennessee’s Little FTC Act when the “allegations concern the actual provision of medical services.” *Id.* at 854.

C. “Regulated” Professions Exemptions

Another reason that some state courts have chosen to exempt licensed professionals stems from the license itself, as some state courts yield to the regulatory scheme already in place for licensed professionals.

In *Gadson v. Newman*, 807 F.Supp. 1412 (C.D. Ill. 1992), an Illinois psychiatrist accused a hospital and another psychiatrist of deceptively creating financial incentives to admit patients to the hospital. While the court acknowledged that state-regulated professionals were not exempt from the FTC Act itself, and that the Illinois Little FTC Act called upon courts to consult FTC precedent, the court found “[t]he medical and legal professions are afforded immunity from the Illinois law primarily, because, unlike other commercial services, medical and legal bodies are regulated by governmental bodies.” *Id.* at 1417-19.

In *Hampton Hospital v. Bresan*, 672 A.2d 725 (N.J. Super. 1996), a New Jersey plaintiff alleged that a hospital inflated its medical bills by unnecessarily extending a patient’s stay. Holding hospitals to be beyond the scope of the New Jersey Consumer Fraud Act, the court noted that hospitals were already strongly regulated by the state department of health. The court did not note, however, whether this separate regulatory scheme included a right of private action or multiple damages. New Jersey has similarly ruled that consumer fraud act claims cannot be asserted against attorneys or insurance producers.

In New Hampshire, the state Supreme Court decided that attorneys and other professionals were exempt from the New Hampshire law because of vague wording exempting trade or commerce subject to a “regulatory board.” *Rousseau v. Eshleman*, 519 A.2d 243 (N.H. 1986). The New Hampshire Legislature has since repealed the relevant language, suggesting a legislative intent to include professionals.

IV. The *Beyers* Decision of the Pennsylvania Supreme Court

Pennsylvania is a state that addressed this issue a bit more recently than other states, in the 2007 case of *Beyers v. Richmond*, 937 A.2d 1082 (2007). In fact, the split opinion (5-2) of the Pennsylvania Supreme Court (the highest appellate court) in *Beyers* effectively incorporates all of the above rationale, and represents the competing viewpoints advanced most often when considering this issue.

In *Beyers*, a woman who had settled her personal injury case sued her attorney, claiming he improperly siphoned some \$26,000 in phantom costs out of her settlement. She alleged he listed these costs as a loan repayment and various medical bills, when in fact they did not even exist. In addition to various other causes of action, she claimed he violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") in the process of collecting and distributing the settlement proceeds.

Generally speaking, the UTPCPL – like other states' consumer protection laws – prohibits unfair or deceptive practices in the trade or commerce in goods or services. Anyone harmed by such practices may bring a private action against the offending party, and if successful, may recover costs, attorney fees, and treble damages. Clearly, the incentive to assert such a cause of action is great.

The narrow issue presented in *Beyers* was whether the practice of law falls within the "services" contemplated by the UTPCPL. The majority found it does not, but in doing so, chose to view the case more broadly. Attorneys in Pennsylvania are regulated

exclusively by the Pennsylvania Supreme Court. Thus, the majority ruled, including attorneys' conduct within the ambit of the UTPCPL would effectively subject them to regulation by someone else, thereby encroaching upon the court's authority. The majority found this unacceptable, and therefore exempted attorney misconduct from the UTPCPL.

The majority view in *Beyers* echoes the rationale used by other courts to exempt professional misconduct from consumer protection laws. This rationale accepts that such laws essentially are enacted to keep the conduct of purveyors of goods and services in check. By contrast, attorneys (and other licensed professionals) are already subject to licensing bodies which regulate their conduct and impose disciplinary measures when appropriate. Thus, the reasoning goes, it would be inappropriate to additionally subject them to consumer protection laws.

The dissenting justices in *Beyers* represented the counterargument, disagreeing with the micromanagement espoused by the majority. They questioned how licensing bodies are supposed to police each and every instance of professional misconduct. Consumer protection laws, they said, are laws of general applicability, and people should not be exempt just because of their status as (insert: attorneys, physicians, insurance brokers, real estate agents, etc.).

They further noted that many jurisdictions which have generally exempted attorneys from consumer protection laws have refused to exempt their business, non-professional activities. The dissent argued since the mere distribution of settlement funds is not a "core function of legal representation" and "does not involve the exercise of legal

judgment,” any court-created exemption to the UTPCPL should not apply.

V. Conclusion

The hodgepodge of conflicting court interpretations exempting licensed professionals from state Little FTC Acts is difficult to fully understand, and presents a challenge, in particular, for insurers writing business across the country. The conduct of a doctor or a lawyer in one state may be ruled unlawful, while the same conduct in another state under an identically worded statute may not be actionable. Even worse, the entire decision may be predicated on whether a judge subjectively determines the action at issue was one of entrepreneurialism or professional judgment. See Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 Tenn.L.Rev. 131-176 (2006) (citations omitted).

If a law firm pads its bills, is that entrepreneurialism run amok, or is it a lapse in professional judgment? *Id.* If a plastic surgeon advertises a procedure to improve one’s looks and it fails, is that false advertising akin to rabid entrepreneurialism, or can it be excused as a professional failure outside the scope of a Little FTC Act? *Id.* If a certified public accountant fails to give one’s finances the attention promised in print ads, can the wrong be characterized solely as malpractice, or is it also false advertising? *Id.* How would the conduct of “miscellaneous professionals” – who may not be licensed by any governing body – be addressed?

From the perspective of defense counsel, the jurisdictions which have exempted professionals can provide guidance for

arguments to be made in those jurisdictions which have not. It never hurts to advance an argument, preserve a basis for appeal, and try to make new (or change existing) case law in a particular state.

From an insurer’s perspective, these issues can be tricky, and pose numerous questions relevant to both the defense and coverage of professionals. From a liability standpoint, where do you draw the line between “professional services” and “business activities”? And is that line different from a coverage standpoint? Is the coverage grant (i.e. definition of “professional services”) in an insuring agreement more broad or narrow than the liability the insured is subject to in a particular jurisdiction? Is there an exclusion in the policy for activities that parallel the “business activities” contemplated by existing case law in a particular state?

On the issue of damages and indemnity, are treble damages imposed by consumer protection laws considered the equivalent of punitive damages that may or may not be covered by the professional liability insurance policy? What if the policy form covers the activities of a professional which would fall within the purview of a state’s consumer protection law, but contains an exclusion for punitive or statutory damages? In such a scenario, a conflict in the policy might arise as the insurer would have agreed to cover the professional activities giving rise to a consumer protection claim, but not the resulting damages.

When these questions are raised in jurisdictions around the country – and they will be, if they haven’t been already – individual judges will be the people who ultimately answer them. However, they are questions worth considering by the insurer when drafting the policy form, the broker



and underwriter when offering coverage, claims personnel when making coverage determinations, and defense counsel when advancing the defense.

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