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NOTES

DAVID'S SLING: THE UNDETECTED POWER OF INDIANA'S DECEPTIVE CONSUMER SALES ACT

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INTRODUCTION

"I know I . . . am about the only thing between you guys and your dinner, cocktail hour, or wherever you're headed, so I'll try to be brief."

— Rep. Gerald Torr, R-Carmel, discussing SB 394[1]

And so with little fanfare, the Indiana General Assembly amended the Deceptive Consumer Sales Act ("DCSA").[2] Although this 2014 amendment has gone relatively undiscussed, its added language could have an extensive impact on consumer law in Indiana.[3] Indeed, prior to this enactment, Indiana remained one of few states[4] limiting the types of claims a consumer could bring by listing an exhaustive, enumerated list of acts or practices that constituted violations.[5] But

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1. *2014 Indiana House Session*, IND. GEN. ASSEMBLY (Feb. 24, 2014, part 2), https://iga.in.gov/information/archives/2014/video/house/ [hereinafter Torr Statement] (statement of Rep. Gerald Torr).

2. IND. CODE § 24-5-0.5-3 (2014).

3. "Under most circumstances, an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has changed." Woodruff v. Ind. Family & Soc. Servs. Admin., 964 N.E.2d 784, 795 (Ind. 2012) (quotation omitted).

4. CAROLYN CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 11 (2009), *available at* http://www.nclc.org/images/pdf/pr-reports/report-udap-50-states.pdf [https://perma.cc/29BJ-NPLU].

5. IND. CODE § 24-5-0.5-3 (2013).

now the DCSA broadly prohibits three new exploits: *unfair* conduct, *abusive* conduct, and *implied* misrepresentations.[6]

First, suppliers now cannot commit *unfair* acts, practices, or omissions.[7] Generally, unfair conduct violates equitable values outside the scope of protections against deception.[8] In other words, "unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset."[9] Indiana courts could choose to create their own jurisprudence since the DCSA does not require conformity with Federal Trade Commission's ("FTC") standards. They also might decide to follow the FTC 1980 Policy Statement approach, because the General Assembly added a protection against unfairness after that time. Instead, courts should resist these temptations, and as discussed *infra*, follow a modified version of the FTC's 1964 Cigarette Rule because it would allow for legal standards outside the DCSA to determine unfairness, would help protect the most vulnerable Hoosiers, and uses the Policy Statement as guidance in interpreting substantial consumer injury.

Second, *abusive* acts, practices, or omissions are also now prohibited under the DCSA.[10] As discussed *infra*, because the General Assembly has failed to provide a definition for this term, Indiana courts should look to the Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibition of "abusive acts and practices." Although Congress enacted the prohibition against abusive conduct under Dodd-Frank specifically to curb abusive financial practices following the 2007-2008 financial crisis,[11] its tests are easily divorced from their financial focus, readily harmonize with the language of the DCSA, and correspond with an example provided by the Office of the Attorney General.[12] Indeed, the Indiana General Assembly and Congress both endeavored to curb the same abuses: those arising from disparities in the knowledge and relative bargaining powers of parties.[13]

Third, the DCSA now explicitly prohibits *implied* misrepresentations.[14] The

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6. IND. CODE § 24-5-0.5-3 (2014).

7. *Id.*

8. David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 30 (1983).

9. *In re* Int'l Harvester Co., 104 F.T.C. 949, 1060 (1984).

10. IND. CODE § 24-5-0.5-3.

11. John D. Wright, *Dodd-Frank's "Abusive" Standard: A Call for Certainty*, 8 BERKELEY BUS. L.J. 164, 164-66 (2011).

12. *Commerce, Small Bus. and Econ. Dev. Comm. Meeting*, IND. GEN. ASSEMBLY (Feb. 12, 2014), https://iga.in.gov/information/archives/2014/video/committee_commerce_small_business_and_economic_development_0200/ [hereinafter Tolliver Testimony] (testimony of Terry Tolliver, Deputy Director, Consumer Protection Division, Office of the Indiana Attorney General).

13. Eric M. Aberg, *The Case for UDAAP-Based Credit Card Lending Regulations: Providing Greater Financial Security for America and American Consumers*, 84 GEO. WASH. L. REV. 1029, 1065 (2016).

14. IND. CODE § 24-5-0.5-3.

General Assembly specifically enacted this prohibition to address a decision by the Indiana Supreme Court[15] that left many questioning whether the pre-amendment DCSA prohibited implied misrepresentations. Indeed, the concerns of the Attorney General's office surrounding this decision served as the catalyst for the legislature's 2014 wholesale revision of the DCSA.[16] But this new prohibition presents an evidentiary problem for Indiana courts concerning the proof required to determine whether an implied misrepresentation occurred. As discussed *infra*, Indiana should follow the many state and federal courts requiring no extrinsic evidence to show implied misrepresentations, examining the totality of the circumstances surrounding the consumer transaction instead.

Part I of this Note discusses the background of consumer law in the United States. Part II examines the DCSA's evolution from a statute prohibiting an enumerated list of conduct to one with broader scope. Part III offers interpretive proposals for Indiana courts to contemplate when considering how to interpret the 2014 amendment's new terms. As briefly expressed above, this Note ultimately concludes that Indiana should use (1) the Cigarette Rule, the FTC's former test, to outline what constitutes an unfair practice, (2) the Dodd-Frank Act to fashion its abusiveness tests, and (3) a totality-of-the circumstances approach not requiring extrinsic evidence to establish the presence of implied misrepresentations.

I. A Brief History of Consumer Protection Law

To best understand the evolution of consumer protection in Indiana and how federal and state consumer protection statutes laws protect Hoosiers in tandem, it is necessary to examine the development of these laws in three eras. This historical overview is especially pertinent since the three additions to the DCSA discussed in this Note correspond with each of these eras.[17]

Each of these three eras is defined by the consumer difficulties of the day and the resulting legislation passed to combat them.[18] The first era (the 1900s to the 1930s) was defined by the growth of monopolies following the industrial revolution and the passage of the FTC Act as a remedy to protect against "unfair competition" and "unfair and deceptive practices."[19] The second era (the 1960s to the 1980s) was shaped by an increased awareness of the effects of advertising, a growing concern over product safety, and a need for private rights of action for consumers under state unfair or deceptive acts or practices ("UDAP") laws.[20] The third era (the 2010s) directly followed the 2007-2008 financial crisis and resulted

15. *See* Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327, 332 (Ind. 2013).

16. Torr Statement, *supra* note 1.

17. "Unfairness" is rooted in the first era, "implied misrepresentations" correspond to the second, and "abusiveness" relates to the third.

18. Robert N. Mayer, The Consumer Movement: Guardians of the Marketplace 10-33 (1989).

19. *Id.*

20. *Id.*

in Congress passing the Dodd–Frank Wall Street Reform and Consumer Protection Act.[21]

A. The First Era: The FTC Act

The Federal Trade Commission Act of 1914 created the FTC and granted it with powers to identify and eradicate "[u]nfair methods of competition."[22] Congress passed the Act in order to eliminate the "intolerable, unscientific, and abnormal" monopolies and trusts of the late-nineteenth and early-twentieth centuries.[23] Although the FTC Act's language focused solely on eliminating monopolies and trusts, the FTC also consistently challenged deceptive and unfair acts and practices committed against individual consumers as "unfair methods of competition."[24] But in 1931, that procedure became untenable after the Supreme Court held in *FTC v. Raladam Co.* that the FTC had to show injury to a business's *competitor* in order to show a supplier engaged in an "unfair method of competition."[25]

In response, Congress amended the FTC Act in 1938 to prohibit "unfair or deceptive acts or practices in commerce,"[26] greatly broadening the authority and responsibility of the FTC. Congressional restoration of the FTC's pre-*Raladam* authority to protect consumers on an individual level was based on the belief that deceptive and unfair acts or practices not only hurt competition but also consumers and advertising as a source of accurate information.[27] That being said, the FTC Act does not provide individual consumers a private right of action and penalties for violations are generally limited to cease and desist demands against offenders, with little to no direct reparation for wronged consumers.[28]

B. The Second Era: State UDAP Laws

Because the FTC Act does not allow for a private right of action, all fifty states enacted UDAP laws between the 1960s and 1980s.[29] Although these

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21. Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1244-46 (2011).

22. 15 U.S.C. § 45 (2006).

23. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 77 (2003).

24. David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. B.J. 247, 258 (2006).

25. *See* 283 U.S. 643 (1931).

26. Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111, 111-14 (1938).

27. *See Raladam Co.,* 283 U.S. at 647-48; Beneficial Corp. v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976); FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir. 1951).

28. *See What We Do: A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, II.A.1.(a), FED. TRADE COMM'N (July 2008), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [http://perma.cc/P7CK-BD3Z].

29. Olha N.M. Rybakoff, *An Overview of Consumer Protection and Fair Trade Regulation*

statutes vary widely from state to state, the aim of each is uniform: to expand the consumer protection mission of the FTC to states' attorneys general and individual consumers.[30] Not only did states enact these laws to allow for private rights of action at the state level, but the FTC also encouraged their passage because it could not adequately enforce consumer protection without aid from individuals and states.[31] In the FTC's eyes, allowing consumers to directly litigate at the state level is more economical and precise than sole FTC enforcement.[32]

Due to the similarity of goals between the FTC Act and these UDAPs, many states follow the FTC's jurisprudence when interpreting their statutes.[33] Although these terms are often interpreted similarly, many of these UDAP laws allow for several types of remedies not afforded under the FTC Act, including rescission of transactions, actual damages, statutory damages, and attorneys' fees.[34] Because of these significant differences, UDAP laws have since supplanted the FTC Act as the primary method of protecting consumers as they—and their states' attorneys general—vindicate their rights.[35]

C. The Third Era: Dodd-Frank and the CFPB

The financial crisis of 2007–2008 greatly impacted the regulatory scheme supervising financial institutions.[36] This crisis was precipitated by policies overzealously encouraging home ownership, the ease of access to loans for subprime borrowers,[37] the overvaluation of bundled subprime mortgages, and a lack of adequate holdings from banks to back their financial commitments.[38]

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in Delaware, 8 DEL. L. REV. 63, 68 (2005). In addition to permitting individuals to bring UDAP claims, states' attorneys general can bring actions as well. *See* John A. Marold, *Third Circuit's Decision in Roberts v. Fleet Bank: Thinking Outside of the "Schumer Box" or "Consumerism Gone Berserk"?,* 8 N.C. BANKING INST. 399, 412 (2004).

30. Marold, *supra* note 29, at 412.

31. Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 754 (2016).

32. Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?,* 63 FLA. L. REV. 163, 165 (2011).

33. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 16 (2005).

34. Jessica Fogel, *State Consumer Protection Statutes: An Alternative Approach to Solving the Problem of Predatory Mortgage Lending*, 28 SEATTLE U. L. REV. 435, 456 (2005).

35. *See* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209, 209-17 (2016).

36. Murdock, *supra* note 21, at 1244-47.

37. These exploitations are still subject to ridicule. *See e.g.*, *Wait, What If We Try Giving People Home Loans They Can't Actually Afford To Pay Off?*, ONION (Jan. 13, 2014, 11:47 AM), http://www.theonion.com/blogpost/wait-what-if-we-try-giving-people-home-loans-they--34930 [https://perma.cc/PHP6-9295].

38. Murdock, *supra* note 21, at 1244-47.

Because of the "widespread failures in financial regulation and supervision"[39] that led to these practices, the U.S. housing bubble burst and the values of securities tied to U.S. real estate pricing rapidly declined.[40] U.S. and global stock markets consequently responded with massive losses and the overall global economy slowed as credit tightened and international trade declined.[41]

As a result of this crisis, Congress passed[42] the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which statutorily created the Consumer Financial Protection Bureau ("CFPB").[43] Under Dodd-Frank, the CFPB is responsible for preventing "unfair, deceptive, or abusive acts or practices" concerning the consumer financial industry.[44] Although the CFPB's allegations of unfair and deceptive conduct track the FTC Act's application of the terms,[45] the term abusive is absent from FTC jurisprudence.[46] But fortunately, Dodd-Frank statutorily defined abusive conduct as any that either materially interferes with consumers' ability to understand the terms of financial products or services, or takes advantage of their lack of understanding of the material risks of a financial product, their inability to protect their own interests, or their reliance on an entity to act in their best interest.[47]

The status of Dodd-Frank and the CFPB remains fluid. Although still championed by the left—with some progressives wistful[48] for a wider regulatory scope—Dodd-Frank and the CFPB remain highly contentious. Detractors assert that Dodd-Frank's constraints provide some of "the greatest obstacles to entrepreneurship, innovation, and job creation."[49] But regardless of future actions

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39. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xviii (2011), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf [https://perma.cc/KS9S-Y94U].

40. *Id.* at xv-xx.

41. *Id.*

42. The bill passed along mainly partisan lines, with Republicans arguing "that the bill creates bigger, more intrusive government and fails to prevent future bailouts of financial companies using taxpayers' money." Brady Dennis, *Congress passes financial reform bill*, WASH. POST (July 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071500464.html [https://perma.cc/9898-UDJA].

43. 12 U.S.C. §§ 5481-5552 (2010).

44. *Id.* § 5531.

45. *See* Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN'S L. REV. 1105, 1116-20 (2011).

46. 12 U.S.C. § 5531(c).

47. *Id.* § 5531(d).

48. *See, e.g.*, Bernie Sanders (@BernieSanders), TWITTER (Jan. 5, 2016, 11:26 AM), https://twitter.com/berniesanders/status/684455976498544640 [https://perma.cc/MLY9-LRRE] ("In my view, @SenWarren [Senator Elizabeth Warren] is right. Dodd-Frank should have broken up Citigroup and other 'too-big-to-fail' banks into pieces. #BreakEmUp").

49. *See, e.g.*, Chris Ingram, *President Trump Should Reform the Consumer Financial Protection Bureau*, INDEP. J. REV. (Dec. 6, 2016), http://ijr.com/opinion/2016/12/262379-president-trump-reform-consumer-financial-protection-bureau [https://perma.cc/7M6R-VDWJ]. Despite these

altering[50] the CFPB's powers, the abusiveness standards established under Dodd-Frank will remain useful to help states interpret similar language in their own statutes.[51]

II. THE INDIANA DECEPTIVE CONSUMER SALES ACT

A. Pre-2014 DCSA

In 1971, the Indiana General Assembly enacted the Indiana Deceptive Consumer Sales Act ("DCSA") to supplement holes left by the FTC Act.[52] The stated purpose of the Act was to:

> (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
>
> (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and
>
> (3) encourage the development of fair consumer sales practices.[53]

Although the legislature asserted that the Act "shall be liberally construed and applied to promote its purposes and policies,"[54] the DCSA listed its violations for much of its history—indeed forty-three years—in an exhaustive, enumerated list.[55] Prior to the amendment, Indiana was one of few states without a general prohibition against unfair and deceptive conduct.[56] This distinction ended after the Indiana Supreme Court issued a 2013 opinion discussing the DCSA.[57]

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protestations, governments have regulated lending practices since as early as the promulgation of Hammurabi's Code (around 1800 B.C.). K.V. Nagarajan, *The Code of Hammurabi: An Economic Interpretation*, 2 INT'L J. BUS. SOC. SCI. 108, 113 (2011).

50. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 17, 2017, 4:48 PM), https://twitter.com/realdonaldtrump/status/934539256940417024 [https://perma.cc/9TAP-5FMX]. ("The Consumer Financial Protection Bureau, or CFPB, has been a total disaster as run by the previous Administrations [sic] pick. Financial Institutions have been devastated and unable to properly serve the public. We will bring it back to life!").

51. *See* Steven T. Dennis & Elizabeth Dexheimer, *Trump's Dodd-Frank Do-Over Diverted to Slow Lane With Obamacare*, BLOOMBERG (Feb. 7, 2017, 5:00 AM), https://www.bloomberg.com/politics/articles/2017-02-07/trump-s-dodd-frank-do-over-diverted-to-slow-lane-with-obamacare [https://perma.cc/6KWE-CFXN].

52. John H. Kazanjian, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME L. REV. 410, 414 n.35 (1973).

53. IND. CODE § 24-5-0.5-1 (2014).

54. *Id.*

55. IND. CODE § 24-5-0.5-3 (2013).

56. CARTER, *supra* note 4, at 11.

57. *See* Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327 (Ind. 2013).

A. Kesling v. Hubler Nissan, Inc.

Kesling v. Hubler Nissan, Inc. catalyzed the DCSA's 2014 amendment.[58] In *Kesling*, the Indiana Supreme Court considered an advertisement Heather Kesling saw for a 1996 Mitsubishi Eclipse:

Price	$2,981
Body Style	Hatchback
Mileage	165,478
Exterior Color	Maroon
Interior Color	Grey
Engine	4 Cylinder Gasoline
Transmission	4 Speed Automatic
Drive Type	2 wheel drive—front
Fuel Type	Gasoline
Doors	Two Door

> Seller's Comments: INTERNET SALE ... REDUCED PRICE!! Trade–In, Automatic, Power Roof, CD/Cassette, Power Interior Options, Cruise, Fog lights, Alloy Wheels ... Sporty Car at a Great Value Price.[59]

Kesling subsequently went to Hubler Nissan's lot to examine and test drive the car.[60] The car idled roughly on the road, but the salesperson assured Kesling the car "'would just need a tune-up' because 'it had been sitting for a while.'"[61] Based on these assurances, Kesling purchased the vehicle.[62] Unfortunately for Kesling, the car did not just need a tune-up, and she only drove it forty-four miles before it ultimately became inoperable.[63] Kesling then sued Hubler, alleging that the term "Sporty Car" was deceptive under the DCSA because it impliedly represented that the car was road-worthy and free of maintenance issues.[64] The trial court ruled in favor of Hubler, ruling against Kesling on all counts, including the DCSA claim, but the Indiana Court of Appeals reversed the ruling in a split decision, instead ruling in favor of Kesling.[65] Determining the Sporty Car ad could imply the car would safely run, the Court of Appeals held the ad actionable under the DCSA because "[h]ow else could it have 'great value' and be a 'sporty car'?"[66]

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58. *Id.*
59. *Id.* at 330.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 331. Kesling also sued alleging fraud for the salesperson's assurances, but this claim is outside the scope of this Note. *Id.*
65. *Id.*
66. Kesling v. Hubler Nissan, Inc., 975 N.E.2d 367, 372 (Ind. Ct. App. 2012).

The Indiana Supreme Court disagreed, holding the Sporty Car ad was "textbook puffery" and thus not a representation of fact.[67] The Court reasoned that any assumption about the vehicle's drivability or quality would involve multiple inferences made by the consumer, and protecting consumers "*from their own inferences*" would exceed even the liberal-construction instruction from the DCSA.[68] In other words, holding the supplier liable for a consumer's inferences would "demand an unrealistic degree of intuition about consumers' subjective perceptions."[69] Because Hubler's Sporty Car ad was no representation at all, the Court did not address whether implied representations of fact were actionable under the DCSA.[70] Even though the "issue [was] open," uncertainty following the Court's decision troubled many legislators.[71]

B. 2014 Amendment to the DCSA

Following *Kesling*, the Indiana General Assembly amended the DCSA to include a general prohibition against any "unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction[,] . . . whether it occurs before, during, or after the transaction[,] . . . [that is either] implicit [or] explicit[.]"[72] Thus Indiana joined the majority of other states generally prohibiting deceptive and unfair acts and practices.[73] Because almost all deceptive practices could be placed under one of the pre-2014-amendment-DCSA enumerations,[74] two major changes came with the addition of a broad prohibition of both unfair and abusive conduct.[75] In addition to adding these two prohibitions, the General Assembly also explicitly prohibited implied misrepresentations,[76] an unequivocal response to *Kesling*.[77] Unfortunately, the legislature left all three of these new terms undefined,[78] and no academic or appellate interpretations have since ensued.

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67. *Kesling*, 997 N.E.2d at 329, 335 ("Hubler's 'puffing' simply [was] not the stuff of a deception claim.").

68. *Id.* at 334-35 (emphasis in original).

69. *Id.* at 334.

70. *Id.* at 332.

71. Torr Statement, *supra* note 1.

72. IND. CODE § 24-5-0.5-3 (2014).

73. CARTER, *supra* note 4, at 11.

74. That being said, since the DCSA fails to provide a definition of deception, *see* IND. CODE § 24-5-0.5-2 (2014), if a consumer cannot particularly allege one of the enumerated deceptive acts, he or she should use the definition provided by the FTC. A deceptive act occurs under the FTC Act where: (1) a representation, omission, or practice misleads the consumer, (2) the consumer interprets the characteristic in a reasonable manner, and (3) the misleading characteristic is material to the consumer's purchasing decision. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984).

75. *Compare* IND. CODE § 24-5-0.5-3 (2013), *with* IND. CODE § 24-5-0.5-3 (2014).

76. IND. CODE § 24-5-0.5-3 (2014).

77. Torr Statement, *supra* note 1; Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327 (Ind. 2013).

78. *See* IND. CODE § 24-5-0.5-2 (2014); *id.* § 24-5-0.5-3.

Consequently, this lack of guidance leaves three open questions concerning the DCSA's meaning. First, although the addition of a prohibition against unfairness seemingly gives wider latitude for consumers to protect themselves, what constitutes unfair conduct? Second, the definition of abusiveness varies widely across different statutes, so what kind of abuse did the Indiana General Assembly intend to curb? Third, the legislature made it clear that implied misrepresentations violate the DCSA, but how should courts go about determining whether conduct was implied? The following sections address these three questions in turn, offering interpretive proposals from jurisdictions that have already answered them.

III. INTERPRETIVE PROPOSALS

A. Unfair Practices

The first significant change to the DCSA involves the addition of a general prohibition of unfair acts and practices.[79] Although some commentators and states combine their analysis of unconscionable and unfairness protections, case law and statutory interpretation have created two distinct bodies of law concerning the meaning of these terms, and thus they must be individually interpreted.[80] Unconscionability is rooted in the common law theory of contract law proscribing terms that are extremely unjust or overwhelmingly one-sided in favor of a party with superior bargaining power and can only be used as a defense to onerous contracts.[81] Unfairness, on the other hand, focuses on consumer injury and its precipitating causes and provides for broader relief outside of the contracting context.[82]

The FTC's first articulation of what constituted unfair acts or practices came in 1964, when it issued a rule governing cigarette advertising and labeling.[83] This "Cigarette Rule" created a three-part test to determine whether any act or practice was unfair:[84]

> (1) [W]hether 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;

79. *Id.* § 24-5-0.5-3.

80. For example, although Kentucky's UDAP law prohibits "unfair conduct," it statutorily limits the definition to "be construed to mean unconscionable." KY. REV. STAT. ANN. § 367.170 (2016).

81. Rider v. Rider, 669 N.E.2d 160, 162 (Ind. 1996).

82. Belt, *supra* note 24, at 256-59, 263-70.

83. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (June 22, 1964).

84. *Id.* at 8355.

> (2) [W]hether it is immoral, unethical, oppressive, or unscrupulous; [and]
>
> (3) [W]hether it causes substantial injury to consumers (or competitors or other businessmen).[85]

Following several cases where the FTC used this unfairness jurisdiction to target practices it saw as offending the first two prongs of the Cigarette Rule,[86] some critics argued that these "penumbra" and "immorality" tests allowed the FTC to employ a standard that shifted "according to which undesirable trade conditions the FTC wishe[d] to regulate."[87] After these accusations amplified following the FTC's attempt to regulate advertisements aimed at children,[88] it revised its unfairness standard to focus solely on consumer injury, eliminating the broader portions of the Cigarette Rule that troubled detractors.[89] Consequently, the FTC issued a Policy Statement in 1980 that articulated the following three-part, cost-benefit analysis to determine whether a consumer injury could be actionably under its unfairness jurisdiction:

> [1] [The injury] must be substantial,
>
> [2] [The injury] must not be outweighed by any countervailing benefits to consumers or competition [that the practice produces], and
>
> [3] [I]t must be an injury that consumers themselves could not reasonably have avoided.[90]

Although the Policy Statement initially permitted the FTC to consider "clear and well-established" public policy when bringing unfairness claims,[91] when Congress entrenched the test via statute in 1994, it eliminated the ability of the FTC to rely on public policy as the sole cause of unfairness, yet still allowing it to be used as a secondary confirming factor.[92] This change seemingly defanged the unfairness jurisdiction of its intuitive meaning. Even so, legislative history

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85. *Id.*

86. *See generally* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

87. Teresa M. Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1, 27-28 (1977).

88. *See* Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911, 919–27 (2005); Am. Fin. Servs. Ass'n v. FTC., 767 F.2d 957, 969 (D.C. Cir. 1985).

89. *See In re* Int'l Harvester Co., 104 F.T.C. 949 (1984).

90. *Id.* at 1073. The Policy Statement was reprinted in *In re International Harvester Co.*, so all citations to the Statement point to *In re International Harvester Co.*'s text.

91. *Id.* at 1076.

92. *See* 15 U.S.C. § 45(n) (2006) (providing that the FTC "may consider established public policies as evidence to be considered with all the other evidence," but that these policies "may not serve as a primary basis for such determinations.").

indicates Congress intended this new statute to outline the general aims of the FTC, not establish a hard and fast rule concerning all unfairness claims.[93] In fact, the Senate report on this statute explicitly professed that states were *not* expected to rely on the Policy Statement to shape their jurisprudence.[94]

In the first and most well-known case demonstrating the Policy Statement approach, a tractor manufacturer failed to warn customers of the danger of heated gasoline jetting—up to twenty feet—out of its tractors' gas tanks when the gas cap was removed.[95] As a result of this so-called "fuel-geysering," one person was killed and eleven people were seriously injured,[96] with one man becoming a "ball of fire" after being soaked with the gasoline and igniting due to his proximity to the combustible engine.[97] The FTC determined this conduct was unfair because consumer injuries were substantial (one man was killed and many others were seriously injured), not outweighed by any countervailing benefits (costs were low to warn customers), and not reasonably avoidable (customers could not know the full consequences of removing the cap because the fuel-geysering was so extraordinary).[98]

States prohibiting unfairness under their UDAPs fall into three camps: those that adhere to the Cigarette Rule, those that follow the Policy Statement, and those that forge their own jurisprudence.[99] Most states continue to follow the Cigarette Rule because they adopted their UDAP statutes prior to 1980 and thus

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93. S. REP. NO. 103-130, at 13 (1993). ("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.") (emphasis added); s*ee also Am. Fin. Servs. Ass'n*, 767 F.2d at 969 ("Congress has expressly declined to delineate such a legal standard claiming that the standard must be stated in broad terms to allow the Commission to respond to evolving market conditions and practices.")

94. S. REP. NO. 103-130, at 13 (1993) ("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 . . . . The Committee intends no effect on those or other developments under State law . . . . The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decisionmaking.").

95. *In re Int'l Harvester Co.*, 104 F.T.C. at 1051-55.

96. *Id.* at 1064.

97. *Id.* at 965.

98. *Id.* at 1065-67.

99. Belt, *supra* note 24, at 273. States, of course, are also free to create their own jurisprudence concerning unfairness claims, but many do not. For an argument against applying the FTC Act's standards to state UDAP laws, see Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 452 (1991), stating that "near automatic application of standards under the FTC Act to consumer actions is troublesome."

adopted the concurrent FTC policy,[100] yet some decided to change their definition alongside the FTC, altering their analyses to follow the Policy Statement approach.[101] In contrast, other states have always followed the Policy Statement approach because they either enacted, or amended their UDAP statute to include, unfairness protections after 1980.[102]

Moreover, a state is not precluded from adopting the Cigarette Rule solely because it passed its UDAP legislation following the release of the Policy Statement.[103] For example, the Supreme Court of Rhode Island adopted the three-part Cigarette Rule after the FTC released its Policy Statement because its UDAP statute "directs this Court to interpret that provision according to" the FTC's interpretation, seemingly at the time of the statute's adoption.[104] In a case where a computer company improperly collected sales tax on nontaxable items, the Court applied each Cigarette-Test prong in turn.[105] The Court found that the company offended public policy by collecting the taxes because "[s]tatutes passed by the Legislature are the state's declaration of public policy" and violations of laws are *per se* offensive to public policy.[106] The Court also determined that the practice may have been "immoral, unethical, oppressive, or unscrupulous" because the company's "efforts to avoid its own tax nexus with Rhode Island unfairly resulted in consumers being charged for taxes that they should not have been charged."[107] Lastly, the company's practice may have resulted in "substantial consumer injury" because the class of consumers alleged damages in excess of $1 million.[108] Although the Court found that all three factors were present in this case, it noted that "plaintiffs need not establish every factor [of the Cigarette Rule], and they may prove unfairness by showing that a trade practice meets one factor to a great degree or two or three factors to a lesser degree."[109]

Connecticut also adopted the Cigarette Rule after the FTC promulgated its Policy Statement.[110] Like Rhode Island, the Connecticut legislature "directed that

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100. Belt, *supra* note 24, at 303.

101. *Id.* at 303-09.

102. *Id.*

103. *See* Ames v. Oceanside Welding & Towing Co., 767 A.2d 677, 681 (R.I. 2001) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5 (1972)).

104. *See id.* at 681 n.6.

105. Because this was an appeal from a grant of summary judgment, the Court made its determinations based on what a reasonable jury could have found. Long v. Dell, Inc., 93 A.3d 988, 995-98 (R.I. 2014).

106. *Id.* at 1001.

107. *Id.*

108. *Id.* at 1001-02.

109. *Id.* at 1001. This aligns with the FTC's 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) (stating 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.").

110. Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 461 A.2d 1369, 1375 n.13

courts of this state shall be guided by interpretations given by the [FTC].”[111] In a case applying the Cigarette Rule where an automobile franchisee claimed the manufacturer violated Connecticut’s UDAP statute by granting a rival franchisee’s request to create a new dealership, the Connecticut Supreme Court held that the manufacturer did not violate any of the three Cigarette Rule prongs.[112] But most notably, the Court determined that the newly promulgated Policy Statement only “elaborate[d] on [the Cigarette Test] criteria” and then used it solely as a means to help determine whether a substantial consumer injury occurred.[113] In other words, the Court used the Policy Statement’s cost-benefit analysis as a factors test to determine whether a party violated the third prong of the Cigarette Rule, fashioning a “modified Cigarette Rule.”[114] This modified rule still stands to this day[115] and provides courts with concrete guidance to determine what constitutes a substantial consumer injury under the Cigarette Test.

Indiana could choose to fashion its own analysis since there is no statutory requirement that it shall follow FTC precedent. But this is inadvisable due to the lack of established precedent and the uncertainty that would accompany disavowing the other approaches.[116] Indiana might also decide to follow the Policy Statement approach since it amended unfairness onto the DCSA after 1980, but this approach is also unsound. The Policy Statement’s sole focus on substantial-consumer-injury “does little towards delineating the specific ‘kinds’ of practices or consumer injuries which it encompasses.”[117] This uncertainty imposes significant burdens on both consumers and businesses because the standards fail to provide any discrete legal principles, such as “fault on the part of the seller or entitlement on the part of the consumer.”[118] Businesses also would face higher operational costs because they would be required to weigh the costs and benefits of each consumer transaction.[119]Additionally, judges and jurors would struggle to determine the precise standards when weighing harms against the benefits, resulting in inconsistent results.[120] This variation is avoided when

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(Conn. 1983) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972)).

111. McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1191 (Conn. 1984).

112. *Id.* at 1187-88, 1190-92.

113. *Id.* at 1191 n.12, 1192.

114. Belt, *supra* note 24, at 280.

115. *See* Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co., 119 A.3d 1139, 1149 n.13 (Conn. 2015) (noting that the Connecticut Supreme Court recently “declined to review a claim that we should abandon the cigarette rule in favor of the substantial unjustified injury test because . . . the legislature has given no indication that it disapproves of [its] continued use”).

116. For example, California courts have struggled to establish a consistent rule since its Supreme Court has not conclusively adopted either rule. *See* Cel-Tech Commc’ns., Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 544-46 (Cal. 1999).

117. Am. Fin. Servs. Ass’n v. FTC., 767 F.2d 957, 971 (D.C. Cir. 1985); *see also* Belt, *supra* note 24, at 320-21.

118. Belt, *supra* note 24, at 321.

119. *Id.* at 321-22.

120. *Id.* at 324. This problem is exacerbated by the uncertainty of whether the cost-benefit

FTC experts adjudicate a case because, as opposed to lay jurors or generalist judges, their specialized understanding of the topics leads to nuanced economic reasoning focused on the requisite "net effects" of the conduct.[121] Even so, some have argued that the FTC itself has struggled to consistently apply the Policy Statement's approach.[122]

Instead—like Rhode Island and Connecticut—Indiana should consider using the Cigarette Rule. The "penumbra" test would allow Indiana courts to consider the common-law, statutory, and other-established-concepts-of-unfairness violations Indiana is concerned with preventing through its liberal reading of the DCSA.[123] In other words, adopting the Policy Statement's wholesale abrogation of reliance on public policy eliminates the ability for legal standards outside the DCSA to determine unfairness. Individual consumers would not bring the broad types of societally-based-public-policy claims that troubled many about the FTC's Cigarette Rule jurisprudence that led to the adoption of the Policy Statement approach.[124] Instead, they would only bring claims based upon their *individualized* injuries resulting from practices prohibited by "[the] common-law, statut[es], or other established concept[s] of unfairness[.]"[125] Likewise, the inclusion of the "immorality" test is not paternalistic but instead helps courts hold businesses accountable to industry standards,[126] prevent unconscionability,[127] and protect the particularly vulnerable.[128] Lastly, like Connecticut, Indiana should elaborate on the substantial-injury test by using the Policy Statement as guidance, thus creating a modified Cigarette Rule.[129] This resulting precision is particularly important in private UDAP actions due to the harsher penalties afforded to individuals in these claims: with actual damages, statutory damages, and attorneys' fees on the table, the clarity of a modified Cigarette Rule is essential to ensure all parties have adequate knowledge of the statutory requirements.[130] For all these reasons, Indiana courts should resist the temptation to adopt the Policy Statement and instead enact the policy that best aligns with the DCSA's goals: a modified Cigarette Rule.

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analysis is limited to the parties or if it also extends to non-parties as well.

121. *Id.*; *In re* Int'l Harvester Co., 104 F.T.C. 949, 1073 (1984).

122. *See* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1979-83 (2000).

123. IND. CODE § 24-5-0.5-1 (2014).

124. Milkis, *supra* note 88, at 919-27.

125. *See* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (June 22, 1964).

126. This conduct could be unethical under the Cigarette Test. *Id.*

127. This conduct could be oppressive under the Cigarette Test. *Id.*

128. This conduct could be either immoral or unscrupulous under the Cigarette Test. *Id.*

129. McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1191 n.12, 1192 (Conn. 1984).

130. The FTC itself acknowledged that the Policy Statement approach was too imprecise to impose harsh sanctions. Companion Statement on the Commission's Consumer Unfairness Jurisdiction (1980), *reprinted in ¶ 13,203 Consumer Unfairness*, 4 TRADE REG. REP. at 20,909-3 to 20,910 at 20,090-5. *See* discussion *supra* Part I.B.

B. Abusive Practices

The DCSA's addition of a prohibition against "abusive practices" is novel: no other state broadly prohibits abuse in its general UDAP law.[131] Thus Indiana has no comparable state law from which it could draw interpretative aid. Additionally, the term "abusive" is wholly new to the DCSA, obviating the ability to "read the statute as whole"[132] in an attempt to define the term. Further, unlike the terms "unfair" or "deceptive," the term "abusive" is absent from the FTC Act.[133] Although "abusive" *is* used in the Fair Debt Collection Practices Act, the DCSA already prohibited any conduct violating the FDCPA's provisions, including "abusive debt collection practices."[134] Dictionaries also prove unhelpfully vague in providing a conclusive definition of "abusive" in the context of consumer protection.[135]

It does not "clearly appear[ ] that the amendment was passed in order to express the original intent [of the DCSA] more clearly" because the legislature completely restyled the DCSA and added wholly new terms, thus the amendment "indicates a legislative intention that the meaning of the statute has changed."[136] Yet Indiana courts are left with little to help divine this legislative intention.[137] Because of the lack of useful language from within the existing statute,

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131. To be sure, many states statutorily prohibit predatory lending practices, yet no state prohibits abuse alongside deception and unfairness in the same generalized manner as Indiana. But many states—like Indiana—prohibit "abuse" in the context of the Fair Debt Collection Practices Act.

132. Suggs v. State, 51 N.E.3d 1190, 1194 (Ind. 2016).

133. 12 U.S.C. § 5531(a) (2010) (Dodd-Frank Wall Street Reform and Consumer Protection Act).

134. IND. CODE § 24-5-0.5-3 (2013); *see also* Alexander, *supra* note 45, at 1123 ("Although as a term, 'abusive' has appeared primarily in debt collection statutes, such statutes are an improper lens through which to view the reach of 'abusive' as used in [Dodd-Frank.]"). Thus interpreting the statute to infer that the General Assembly attempted to incorporate the FDCPA's prohibition of collecting debts in an "abusive" manner is redundant. This definition also does not align with an example, which did not involve debt collection, given during testimony in support of the bill by a representative from the Office of the Attorney General. *See* discussion *infra* accompanying note 137.

135. Black's Law Dictionary defines abusive as something "[c]haracterized by wrongful or improper use." *Abusive*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Oxford English Dictionary defines abusive as something "involving injustice or illegality." *Abusive*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

136. Woodruff v. Ind. Family & Soc. Servs. Admin., 964 N.E.2d 784, 795 (Ind. 2012).

137. "Good statutory construction requires the rarest of skills. The judge must find clues in the structure of the statute, hints in the legislative history, and combine these with mastery of history, command of psychology, and sensitivity to nuance to divine how deceased legislators would have answered unasked questions." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 550 (1983).

unhelpfully vague dictionary definitions, non-existence of similarly-worded statutes from other jurisdictions, dearth of legislative history, and the "strong presumption that when the legislature enacted a particular piece of legislation, it was aware of existing statutes relating to the same subject,"[138] the courts should look toward similar federal consumer protection statutes to determine a workable definition.[139] The Dodd-Frank Act's prohibition against any "abusive act or practice" proves most useful for this purpose.[140]

The language contained in the newly-added general prohibition closely mirrors Dodd-Frank's.[141] An example provided by the Indiana Attorney General's Office demonstrates this similarity in action.[142] While testifying on behalf of the amendment at a house committee hearing, Terry Tolliver, then-Deputy Director of Consumer Protection for Attorney General Greg Zoeller, explained that an abusive act would occur under the amendment's language if a service provider asks an indigent consumer to contact and directly pay another provider for services after it already received funds from the town trustee on behalf of the consumer and promised to provide him or her services.[143] In other words, the vulnerable consumer relied on the service provider to act in his or her best interest, but the provider violated that reliance. Like the objective illuminated by this example, the CFPB has also asserted that its chief aim in combatting abusiveness is preventing companies from taking advantage of consumers with

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138. Wagler v. W. Boggs Sewer Dist., Inc., 898 N.E.2d 815, 818 (Ind. 2008). Additionally, the language contained in the general prohibition of IND. CODE § 24-5-0.5-3 (2014) mirrors that of Dodd-Frank. *See infra* note 141 and accompanying text.

139. Indiana courts have looked toward federal law to help interpret similar state statutes when the state has failed to provide adequate guidance. *See* William D. Popkin, *Statutory Interpretation in State Courts – A Study of Indiana Opinions*, 24 IND. L. REV. 1155, 1163 n.32 (1991) (providing the following examples: "Alvers v. State, 489 N.E.2d 83, 87-89 (Ind. Ct. App. 1986) (Indiana's anti-racketeering statute and federal RICO statute); United Steelworkers of Am., AFL-CIO-CLC v. Northern Ind. Pub. Serv. Co., 436 N.E.2d 826, 829 n.2 (Ind. Ct. App. 1982) (Indiana's Anti-Injunction Act and federal Norris LaGuardia Act); *In re* CTS Corp., 428 N.E.2d 794, 798-99 (Ind. Ct. App. 1981) (Indiana's Business Take-Over Act and federal Williams Act); *In re* City Investing Co., 411 N.E.2d 420, 427 (Ind. Ct. App. 1980) (same); Indiana Dep't of State Revenue, Inheritance Tax Div. v. Estate of Wallace, 408 N.E.2d 150, 157 (Ind. Ct. App. 1980) (Indiana and federal estate tax law).").

140. The primary goal of Indiana courts in statutory construction is "to determine, give effect to, and implement the intent of the legislature." Redevelopment Comm'n of Town of Munster v. Ind. State Bd. of Accounts, 28 N.E.3d 272, 278 (Ind. Ct. App. 2015). When the statute's language is unclear, courts "may look not only to the language, but also to *the nature and subject matter of the act and the object to be accomplished*." *Id.* (emphasis added) (citations omitted); 12 U.S.C. § 5531(a) (2010).

141. The DCSA prohibits any "unfair, abusive, or deceptive act, omission, or practice[,]" while Dodd-Frank prohibits "unfair, deceptive, or abusive acts and practices." IND. CODE § 24-5-0.5-3; 12 U.S.C. § 5511(b)(2) (2010).

142. Tolliver Testimony, *supra* note 12.

143. *Id.*

vulnerabilities.[144]

Although Dodd-Frank applies to "financial products and service," the tests derived from its abusiveness prohibition can provide a skeleton for altering the tests to assess abusiveness in conformity with the DCSA's application to "consumer transactions."[145] Because of this important change, Indiana's application of these tests avoids many of the concerns expressed by the Dodd-Frank's opponents, such as the CFPB's enforcement actions burdening financial institutions with additional costs, threatening bank solvency with unnecessary rules, increasing the cost of credit to consumers, and creating credit restrictions that will hurt small businesses.[146] Here, these concerns are assuaged because the scope of the DCSA would not expand to cover financial transactions but would merely enhance the protections of the existing statute.[147]

The inclusion of the elastic prohibitions against abusive acts and practices created a wholly new term in need of defining under Dodd-Frank.[148] Indeed, when testifying at a congressional hearing on how to improve federal consumer protection, the chairwoman of the Federal Deposit Insurance Corporation noted that "'abusive' is a more *flexible* standard to address some of the practices that make us all *uncomfortable*."[149] Confounding as it is, "[t]he definition of abusive

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144. Ori Lev & Christopher E. Shelton, *The Extra A in UDAAP: An Analysis of the CFPB's Abusiveness Claims,* K&L GATES LEGAL INSIGHT (Feb. 23, 2016), at 14, http://www.jdsupra.com/legalnews/the-extra-a-in-udaap-an-analysis-of-the-21718/ [https://perma.cc/K4CD-X4SY].

145. 12 U.S.C. § 5531(a); IND. CODE § 24-5-0.5-3. In fact, Dodd-Frank's first three prongs are ostensibly concerned with the same type of unconscionable "bargaining naughtiness" that can arise in *any* contractual claim, financially-based or not. Alexander, *supra* note 45, at 1122 n.89.

146. James P. Nehf, *Preventing Another Financial Crisis: The Critical Role of Consumer Protection Laws* 14 (Ind. Univ. Robert H. McKinney Sch. Law, Research Paper No. 2012-15, 2016), https://ssrn.com/abstract=2111776 [https://perma.cc/97QY-BVX9].

147. In fact, Dodd-Frank's adoption of the FTC's definitions of deceptive and unfair suggests that the converse should also be true when determining how to interpret prohibitions against abusive conduct in general consumer-protection statutes because these terms can flow across contexts. *See supra* note 141 and accompanying text comparing the similarity in language between the DCSA and Dodd-Frank.

148. The terms "unfair" and "deceptive" have long-standing definitions under FTC actions. *See* discussion *supra* Parts II.C, III.A. Dodd-Frank mirrors these definitions. First, its language statutorily tracks the FTC's Policy Statement approach concerning unfairness. 12 U.S.C. § 5531(c) (an "unfair" act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers," where "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."). Second, although the statute itself does not define deception, a "deceptive" act or practice under Dodd-Frank also tracks the FTC's approach that a deceptive act is a representation, omission, act, or practice that is likely to materially mislead a consumer whose interpretation is reasonable under the circumstances. Consumer Fin. Prot. Bureau v. Mortg. Law Grp., LLP, 196 F. Supp. 3d 920, 939 (W.D. Wis. 2016) (noting that "the requirements [under Dodd-Frank] are the same as those for a deceptive practices claim under the Federal Trade Commission Act").

149. *Improving Federal Consumer Protection in Financial Services, Hearing Before the H.*

. . . never became the subject of Congressional debate" and no record of committee-level deliberations emerged from this time period either.[150] So the only way to interpret legislative intent is to look to the language of the statute.[151]

As formulated under Dodd-Frank and modified to correspond with the DCSA's language, Indiana should find an abusive act or practice has occurred if it:

> (1) materially interferes with the ability of a consumer to understand a term or condition in connection with a consumer transaction;
>
> (2) takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the consumer transaction;
>
> (3) takes unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using an item of personal property, real property, a service, or an intangible in connection with a consumer transaction; or
>
> (4) takes unreasonable advantage of the reasonable reliance by the consumer on a supplier to act in the interests of the consumer.[152]

As previously stated, although all actions alleging abusiveness under Dodd-Frank involve financial products or services, these cases still provide a thorough examination of how to apply the tests, even in the DCSA's consumer transaction context.[153] Thus a thorough analysis of the cases brought under each test is necessary to determine the scope of powers Indiana could undertake in enforcing similar language.

Comm. on Fin. Servs., 110th Cong. 40 (2007) (emphasis added).

150. Alexander, *supra* note 45, at 1120.

151. *See* Suggs v. State, 51 N.E.3d 1190, 1194 (Ind. 2016).

152. Dodd-Frank authorizes the CFPB to prohibit any act or practice that "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of--(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d). The DCSA bars "suppliers" from engaging in prohibited conduct in a "consumer transaction." IND. CODE § 24-5-0.5-3 (2014). A supplier is generally "[a] seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions." *Id.* § 24-5-0.5-2. A "[c]onsumer transaction means a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible." *Id.*

153. *See supra* note 145 observing the similarity of objectives of Dodd-Frank's first three prongs and general prohibitions against unconscionability.

1. Material Interference with Consumer's Ability to Understand a Term or Condition.—Dodd-Frank prohibits "materially interfer[ing] with the ability of a consumer to understand a term or condition of a consumer financial product or service[,]" such as "obfuscating key terms and conditions" through "long, fine print [ridden] contracts" that consumers are unlikely to understand.[154] The CFPB has rarely relied on this test, and almost always alleges it, along with other abusiveness tests, muddying the ability to interpret its contours.[155] Although the case law on this test remains relatively thin, the following two cases illustrate a willingness on the part of the CFPB to allege violations when a company makes it difficult for consumers to identify important terms and conditions or seemingly mislabels a product or service to divert the consumer's attention from its true form.

The CFPB alleged a group of Internet-based, payday-loan companies committed abusive acts when they collected loan amounts and fees that were void under state usury laws and also threatened consumers with lawsuits and imprisonment if they did not pay.[156] So because the companies' "loan agreements and . . . communications with consumers materially interfered" with their ability to understand that they were not under legal obligation to repay their loans, the companies took unreasonable advantage of the consumers and committed abusive acts.[157] In other words, a material interference occurred when the companies communicated with consumers in a manner solely designed to mislead and confuse them.

Similarly, the CFPB alleged that a pension advance company that represented it would transact "a pension buyout" and advance pensioners "cash when needed" engaged in abusive conduct when it wrongly denied its product constituted a loan, concealed the true nature of the credit transaction, and failed to disclose the interest rate or fees associated with the pension advance.[158] Even further, because the company explicitly mislead consumers by advising them that their product was preferable to a home-equity loan or a credit card that were actually more

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154. 12 U.S.C. § 5531(d); Alexander, *supra* note 45, at 1132-35; *see also* MACRO INT'L INC., DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES 6 (2007) ("When shown a sample cardholder agreement, few of the participants said they would read the entire document if they received it. Others said that they would skim it and look for what they felt were the most important headings. In each group about half of participants said that they would not look at the cardholder agreement at all."); William Hughes, *Here's nine hours of a guy reading the entire terms and conditions for the Amazon Kindle*, A.V. CLUB (Mar. 15, 2017, 9:41 PM), http://www.avclub.com/article/heres-nine-hours-guy-reading-entire-terms-and-cond-252169 [https://perma.cc/AS3Z-K7TJ] ("The Kindle document, which fills a decent-sized binder when printed out, is more than 73,000 words long.").

155. Lev & Shelton, *supra* note 144, at 3.

156. Complaint at 12, Consumer Fin. Prot. Bureau v. NDG Fin. Corp., No. 1:15-cv-05211 (S.D. N.Y. 2015).

157. *Id.* at 25, 27.

158. Complaint at 7, 17-18, Consumer Fin. Prot. Bureau v. Pension Funding, LLC, No. 8:15-cv-01329 (C.D. Cal. 2015).

affordable, it materially interfered with the consumers' ability to clearly understand the terms and conditions of the loan.[159]

2. Taking Advantage of Consumer's Lack of Understanding.—Unlike the first test, the CFPB frequently brings abusiveness claims under Dodd-Frank's prohibition of any act or practice that "takes unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service."[160] This test has primarily been used when an *initial deceptive act* by the defendant when garnering the consumer's business creates his or her lack of understanding.[161] In other words, most of the abusiveness claims brought under this test also include an allegation of a deceptive act or practice that then leads to the ensuing consumer lack of understanding.[162]

In an example of the CFPB alleging abusiveness based upon an initial deceptive act, the CFPB sued a debt-relief company that falsely promised customers that it would "renegotiate, settle, reduce, or otherwise alter the terms" of their debts in exchange for up-front fees.[163] The initial false promise itself was a deceptive act because the company "only rarely renegotiated, settled, reduced, or otherwise altered the terms of debts for consumers within three to six months of their enrollment."[164] The CFPB also alleged that it was "abusive" to enroll consumers that, due to their vulnerable economic conditions, made it "highly unlikely that they [could] complete the programs."[165] In other words, because the company "required that consumers complete detailed worksheets describing their monthly income (including income sources), expenditures, and debts" and then reviewed the information with potential customers "before they enter[ed] into any debt-relief program," the company knew some customers' dire financial circumstances before it collected any payment from them.[166] All in all, the company performed abusive acts because of its knowledge that it would not make progress settling debts within the time that consumers could continue to make payments as well as consumers' lack of understanding of how long it would take the company to settle their debts "before realizing any benefits from enrolling" in the service.[167]

In another example of an abusiveness claim predicated upon an initial deceptive act, the CFPB alleged that a company "engaged in offering, providing, collecting upon, and taking assignment of open-end financing agreements" committed deceptive and abusive acts when it entered into financing agreements

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159. *Id.* at 17.

160. Lev & Shelton, *supra* note 144, at 2.

161. *Id.* at 5.

162. *Id.*

163. Complaint at 4, Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc., No. 9:13-cv-80548 (S.D. Fla. 2013).

164. *Id.* at 7.

165. *Id.* at 4, 13-15.

166. *Id.* at 4.

167. *Id.* at 14-15.

that imposed interest rates violating state usury laws on consumers that did not "understand the impact [of the] laws."[168] When the company demanded payment from customers, it deceptively represented that the customers were "legally obligated to pay the full amount collected or demanded."[169] Thus the company "took unreasonable advantage of these consumers' lack of understanding about the impact of applicable state laws" and engaged in an abusive act.[170]

Additionally, these claims are sometimes framed in the same way as a claim of unconscionability: a claim may arise when a company exercises its one-sided ability to change a contract when the consumer did not know it could effect this power.[171] For example, a credit card company changing a consumer's credit card interest rate may take advantage of its customer's lack of understanding because this power "makes it impossible for consumers to ever understand the true cost of using the card since the price of a transaction can never be known with certainty until it is paid off in full."[172]

3. Taking Advantage of Consumer's Inability to Protect Interests in Selecting or Using Product or Service.—The CFPB has contended that companies have taken advantage of a consumer's inability to protect his or her interest in selecting or using a consumer financial product or service more than any of the other abusive tests.[173] That being said, the test's standards have been somewhat inconsistently applied.[174] Although many of the cases here are similar to those of the test prohibiting "tak[ing] unreasonable advantage of . . . a lack of understanding on the part of the consumer," the focus primarily lies on the *nature* of the company's conduct, without delving into the question of whether consumers had sufficient *information* to avoid the abusiveness.[175] In other words, although the second abusiveness test focuses on an initial *deceptive* act or practice, this prong concentrates more on preventing *unfairness*. Because "unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset,"[176] all second-test claims could also be brought under this third test since a consumer who cannot "understand[] . . . the material risks, costs, or conditions of a product or service" cannot then protect those unrecognized interests.[177]

For example, the CFPB entered a consent order after alleging that when a payday lender created "an artificial sense of urgency" to convince "delinquent borrowers with a demonstrated inability to repay their existing loan" to refinance their loans into new loans by "cit[ing] the company's initial loan approval as

168. Consent Order at 6, 11-12, *In re* Colfax Capital Corp., No. 2014-CFPB-0009.
169. *Id.* at 11.
170. *Id.* at 12.
171. Alexander, *supra* note 45, at 1132.
172. *Id.*
173. Lev & Shelton, *supra* note 144, at 5.
174. *Id.* at 5-6.
175. *Id.* at 2, 6.
176. *In re* Int'l Harvester Co., 104 F.T.C. 949, 1060 (1984).
177. Lev & Shelton, *supra* note 144, at 2.

evidence that consumers could afford to repay the new loan," it took unreasonable advantage of its customers' inability to protect their interests in using its services.[178] The CFPB determined that because the lender knew the borrowers were unlikely to be able to pay off the new loans, it was abusive for it to induce them to take out new loans laden with additional fees.[179] This case illustrates that not only was the lender prohibited from taking advantage of the borrowers' inability to protect their interests in *selecting* its service, but also that it could not—in an attempt to create new loans—act in a way that took advantage of their existing indebtedness to prey on the consumer's inability to protect their interests in *using* its services as well.[180] In other words, companies cannot unreasonably use an existing relationship as leverage against consumers to take advantage of their inability to protect their interests.

In another case, the CFPB alleged that when a store that specialized in selling furniture and electronics on installment plans to military veterans filed debt-collection lawsuits in Virginia courts against customers who signed their contracts and lived outside of Virginia, it also took unreasonable advantage of its customers' inability to protect their interests in selecting its services.[181] Unbeknownst to many customers, the financing agreements contained venue-selection clauses in their form contracts.[182] Additionally, because the customers "had little opportunity to review" the contracts before signing and were unable to "bargain for [their] removal because the clause[s] [were] non-negotiable,"[183] the company's practice of filing lawsuits in Virginia was abusive because the customers "were unable to appear and assert defense[s]," almost always leading to default judgments against the customers.[184] Here, the CFPB gave a quite literal reading of the inability of the customers to protect their interests by alleging that abuse occurs when customers are unlikely or unable to appear in court to defend themselves because they are out-of-state and likely economically disadvantaged. The *acts* of including the non-negotiable venue-selection clause and insisting on its enforcement took unreasonable advantage of the customers' inability to protect their interests in selecting its services.

The CFPB also alleged abusiveness against a for-profit college that, after offering students short-term, interest-free loans, required them to either "repackage" their loans into interest-paying loans once they became due, or be forced to "leave the school in the middle of their program," functionally losing all academic credits due to their "virtual non-transferability" to other institutions.[185] This tactic took unreasonable advantage of students' inability to

178. Consent Order at 1, 7-8, 10-11, *In re* ACE Cash Express, Inc., 2014-CFPB-0008.

179. *Id.* at 10-11.

180. *Id.*

181. Complaint at 14, Consumer Fin. Prot. Bureau v. Freedom Stores, Inc., No. 2:14-cv-00643 (E.D. Va. 2014).

182. *Id.* at 15.

183. *Id.* at 14-15.

184. *Id.* at 15.

185. Complaint. at 2, 16, 25, 28, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., 219

protect their interests in selecting the college's services because the college "pushed" students into these loans in a rushed and high-pressured manner and "few students had the resources, particularly in the time permitted, to repay . . . or to obtain private loans elsewhere."[186] Much like the payday lender attempting to leverage its existing relationship with consumers to pressure them into refinancing their loans, the college engaged in abusive acts by "[t]aking control of the complex financial aid process," "[u]sing aggressive repackaging tactics," and "[p]ushing students into expensive, high-risk loans that [the college] knew were likely to default."[187] All in all, the college's existing relationships with its low-income students and subsequent acts of pressuring them into accepting a less favorable product led to it taking unreasonable advantage of the students' inability to protect their interests because of the uniquely inequitable nature of the relationship and the inability of the students to retain any documented academic benefit unless they repacked their loans.

Lastly, the CFPB challenged a company's practice of both enrolling consumers in its credit program without their consent and failing to deliver promised promotional offers after their enrollment.[188] The CFPB alleged the company's application of payments took unreasonable advantage of its customer's inability to protect their interests because it chose default payment allocation methods consumers would not have chosen independently, failed to sufficiently disclose this selection to consumers, and made it difficult or impossible for consumers to change this default selection.[189] The CFPB alleged customers were quite literally unable to protect their interests in using the service because the company made it particularly arduous for them to reach customer-service representatives and, even if they did speak to representatives, ignored their requests to distribute payments in their preferred allocations.[190]

4. Taking Advantage of Consumer's Reasonable Reliance.—The CFPB can also allege abusiveness when a provider of a financial product or service takes unreasonable advantage of the "reasonable reliance by the consumer on a covered person to act in the interests of the consumer."[191] In other words, this test focuses on companies developing relationships of trust with vulnerable consumers and then taking advantage of that trust by advising them to purchase products or services that are not beneficial to them. The CFPB examines whether companies created this trust by examining whether the company made specific affirmative statements that it would act in consumers' best interests.[192] Under this test, it is

F. Supp. 3d 878 (S.D. Ind. 2015) (No. 1:14-cv-00292).

186. *Id.* at 25, 30.

187. *Id.* at 30-31.

188. Complaint at 1-2, Consumer Fin. Prot. Bureau v. PayPal, Inc., No. 1:15-cv-01426 (D. Md. 2015).

189. *Id.* at 15.

190. *Id.*

191. 12 U.S.C. § 5531(d)(2)(C) (2010).

192. Patrick M. Corrigan, *"Abusive" Acts and Practices: Dodd-Frank's Behaviorally Informed Authority over Consumer Credit Markets and its Application to Teaser Rates*, 18 N.Y.U.

reasonable under these circumstances for consumers to rely on the company to act in their best interest, even in the absence of any other existing legal obligation to do so.[193]

In addition to alleging that the students at the for-profit college could not protect their own interests, the CFPB also alleged they reasonably relied on the college's financial aid staff to act in their best interests.[194] Although the college "held itself out as a school that would help students better their lives" and represented that the financial aid staff were "subject matter experts who could advise the students about financial aid[,]" the staff actually were salespeople paid on commission "[u]sing aggressive repackaging tactics."[195] The repackaged loans were "expensive, high risk . . . [and] likely to default."[196] All in all, the college created an environment where it portrayed itself as an institution that would look after vulnerable students, but in reality preyed upon their vulnerabilities.

In another case involving college loans, the CFPB alleged that a company whose website assured customers that it was "here to help"[197] and that it could "help you find an option that . . . minimizes your total interest cost"[198] committed an abusive act when it failed to offer student loan borrowers the opportunity to enroll in income-driven repayment programs to which they were entitled.[199] In other words, the borrowers reasonably "relied on [the company] to act in their interests in advising about options to address their financial situation."[200] The CFPB alleged that the company took unreasonable advantage of this reasonable reliance by "steer[ing]"[201] borrowers to loan forbearance rather than advise them about a program that "would have been [more] financially beneficial to those borrowers."[202]

The CFPB also alleged that an individual that represented that he would be "providing independent professional advice"[203] yet in actuality "had personal and professional ties"[204] with a loan company and "advised consumers without having any information about [their] financial situations"[205] committed a deceptive act

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J. LEGIS. & PUB. POL'Y 125, 141-42 (2015).

193. *Id.*

194. Complaint. at 31-32, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., 219 F.Supp.3d 878 (S.D. Ind. 2015) (No. 1:14-cv-00292).

195. *Id.*

196. *Id.* at 32.

197. Complaint at 17, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. 2017) (emphasis removed).

198. *Id.*

199. *Id.* at 17-18.

200. *Id.* at 50.

201. *Id.*

202. *Id.* at 50-51.

203. Complaint at 12, Consumer Fin. Prot. Bureau v. Access Funding LLC, No. 1:16-cv-03759 (D. Md. 2016).

204. *Id.*

205. *Id.*

because "[c]onsumers did not understand that Smith was not providing independent professional advice or that he did not take their individual circumstances or interests into account."[206] Again, the CFPB alleged that the individual both created reasonable reliance on behalf of the consumers by holding himself out as someone that would look after their interests and took advantage of the consumers' trust in him to do so by providing them a service that actually was not as beneficial as an alternative.[207]

5. Abusiveness Under the DCSA.—Even though most abusiveness claims brought by the CFPB have also alleged unfair or deceptive conduct,[208] these cases still provide clarification on how this standard can be applied by Indiana courts. Many abusiveness cases involve especially vulnerable consumers such as students, seniors, members of the military, payday loan borrowers, and those seeking debt relief assistance.[209] Because protecting these types of consumers corresponds with the example provided by the Office of the Attorney General,[210] Indiana courts should especially look to the abusiveness prong to protect the most at-risk Hoosiers. Abusiveness claims also generally arise when companies affirmatively indicate they will act in consumers' best interests.[211] Under the abusiveness tests, these companies then cannot steer consumers into purchasing products or services that are unlikely to benefit them, especially if more cost-effective alternatives exist.[212]

Although Dodd-Frank's definition of abusive is concerned with financial products and services, Indiana should still follow its standards because they easily translate to the DCSA's protections concerning consumer transactions. The goal of protecting vulnerable consumers from companies that falsely assert they are acting in their best interest can arise in any context, financially-based or not. Because these abusiveness standards provide unique protections concerning these consumers and a flexible standard unavailable through the also-newly-added broad unfair and deceptive safeguards, the articulations brought forth through CFPB actions offer the only satisfactory illustrations for which Indiana courts can

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206. *Id.* at 13.

207. *Id.* at 12-13.

208. In fact, by definition, material interferences could feasibly be interpreted as deceptive acts. The FTC provides that a deceptive act is (1) a representation, omission, or practice misleading the consumer, (2) the consumer interprets the characteristic in a reasonable manner, and (3) the misleading characteristic is material to the consumer's purchasing decision. *See generally In re* Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984). Again, because Indiana now broadly prohibits deceptive acts, but does not provide a definition of what constitutes deceptive acts, it should follow the FTC's definition.

209. *See supra* notes 154-207 and accompanying text.

210. *See supra* text accompanying notes 141-44.

211. *See e.g.*, Complaint. at 31-32, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., 219 F.Supp.3d 878 (S.D. Ind. 2015) (No. 1:14-cv-00292).

212. *See e.g.*, Complaint at 50-51, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101 (M.D. Pa. 2017).

rely.[213]

C. Implied Misrepresentations

The final important addition to the DCSA is an explicit prohibition of implied misrepresentations.[214] Unlike express misrepresentations, "implied claim[s] involve[ ] indirect representations created through context and may vary along a continuum from claims that are clearly deceptive to claims that are barely deceptive."[215] Statements of intention, opinion,[216] promises, or even a supplier's silence,[217] can constitute implied misrepresentations when "the product appearance, surrounding circumstances of a specific transaction, or ordinary consumer expectations of minimum performance standards"[218] would likely mislead a reasonable consumer.[219]

Courts and academics frequently grapple with how to measure the proof required in implied-misrepresentation claims due the inferential steps needed to determine their existence.[220] To offset this concern, some commentators wary of

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213. *See generally Legislative Highlights*, 32 AM. BANKR. INST. J. 10 (2013).

214. IND. CODE § 24-5-0.5-3 (2014).

215. Dennis P. Stolle, *The FTC's Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking*, 74 NEB. L. REV. 352, 360 (1995); *see also* Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992) ("[I]mplied claims fall on a continuum, ranging from the obvious to the barely discernible."). Similarly, some courts have "set up a sliding scale for consumer expectation of *quality* in used goods based on such factors as the age, appearance, and price of a particular product." *See* David B. Goodwin, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable*?, 33 STAN. L. REV. 535, 546 (1981) (citing Turner v. Int'l Harvester Co., 336 A.2d 62, 69 (N.J. Super. Ct. Law Div. 1975)).

216. *But see* Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327, 333 (Ind. 2013) (stating that the DCSA requires "a representation of *fact* . . . . By contrast, statements of the seller's *opinion*, not made as a representation of fact—such as claiming a product 'is the best'—are simply puffing") (emphasis in original) (internal quotation marks omitted). Notwithstanding, *Kesling* was decided before the DCSA's 2014 amendment and did not consider how implications arising from a supplier's stated opinions can influence a reasonable consumer.

217. *See, e.g.*, TEX. BUS. & COM. § 17.46(24) (2017) ("[F]ailing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed" is classified as a false, misleading, or deceptive act or practice.).

218. Jack E. Karns & Alan C. Roline, *The Federal Trade Commission's Deception Policy in the Next Millennium: Evaluating the Subjective Impact of Cliffdale Associates*, 74 N.D. L. REV. 441, 453 (1998).

219. *Id.*

220. *See, e.g.*, Thomas J. Holdych, *Standards for Establishing Deceptive Conduct Under State Deceptive Trade Practices Statutes That Impose Punitive Remedies*, 73 OR. L. REV. 235, 274-275 (1994) ("Applying deceptive trade practices statutes to implied representations is difficult because of the number and relationships of inferences that may be derived from a communication. One

unfettered claims have argued that extrinsic evidence, such as an objective consumer survey, is needed to show that consumers actually would perceive an implied misrepresentation.[221] The Seventh Circuit summarily rejected this view in regard to actions brought by the FTC.[222] In *Kraft, Inc. v. FTC*, the court affirmed a decision by the FTC, holding that "so long as [ ] claims are reasonably clear from the face of the advertisement,"[223] the FTC need not exhibit extrinsic evidence because it holds the expertise necessary to make such determinations without relying on outside proof.[224] Although, the court noted that the FTC "would be well-advised to adopt a consistent position on consumer survey methodology,"[225] the precedent recognizing the FTC's authority to use its own reasoned analysis rather than extrinsic evidence prevailed.[226]

Several states protect consumers against implied misrepresentations under their UDAP laws. Alabama is one of these states.[227] In the Alabama Supreme Court's seminal case defining implied misrepresentations, it instituted a "reasonable expectations"[228] standard to be viewed in light of the totality of the circumstances:

> Purchasers have a right to assume that new [goods] will perform in accordance with reasonable expectations and in accordance with implied representations inherent in marketing such products. Absent express representation, implied representations are not uncommon in the sale of new products, and reliance thereon may be shown by the totality of the

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meaning derived from a communication may be truthful and useful to consumers while another may be false and injurious.").

221. Ivan L. Preston, *The Federal Trade Commission's Identification of Implications As Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243, 1263 (1989). Additionally, in a 1976 case, the FTC indicated it could require extrinsic evidence when "visual inspection is inadequate," although it did not hold "that elaborate proof of consumer beliefs or behavior is necessary." *In re* Leonard F. Porter, Inc., 88 F.T.C. 546, 626 n.5 (1976). In other words, the FTC can choose—but is not required—to rely on extrinsic evidence as additional support when needed.

222. *See generally* 970 F.2d 311 (7th Cir. 1992) (involving a claim that Kraft, Inc. falsely implied that each of its Kraft Singles American Pasteurized Cheese Food slices contained the same amount of calcium as five ounces of milk).

223. *Id.* at 319.

224. "[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement[.]" *Id.*

225. *Id.* at 321.

226. *Id.*

227. Although the Alabama Supreme Court discussed implied misrepresentations regarding fraud, the analysis comports easily into analysis concerning a UDAP statute. Indeed, the U.S. Supreme Court recently acknowledged that statutes concerning states of mind "may still look to the common law for its insights into how a reasonable person understands statements of opinion." Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1330 n.9 (2015).

228. Mathis v. Jim Skinner Ford, Inc., 361 So. 2d 113, 115 (Ala. 1978).

circumstances and the underlying nature of the transaction itself.[229]

But the "reasonable expectations rule" only requires sellers "not to pass off a [good] as new"[230] if it had actually been previously sold, or was "so damaged or altered that a reasonable person would not consider it a new product."[231] This standard did not "impose on sellers of new [goods] a general duty . . . to sell [goods] that meet reasonable customer expectations."[232] Like the Seventh Circuit's decision in *Kraft*, this case instructs that all the circumstances surrounding a consumer interaction should inform a court's decision. Because the court will look to the totality of the circumstances, there is no need to examine extrinsic evidence as the "reasonable expectations rule" helps fill the allegedly troublesome inferential steps.

California also protects consumers against implied misrepresentations. The California Court of Appeal, Fifth District noted that "[a] misrepresentation need not be express but may be implied by or inferred from the circumstances."[233] Illustrating this concept, the court stated that, "a person who sells securities impliedly represents that the applicable provisions of law have been complied with and the falsity of that representation may give rise to an action for fraud."[234] Applying this standard to a case where a municipality solicited bids for garbage collection services, the court reasoned that the municipality made an implied misrepresentation that it would consider each bid because it "reasonably and fairly can be inferred from the notice to bidders"[235] that it would do so.[236] Thus, similarly to Alabama, California does not require extrinsic evidence to determine that conduct constituted an implied misrepresentation when words do not explicitly represent a fact and instead relies upon a reasonableness standard applied to the totality of the circumstances.

The U.S. Supreme Court recently weighed in on the issue as well, favorably citing to the Restatement-of-Torts view which acknowledges that "[a] statement of opinion as to facts not disclosed and not otherwise known to the recipient may . . . reasonably 'be interpreted by him as an implied statement'[237] that the [seller]

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229. *Id.*

230. Jewell v. Seaboard Indus., Inc., 667 So. 2d 653, 659 (Ala. 1995) (internal quotation marks omitted).

231. *Id.* (internal quotation marks omitted).

232. *Id.*

233. Universal By-Prod., Inc. v. City of Modesto, 117 Cal. Rptr. 525, 529 (Ct. App. 1974). Again, although California applied this doctrine to actions against fraud, it still aligns easily into UDAP analysis. *See* discussion of Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1330 n.9 (2015) *supra* note 227.

234. *Universal By-Prod., Inc.*, 117 Cal. Rptr. at 529.

235. *Id.*

236. *Id.*

237. *Omnicare, Inc.*, 135 S. Ct. at 1330; RESTATEMENT (SECOND) OF TORTS § 539 (AM. LAW INST. 1976).

'knows facts sufficient to justify him in forming'"[238] his or her opinion.[239] The Court went on to further explain that any "expression of an opinion may carry with it an implied assertion" that a product possess certain qualities.[240] This is of particular importance when a speaker "holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff."[241] Yet again, even the Supreme Court determined that extrinsic evidence was not required to prove implied misrepresentations, instead applying a reasonableness standard to the totality of the interaction between the buyer and seller.[242]

Indiana should mirror the approach followed by the FTC and the numerous courts that have found extrinsic evidence unnecessary to prove implied misrepresentation claims. Requiring extrinsic evidence considerably burdens both consumers and businesses due to the significant costs required to provide information such as wide-scale consumer surveys.[243] Further, juries will also usually serve as the fact finders of these cases and can accurately weigh whether a reasonable consumer would infer that an act, omission, or practice impliedly misrepresents a feature of a product because they themselves are consumers.[244] Further, because of the deterrent effect of requiring extrinsic evidence leading to a functional loophole, sellers may reduce communications to consumers in an attempt to circumvent the DCSA by avoiding making any representation at all.[245]

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238. *Omnicare, Inc.*, 135 S. Ct. at 1330; RESTATEMENT (SECOND) OF TORTS § 539 (AM. LAW INST. 1976).

239. *Omnicare, Inc.*, 135 S. Ct. at 1330; RESTATEMENT (SECOND) OF TORTS § 539 (AM. LAW INST. 1976).

240. *Omnicare, Inc.,* 135 S. Ct. at 1330 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 760 (5th ed. 1984)).

241. *Id.*

242. *Id.* at 1333.

243. DEREK L. WALLER, STATISTICS FOR BUSINESS 134 (2d ed. 2016) ("Consumer surveys can be expensive. There is the cost of designing the questionnaire such that it is able to solicit the correct response; there is the operating side of collecting the data; and then the subsequent analysis."); *see also* Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 951 (3d Cir. 1993) (The task of conducting consumer surveys is "time consuming and expensive.").

244. *See generally* Barbara S. Swain & Dan R. Gallipeau, *What They Bring to Court: Juror Attitudes in Antitrust Cases*, 8 ANTITRUST 14 (1994). *But see* Holdych, *supra* note 220, at 275 (noting that determining inferences based on "knowledge of the communication process, human reasoning, and evidence concerning the express content of a communication and the context in which it occurred . . . presents a risk of erroneous decisionmaking when the inferences in question are disputable."); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 488-89 (2012) ("While we can all agree how a consumer should interpret the literal meaning of an advertisement, there is neither a factual nor normative baseline for how consumers do or should interpret an advertisement's implicit meanings."). But Holdych and Klass's concerns are outweighed by the deterrence accompanying an extrinsic evidence requirement and the, as acknowledged by Klass, "inaccuracy and manipulability" of the results of such evidence.

245. Holdych, *supra* note 220, at 277.

Indeed, silence can be just as harmful as any express misrepresentation.[246] Instead—like Alabama, California, and the FTC—Indiana should look toward what a reasonable consumer would infer from the totality of the circumstances.

CONCLUSION

In 2014, the Indiana General Assembly adopted a significant, yet presently little-discussed, amendment to the DCSA. By adding a general prohibition against any "unfair, abusive, or deceptive act, omission, or practice,"[247] the legislature granted wider latitude for consumers to seek claims under broad prohibitions of unfair and abusive conduct.[248] In barring suppliers from making implied misrepresentations, the legislature prohibited conduct not previously forbidden by statute and that some thought might have been outside the scope of the pre-2014-DSCA.[249] This Note urges Indiana courts to honor the General Assembly's express instruction for the DCSA to be liberally construed by following a modified Cigarette Rule to interpret unfairness, Dodd-Frank's tests to define abusiveness, and a reasonableness standard embedded in a totality-of-the-circumstances approach to determine the presence of implied misrepresentations.[250]

These conclusions are supported not only by the numerous states adhering to these interpretations, but also the judicial efficiency that would accompany following prior rulings by the FTC, the CFPB, and the states that follow their approaches.[251] As cases begin to increasingly arise out of the DCSA's expanded jurisdiction—and Indiana courts begin to grapple with the meaning of these new terms—they will have an abundance of resources to define issues already settled in numerous other courts. The consistency that would come with relying upon already-settled law would not only help consumers know what rights they can

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246. *See, e.g.*, Orkin Exterminating Co. v. Lesassier, 688 S.W.2d 651 (Tex. Ct. App. 1985) (Involving a case where termites continued to destroy a woman's home after an exterminator impliedly misrepresented that his work was complete by leaving—and never returning—after he only partially completed some of the labor.).

247. IND. CODE § 24-5-0.5-3 (2014).

248. *Id.*

249. *Id.*; Torr Statement, *supra* note 1.

250. But if the General Assembly did not intend these outcomes, it could take clarifying actions. It could amend IND. CODE § 24-5-0.5-2 to provide definitions for "unfair," "abusive," and "implied." In doing so, it could, for example, explicitly adopt the Cigarette Rule, s*ee e.g.*, OKLA. STAT. § 15-752(14) (2017) ("'Unfair trade practice' means any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers[.]"), the Policy Statement approach, or even (imprudently) create its own standard concerning unfairness. The legislature could also, as many states have done, give the Attorney General rulemaking authority over the DCSA. CARTER, *supra* note 4, at 7-10.

251. CARTER, *supra* note 4, at 5-6.

assert, but would also aid businesses in ensuring they are compliant with the DCSA's new demands. Until courts begin to outline the meaning of these new terms, or the legislature speaks, the DCSA will continue to be shrouded in uncertainty. And if the General Assembly decides to take up this task, it could even deliberate it over that happy hour.[252]

252. *See* Torr Statement, *supra* note 1.