March 18, 2008

DOES FRAUD PAY: AN EMPIRICAL ANALYSIS OF ATTORNEY'S FEES PROVISIONS IN CONSUMER FRAUD STATUTES

Debra P. Stark
Jessica M. Choplin

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By:

Debra Pogrund Stark[1]
and
Jessica M. Choplin[2]

Introduction

Imagine that you are about to purchase a new car from an auto dealer. The car has 972 miles on the odometer, but the sales person assures you that those miles took place on their own lot from test drives and from sales persons’ use of the car. The sales person assures you that there was no prior owner of the car (this point being important since if the car had a previous title holder it would reduce the value of the car). You pay the value of the car as a new car with 972 miles on it, but discover when you receive the title to the car that the car in fact was previously titled to someone else. The value of the car is consequently $4,000 less than what you paid for it. If the dealer denies that its sales person lied to you and will not return the $4,000 to you, would you hire an attorney to bring a lawsuit to redress this wrong? What if you were told that it would cost you $34,183 to successfully litigate the case? These are the facts in Wilkins v. Peninsula Motor Cars, Inc.[3] A typical consumer under these facts would not rationally choose to hire an attorney to pursue a claim like this because the costs to litigate the case exceed the amount of the consumer’s damages from the fraud.[4] However, to combat this problem and to discourage businesses from being able to make fraud profitable, forty-five of the fifty states have enacted consumer fraud and deceptive practices statutes that provide for the possibility of attorneys’ fees to a prevailing plaintiff in a consumer fraud or deceptive practice case.[5] Due to these statutes, consumers are better able to protect themselves when they have been defrauded or deceived by now being able to hire competent attorneys willing to take on their cases. In addition, through these statutes, unscrupulous businesses will face a stronger deterrent to committing such fraud and deceptive practices since they will now be more likely encounter a lawsuit in reaction to their fraudulent or deceptive practices than if there were no awarding of attorneys’ fees to the prevailing consumer.

However, the wording of some of these consumer fraud statutes regarding the recovery of attorneys’ fees may in fact impede the legislative goal of encouraging the bringing of meritorious cases. For example, while some state statutes make very clear that a prevailing plaintiff is entitled to reasonable attorney’s fees,[6] a number of state statutes (or court interpretations of these statutes)[7] provide instead that the prevailing plaintiff may be ordered attorney’s fees at the discretion of the court.[8] This discretion creates a level of uncertainty that might very well discourage attorneys from taking on even a strong meritorious consumer fraud case where the consumer is not in a position to pay the attorneys fees or where the attorney’s fees are likely to eclipse the amount at issue in the case. It is also hypothesized that in this scenario, the consumer is less likely to decide to bring the case. This article tests these hypotheses empirically by surveying consumers and attorneys on the likelihood that they would bring consumer fraud cases to court under different provisions regarding attorneys' fees such as when they are discretionary versus required. If this discretionary language causes consumers and lawyers to be less likely to decide to bring even a strong meritorious consumer fraud case, then the articulated legislative policy to promote the bringing of such cases is being impeded by such language and statutes that contain this type of discretionary language should be modified to eliminate such discretion by the courts.

To further complicate the calculus of costs and benefits in bringing an action, some of the state consumer fraud statutes provide that in the discretion of the court, the court may award a prevailing defendant her attorney's fees. This broad provision, not necessarily confined to the situation where the plaintiff has brought a frivolous case, may impede the legislative goals of encouraging consumers to bring meritorious cases and, consequently, to deter fraud against consumers.[9] Our survey therefore also sought to discover how the possibility of awarding attorney's fees to a prevailing defendant might affect the decision making of attorneys and consumers regarding initiating a lawsuit even when the consumer has a very strong meritorious case. If it turns out that the possibility that a prevailing defendant could recover her attorneys' fees reduces the likelihood that consumers and attorneys would bring a claim (even for a meritorious case that is characterized as a strong case), then this variation on attorney's fees is contrary to the legislative goals in creating the attorneys' fees provisions and should be modified.

Our survey also sought to test the decision making process of consumers and attorneys under the various forms of statutory attorneys' fees provisions in the scenario where the plaintiff is raising a good faith claim, but where success is very unclear. One such scenario where policy dictates that such cases should be encouraged to be brought, is the situation where the consumer is bringing a claim that is on some level a matter of first impression in the jurisdiction, but where another jurisdiction might have case law in support of the plaintiff's contention. A survey of attorneys and consumers presented in this article tests how likely consumers and attorneys are to bring a case in this scenario under the various forms of attorneys' fees provisions in consumer fraud statutes. We hypothesized that not only are attorneys and consumers less likely in general to bring such cases compared with the situation where their chance of success is characterized as very strong, but we also hypothesized that the consumer's and attorney's willingness to bring a good faith action will also be significantly reduced when the court can award attorneys' fees to a prevailing defendant even when the plaintiff has not brought a frivolous case. If the surveys confirm this hypothesis, then policy articulated by legislatures to encourage meritorious consumer fraud claims dictates that they revise their attorneys' fees provisions to clarify that defendants recover their attorneys' fees only when the plaintiff's case is frivolous.

The consumer fraud statutes that provide for attorney's fees to a prevailing defendant do so in order to achieve the goal of discouraging the bringing of non-meritorious (i.e. frivolous) claims by consumers and their attorneys.[10] Since some consumer fraud statutes provide for not only attorneys' fees but also punitive damages under certain circumstances and potentially lucrative class-action matters, there is a potential economic incentive for consumers and their attorneys to bring non-meritorious claims in the hope of extracting a settlement from the big-pocket defendants.[11] With this possibility in mind, we surveyed consumers and attorneys to investigate the decision making process of consumers and attorneys under the different statutory attorneys' fees provisions in a scenario where the consumer would be bringing a claim without merit under the law in the hope of extracting a settlement from the defendant. We hypothesized that most attorneys would not be willing to bring a non-meritorious case since there are ethical rules and civil procedure rules that already prohibit and sanction this.[12] However, we wanted to see if in the rare cases where an attorney still expressed a willingness to bring such a claim, that decision would be less likely to be made when the prevailing defendant could be awarded attorney's fees at the court's discretion versus when the prevailing defendant could be awarded attorney's fees only if the plaintiff's case was deemed frivolous. If the frivolous standard version is equally likely to impede the bringing of non-meritorious cases as the version which awards the prevailing defendant her attorneys' fees at the discretion of the court, then this result is further reason for the attorneys' fees provisions to provide that a prevailing defendant should only recover her attorneys' fees when the plaintiff's case is frivolous. However, if the version requiring the plaintiff's case to be frivolous before awarding fees to the defendant is less likely to impede the bringing of non-meritorious cases, then this result could serve as support for the attorneys' fees provisions to provide for the prevailing defendant to be awarded attorney's fees at the discretion of the court rather than only when the plaintiff's case is frivolous. Before drawing this conclusion, the legislature should also consider the impact of such a potentially broad granting of fees to a prevailing defendant on the bringing of meritorious consumer fraud cases.

The issue of ensuring that victims of consumer fraud will be able to have their day in court is particularly important today in light of the widespread and pernicious problem of predatory home mortgage loans. It has been estimated, for example, that 50% of the people who were induced by mortgage brokers to take out a high cost sub-prime loan could have qualified for a lower cost, or prime loan, and some of these people are now having trouble keeping up payments on these high cost loans.[13] Yet it will be very difficult and time consuming for an attorney to litigate this type of case in order to seek damages or rescission of the loan or to save a person from becoming homeless or losing the equity that they put into their home.[14] Potentially, consumer fraud statutes could be the basis for a homeowner to recover some or all of her losses when she was deceived into entering into an overpriced or unaffordable loan,[15] but if the attorneys' fees provisions are drafted in a way that creates uncertainty that the attorney will recover her attorneys' fees, even if her client prevails in the litigation, this may lead to far fewer attorneys who will be willing to take on these important but complicated cases.

Part I of the article sets out the economic dilemma a typical consumer who has been defrauded faces in deciding whether to bring an action under the common law to be compensated for her losses when she has been defrauded (the "economic feasibility" issue). It then discusses the legislative response to the economic feasibility problem through the awarding of attorneys' fees to prevailing plaintiffs in consumer fraud cases. It also identifies the primary legislative goals articulated in legislative histories and in cases interpreting consumer fraud statutes to enable defrauded consumers to be able to bring consumer fraud actions and to thereby also deter businesses from engaging in consumer fraud. Part II provides a summary of the different approaches among the fifty states' consumer fraud statutes in terms of when attorneys' fees will be awarded to a successful plaintiff or to a successful defendant (and the secondary policy reason for this), with an Appendix containing a breakdown of the attorneys' fees provisions and case law interpretations of these statutes among the fifty states. Part III critiques the attorneys' fees provisions in the various consumer fraud statutes in the United States and the court interpretations of these provisions in light of the goals articulated for these statutes and raises questions to be empirically tested. Part IV describes the methodology and results of our surveys which seek to determine the impact of different statutory terms regarding the awarding of attorney's fees under different scenarios on the likelihood that a consumer or attorney will bring a consumer fraud case. Finally, Part V sets forth a proposal regarding the best approach to the awarding of attorneys' fees to a prevailing plaintiff or defendant based upon the results of the data collected from these surveys and a consideration of the public policy goals articulated when the consumer fraud acts were enacted.

I. The Problem of Economic Feasibility and the Legislative Response

An estimated twenty-five million Americans became the victims of certain types of consumer fraud in 2004 according to data collected by the Federal Trade Commission ("FTC").[16] Often in these situations (such as purchasing a membership in a pyramid scheme, or having one's phone service carrier change without the consumer's permission), a very large number of consumers are affected, but the amount of any individual consumer's loss is typically small (i.e. less than $250).[17] In this situation, a consumer is unlikely to bring an individual lawsuit on the basis of the common law action for fraud to recover her losses because the legal fees and costs for the lawsuit will far outweigh the amount the consumer could recover from the lawsuit.[18] While consumers filed 635,173 complaints with the FTC in 2004 for matters which fell within the ten categories compiled by the FTC,[19] only 2.4% of the consumers surveyed who believed that they had been defrauded consulted with a lawyer,[20] even though 46.3% reported that they were not satisfied after directly seeking recovery from the party who had defrauded them.[21] With limited resources, the FTC clearly can not respond to so many consumer complaints each year. One potential method to make it economically feasible for a consumer to bring a private consumer fraud claim when thousands of consumers are affected but the damages to each is low is the filing of a class action on behalf of all those injured. However, in general, it is very difficult to meet the requirements to certify a class action.[22] Furthermore, it is especially difficult to meet these requirements for class action status in the context of a consumer fraud claim because of the plaintiffs' individualized reliance or individualized harm.[23] Due to these difficulties, it is likely that a large number of consumer fraud claims will not be able to be brought in the context of a class action case and, consequently, many consumers will be left without an economically viable option to litigate their claims without an award of attorney's fees.

In addition to the high volume of consumer fraud in the ten categories tracked by the FTC[24] where large numbers of consumers are affected, but the average consumer loss is usually low, consumers are also defrauded in contexts where they could be individually losing thousands of dollars, such as home improvement scams, where contractors take money from the homeowners at the start of the job to "pay for materials" but then disappear and never perform, or predatory home mortgage loans, where consumers are tricked into entering into overpriced and unaffordable home loans. Predatory loans often occur in the sub-prime lending market, where the total number of sub-prime loans has nearly tripled since 2001, outnumbering the total number of prime loan originations in 2006.[25] As previously noted, it has been estimated as many as 50% of those who received a high cost home loan could have qualified for a lower cost loan.[26] An estimated 10.3 percent of American homeowners (approximately 8.8 million people) now owe more than their homes are worth, an epidemic unseen since the depression. [27] Predatory home loans ending in foreclosure (15.8 percent of sub-prime loans) have cost homeowners as much as $164 billion between 1998 and the third quarter of 2006.[28] Further analysis of those home loans originating in 2005-2006 shows that sub-prime foreclosures will also result in a $202 billion decrease in home values and tax base, with this devaluation affecting nearly 40.6 neighboring homes.[29] Americans have also been the victims of home improvement scams. In Illinois alone, there were 3,204 consumer construction and home improvement complaints to the Attorney General in 2006.[30] Indeed, according to a study conducted by the American Association of Retired Persons in 1998, seventeen percent of those surveyed indicated that they had been the victim of a major swindle or fraud at some time during their life-time.[31]

As previously noted, even when the consumer fraud takes place in contexts where the consumer may be losing thousands of dollars or more, certain required elements to make out a cause of action for common law fraud can be very difficult[32] and expensive to prove, making the private lawsuit under a common law fraud action, where there is no recovery for attorney's fees, too expensive and uncertain to truly be of use to consumers and causing fraud "to pay" for disreputable companies and businesses.[33] In an extreme example of the difficulties and expenses that can be involved in litigating these cases, the plaintiff's attorneys in Taylor v. Medenica,[34] spent over 1,500 hours to successfully litigate a case involving a claim under the South Carolina Unfair Trade Practices Act in response to a vigorous defense mounted by the defendants. The court in that case awarded the plaintiff $108,000 in damages and attorneys' fees of $500,000 and the attorneys' fees award was upheld on appeal. Had there been no consumer protection statute authorizing attorneys' fees, the case would not have been economically feasible for the plaintiff to file. In a more typical example of how the attorney's fees can exceed the amount the consumer is damaged, the court in Jordan v. Transnational Motors, Inc.[35], awarded the consumer damages of $7,600 for defects with a car the plaintiff purchased and attorneys' fees of $21,000 based on the hours the plaintiff's attorney spent on the case in bringing a claim under the Magnuson-Moss Warranty Act and under the Michigan Consumer Protection Act. Although it may initially seem misguided to award attorneys' fees far in excess of the amount the plaintiff recovers, the court in Jordan explained it well:

> In consumer protection as this, the monetary value of the case is typically low…if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is but precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended.[36]

Under the American legal system where a prevailing party is not awarded her attorneys' fees (unless a contract at issue calls for attorneys' fees or a statute provides for this remedy), if the cost of hiring an attorney to litigate the case exceeds the amount at stake, the aggrieved party will normally not bring a lawsuit for a redress of grievances and this result is acceptable in the typical litigation matter. But when important policy reasons exist to promote the bringing of certain litigation, Congress and state legislatures can and have enacted statutes which provide for attorneys' fees to the prevailing plaintiff to encourage and enable such litigation. There are many examples of such statutes at both the state and federal level and many relate to actions that are considered particularly pernicious, such as discrimination against certain classes of persons in employment and housing.[37] The problem of sharp and unscrupulous suppliers of goods and services deceiving and defrauding consumers is also an example of a pervasive and pernicious practice that the federal government[38] and all fifty state legislatures have enacted legislation to combat.

When New Jersey passed its Consumer Fraud Act in 1960, it did so to "combat the increasingly widespread practice of defrauding the consumer"[39] by enacting a law that contained provisions for private causes of action, an award of treble damages, attorneys' fees, and costs in order to "provide easier access to the courts for the consumer, increase the attractiveness of consumer actions to attorneys and also help reduce the burdens on the Division of Consumer Affairs."[40] The Attorney General stated to the senators at that time:

> We found through our study that consumers are often without adequate remedy for redressing violations such as those contained in the Consumer Fraud Act. In addition, we found that consumers most often cannot afford the cost of pursuing what remedies they do have available and that attorneys are not generally attracted to individual consumer suits which involve a great amount of work and very little monetary award. Consequently, we included the above private right of action in order to provide a vehicle for private consumer redress, to make that vehicle economically feasible to the private consumer and to make it economically and professionally attractive to the attorneys of this State. [41]

Other state legislatures expressed similar concerns about the existence of widespread fraud upon consumers. In commenting on Minnesota's consumer fraud law, the Governor noted "the intrastate practice of fraud has grown into a field of great profit and great damage both to individual citizens and to honest businessmen."[42] As previously noted, this state of affairs is perhaps even more pressing today in light of the widespread fraud that homeowners have suffered at the hands of predatory lenders and predatory mortgage brokers and the public need to curb such abusive practices is acute.[43] The ability of consumers to bring to justice those who have defrauded them is considered a matter of public interest:

> Allowing plaintiffs who successfully pursue an action under the UTPA to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest. Similarly, requiring unsuccessful defendants to pay the plaintiff's attorney's fee discourages tradesmen from engaging in unfair methods of competition and unfair or deceptive acts in the conduct of trade or commerce, thereby also enforcing the purpose of the UTPA. [44]

In summary, there are five purposes articulated by courts and legislatures for the prevailing plaintiffs to recover attorneys' fees in consumer fraud and deceptive practices statutes: (i) to wholly compensate the victim for her losses, (ii) to punish the wrongdoer who has engaged in the fraud, (iii) to make it economically feasible for a consumer to bring a consumer fraud claim, especially when the costs to litigate it may be higher than the damages to be recovered, (iv) to encourage attorneys to take on these cases, and (v) to deter future acts of fraud, deception and unfair trade practices.45

II. A Comparison of the Different Legislative Approaches

Based on our review of the fifty states' consumer fraud and deceptive practices type statutes, the overwhelming majority, forty-five[46] states provide for the awarding of attorneys' fees to a prevailing plaintiff either as a mandate to the court or at the discretion of the court.[47] The only states' statutes that do not provide for attorney's fees to a prevailing plaintiff are: Arizona, Delaware, Iowa (which state does not even provide for a private right of action under its consumer fraud statute), Mississippi, and South Dakota.[48] Among the forty-five states that do provide for the award of attorneys' fees to prevailing plaintiffs, twenty-one of these state statutes mandate that a court award a prevailing plaintiff her attorney's fees, through the use of terms like "shall award" and twenty-three permit a court, in the court's discretion, to award attorneys' fees to a prevailing plaintiff (it is unclear, based on Arkansas case law, whether awarding fees to a prevailing plaintiff is mandatory or discretionary so we do not count Arkansas in either the mandatory or discretionary sub-categories).[49]

Some states' statutes impose other, specific conditions that must be satisfied for a prevailing plaintiff to be awarded attorney's fees.[50] The Georgia statute provides that the prevailing plaintiff will not recover her attorneys' fees if she rejected a reasonable written offer of settlement made within 30 days of a written demand for relief has been made and case law there also requires that the defendant's actions have the potential to harm the public.[51] Similarly, the North Carolina statute provides that for the prevailing plaintiff to recover attorney's fees the defendant must have refused to resolve the matter in an unwarranted fashion.[52] The Hawaii and North Carolina statutes require that the plaintiff show that the defendant "willfully" engaged in deceptive trade practices in order for the prevailing plaintiff to recover attorney's fees.[53] Similarly, the North Dakota statute also requires that the defendant "knowingly" committed the unlawful act for the prevailing plaintiff to recover her attorneys' fees.[54]

In terms of awarding attorneys' fees to a prevailing defendant, only one states' consumer fraud statute on its face, Alaska, appears to mandate that a court should award attorney's fees to a prevailing defendant with no further conditions attached beyond the defendant prevailing in the litigation.[55] But in reviewing case law interpreting these statutes, we found that in California the courts have interpreted what appears to be discretionary language in the statutes for the awarding of attorney's fees to a prevailing defendant to be mandatory.[56] In addition, five states' consumer fraud statutes (Alabama, Colorado, New Mexico, Oklahoma, and Texas) mandate that a court award attorneys' fees to a prevailing defendant, but only when the plaintiff's case is deemed one or more of the following: "frivolous," "groundless," "unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law," "for the purpose of harassment," in "bad faith," or in bad faith after a "reasonable settlement offer" was made (hereafter sometimes collectively referred to as "frivolous or in bad faith.")[57] A total of twenty-eight states' consumer fraud statutes either require or permit a prevailing defendant to recover her attorney's fees.[58] Of those twenty-eight states, twenty clarify (either in the statute or case law interpreting the statute) that the court should only award attorney's fees to a prevailing defendant if the plaintiff's case is deemed "frivolous or in bad faith."[59] However, this leaves eight states (Alaska, Florida, Georgia, Indiana, Kentucky, Nevada, Oregon, and Rhode Island) whose statutes and court interpretations of these statutes provide for a court to award attorney's fees to a prevailing defendant at the court's discretion without any explicit additional requirements, such as the plaintiff's claim being frivolous or in bad faith.[60]

Finally, some state statutes impose other conditions (i.e. in addition to the bad faith/frivolous requirements) that must be satisfied for a prevailing defendant to recover her attorneys' fees. The Georgia statute requires that the plaintiff's action continued after the rejection of a reasonable written offer of settlement for the prevailing defendant to recover her attorney's fees. Three states (Hawaii, Kansas, and Utah) require not only that the plaintiff's claim is groundless, but also that the plaintiff knew that the claim was groundless. The North Carolina statute similarly requires that the plaintiff knew or should have known the action was frivolous and malicious. The Oregon statute does not allow attorneys fees to a prevailing defendant in a class action case. However, the Missouri statute, which permits a court in the court's discretion to award a prevailing defendant her attorney's fees, has been interpreted by Missouri case law to permit the awarding of attorney's fees to prevailing defendants not only in the bad faith/frivolous type situations, but also if the case brought was "unreasonable."[61]

In this article we focus on *when* a prevailing party will or might be able to recover attorney's fees under the fifty state statutes and case law interpreting these statutes, rather than on *how much* of their attorneys' fees a prevailing plaintiff or defendant can recover. The amount of attorneys' fees that prevailing plaintiffs can recover is also an important topic relative to the issue of tailoring the statutory provisions to promote the five legislative goals articulated earlier, but beyond the scope of this paper.

The attorneys' fees provisions among the fifty states reflect a wide variety of approaches. The next section provides a preliminary critique these approaches in light of the five legislative goals behind enactment of consumer fraud statutes and raises questions to be empirically tested.

III. A Preliminary Critique and Identification of Questions To Empirically Test

An initial critique of the various attorneys' fees provisions among the fifty state consumer fraud statutes should focus on which version of these provisions is best tailored to achieve the five goals that have been articulated by courts and legislatures in connection with the enactment of the consumer fraud statutes and the attorneys' fees provisions in such statutes: (i) to wholly compensate the victim for her losses, (ii) to punish the wrongdoer who has engaged in the fraud, (iii) to make it economically feasible for a consumer to bring a consumer fraud claim, especially when the costs to litigate it may be higher than the damages to be recovered, (iv) to encourage attorneys to take on these cases, and (v) to deter future acts of fraud, deception and unfair trade practices.[62] As previously discussed, awarding attorney's fees to a prevailing plaintiff has been almost universally considered by state legislatures to be essential to the achievement of these goals.[63] Indeed, an overwhelming forty-five states provide for the possibility of attorney's fees to prevailing plaintiffs under their consumer fraud acts.

However, twenty-three of the states interject an uncertainty to the recovery of attorneys' fees by prevailing plaintiffs by providing that the awarding of such fees are within the discretion of the court rather than mandatory. We hypothesized that attorneys and consumers would be less willing (perhaps much less willing) to bring a consumer fraud case for a plaintiff when they are not assured of recovering their attorneys' fees, even if they prevail in the case. We tested this hypothesis with a survey of attorneys and consumers discussed in Part IV. It is important to note that even if there is only a small difference in likelihood to take the case due to the discretionary rather than mandatory language, if there is only a small pool of attorneys ever willing to take on a typical consumer fraud case on behalf of the consumer, then even a small difference in willingness to take on a case due to the discretionary language will have a significant impact on the ability of consumers to find competent attorneys to take on these cases.

There are several reasons why there is only a small pool of attorneys willing to take on consumer fraud cases on behalf of a consumer. First, there is the economic feasibility issue discussed in Part I and the need for the awarding of attorney's fees in order for the attorney to have an economic incentive to take on the case. Second, even strong and meritorious cases do not always end in victory in court so the attorney is not guaranteed to receive any attorney's fees for their work (and some companies or individuals who defraud consumers may have few assets and are "judgment proof"). Third, these cases can be difficult to prove and highly complicated[64] which will cause attorneys who do not specialize in this area of law to be reluctant to take on the case.[65] Finally, lawyers at large law firms that tend to represent major business clients may, due to "firm politics" or potential conflicts of interest, not be able to represent a consumer in a consumer fraud case against a large company.[66] These factors all contribute to a very small pool of competent attorneys who would consider taking on a consumer fraud case on behalf of the consumer. Thus, any further disincentives, such as making the attorney's fees award discretionary rather than mandatory, create serious impediments to the goal of encouraging attorneys and consumers to bring these cases and cause the impact of badly worded attorneys' fees provisions to become even more significant.

We were also interested in testing the impact of the strength of the case on the willingness of attorneys to take on the case. We hypothesized that when the consumer fraud case is less strong, but in good faith, such as a situation where it will be difficult to prove the alleged facts or when the plaintiff argues for a new interpretation of the statute based on policy grounds or case law in other jurisdictions, that attorneys in this scenario would be even less likely to take on the case due to the reduced chances of recovering her time spent on the case in the form of attorneys' fees. We test this hypothesis in the study of consumers and attorneys described in Part IV. There were other variations among the statutes regarding the plaintiff's recovery of her attorney's fees, but the variations were either idiosyncratic or involved so few states that we elected not to empirically test the impact of these variations.[67]

Although the most fundamental of the five legislative goals is to enable and encourage consumers and attorneys to bring cases against businesses who have defrauded the consumer, some of the other legislative goals are also impeded when a court in its discretion chooses not to award attorneys' fees to a prevailing plaintiff. One of these other legislative goals was to wholly compensate the victim of fraud from her losses. But this clearly will not occur when a court in its discretion chooses not to award attorneys' fees to a prevailing plaintiff. Indeed the consumer may end up with no recovery at all if the attorney's fees equal or exceed the consumer's actual damages. Another goal that would be impeded with a discretionary award of attorney's fees is having the wrongdoer who has engaged in fraud be punished. Having the wrongdoer pay not only the consumer's damages but also the consumer's attorney fees forces the wrongdoer to not only give back what it defrauded from the consumer but also pay another sum as well.[68] If there are no attorney's fees awarded, the wrongdoer is not really punished for her actions, unless the court has awarded punitive damages. Another articulated legislative goal is to deter future fraud. We speculate that when a business is aware that they might be liable not only to return their ill gotten gains, but also to pay the consumer's attorney's fees, this is an added deterrent to committing the fraud[69]. If businesses know that even if they lose in the consumer fraud case a court might not award the plaintiff their attorney's fees, the wrongdoer will calculate this uncertainty of having to pay those fees, and the reduced chance the consumer will now bring a claim, in determining whether to engage in the fraud.[70]

How do awarding attorney's fees to a prevailing defendant comport with the five legislative goals and why do some legislatures provide for attorney's fees to a prevailing defendant in a consumer fraud case?

The Illinois Supreme Court, in Krautsack v. Anderson,[71] addressed this issue when called upon to determine how to interpret a consumer fraud statute that provides for the court in its discretion to award attorney's fees to a prevailing plaintiff or prevailing defendant. Similar to how the U.S. Supreme Court addressed a similar issue in a Title VII case,[72] the Illinois Supreme Court noted that the policies that support a prevailing defendant recovering attorney's fees are different from and much more limited than for a prevailing plaintiff.[73] The Illinois Supreme Court noted two legislative policies that would explain awarding attorney's fees in a consumer fraud statute claim to a prevailing defendant: to deter bad faith conduct by the plaintiff and to reimburse the defendant when that happens.[74] The court also noted that limiting the circumstances of when a prevailing defendant can recover attorney's fees when a plaintiff has brought a consumer fraud act claim is consistent with the overall goals of the consumer fraud act because to interpret the circumstances in a broader way would have a chilling effect on the goal of encouraging consumers to bring good faith, legitimate claims:

> Limiting a consumer fraud defendant's ability to recover fees to instances where the plaintiff acted in bad faith is consistent with the purpose of the Act. If this limitation did not exist, a prevailing defendant could be awarded fees simply because the plaintiff, although having a legitimate claim and proceeding in good faith, lost at trial on the proofs. The potential for such a penalty would act as a deterrent to the filing of valid consumer fraud claims . . . Our duty, of course, is to avoid a construction that would defeat the statute's purpose or yield absurd or unjust results.[75]

The court in Krautsack ruled that in light of the entire consumer fraud statute and the purpose of the statute (to encourage and enable consumers to bring a consumer fraud claim), the court interpreted the statute to require that as a "threshold" matter the defendant first must show that a plaintiff has acted in "bad faith" before a court could in its discretion (applying any other relevant factors) award a prevailing defendant her attorney's fees.[76] The court noted that case law on what is conduct that a court can sanction under Supreme Court Rule 137 is relevant to a court's determination of what is "bad faith" under a consumer fraud claim.[77] However, the court ruled that the standard for what is "bad faith" in the consumer fraud claim context is not limited to the narrow definition in Supreme Court Rule 137 which only addresses the pleadings, motions and other papers a litigant files, since a litigant or the litigant's attorney can engage in bad faith conduct at other times during the course of litigation as well.[78]

Not every jurisdiction faced with a similar consumer fraud act provision on attorney's fees will necessarily follow this ruling. Although the Illinois Supreme Court's policy analysis is quite strong, as the Dissenting Justice points out in his dissent to the opinion, the majority's interpretation of the statute can be criticized as doing more than interpreting the statute; that by requiring a threshold finding of bad faith by the plaintiff, the court is adding a requirement that is not in the statute and is thus "amending" the statute.[79] "Although the majority makes a persuasive case as to why Section 10a(c) should require a prevailing defendant to demonstrate that the plaintiff acted in bad faith, the legislature chose not to include such a requirement, and it is not the prerogative of this court to correct the legislature's 'omissions.'"[80] Thus, in jurisdictions where the consumer fraud statute provides that the prevailing defendant can recover attorney's fees at the discretion of the court, it is possible, but uncertain that a court will confine this discretion to bad faith acts; some might agree with the dissent in Krautsack and refuse to so interpret the statute because they view it as "amending" the statute. Until the supreme courts of each of these states rules on how this discretion is to be exercised, lower state courts (and federal courts applying state law) could opt to award attorney's fees to a prevailing defendant on much lesser grounds than a showing of bad faith by the plaintiff. But what could these lesser grounds be?

The U.S. Supreme Court in Christianburg Garment Co. v. Equal Employment Opportunity Commission,[81] addressed the issue of how to interpret a statute which provides for attorney's fees to the prevailing plaintiff or defendant at the court's discretion. Although, the case involved was a Title VII employment discrimination claim, and the ruling in the case is thus not binding on courts who are interpreting state consumer fraud statutes, due to the similarity between Title VII and consumer fraud statutes (both seek to eradicate the bad behavior prohibited under each of their statutes through the awarding of attorney's fees to the prevailing plaintiff), the Christianburg decision provides guidance to state and federal courts on how to interpret the discretionary language in the consumer fraud statutes. Indeed, some courts have already applied the reasoning in that case as guidance on how the court should interpret the discretionary attorney's fees language in the consumer fraud statute.[82]

In determining how to interpret language which permitted a court in its discretion to award attorney's fees to the prevailing party in a Title VII claim, the U.S. Supreme Court in Christianburg first addressed the question of what policy goals would be achieved through awarding attorneys' fees to a prevailing defendant.[83] The Court noted that the language in the statute did not provide any guidance to it on how the court should exercise this discretion.[84] The Court immediately thereafter, however, stated "a moment's reflection reveals that there are at least two strong equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant."[85] First, that through bringing a case of employment discrimination, the plaintiff is the "chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority."[86] Second, when a court wards attorneys' fees to a prevailing plaintiff, "it is awarding them against a violator of federal law."[87] A prevailing defendant seeking attorney's fees must rely on different equitable considerations.[88]

The Court in Christianburg rejected the plaintiff's contention that the prevailing defendant should only be awarded attorney's fees when the plaintiff's case is brought in bad faith, because the Court concluded that even under the American common law rule, attorney's fees already may be awarded against a party who has proceeded in bad faith.[89] The Court then looked to the legislative history on attorney's fees under Title II (since they found none under Title VII) and noted that several Senators explained that its allowance of awards to defendants was for the purpose "to deter the bringing of lawsuits without foundation" and to "discourage frivolous suits" and to "diminish the likelihood of unjustified suits being brought."[90] Consequently, the Court also rejected the defendant's claim that they should be awarded their attorney's fees when they prevail unless special circumstances exist. Instead, the Court ruled that the plaintiff's claim must be "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so" for a court to award attorney's fees to a prevailing defendant in a Title VII case.[91] The Court also ruled that if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.[92] Of equal importance in terms of providing guidance to courts on what it means to bring a "frivolous, unreasonable, or groundless" case, the court clarified that "when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."[93] The Court affirmed the lower court's holding that the bringing of a case of first impression did not cause the action to be "unreasonable" or "merit less" for purposes of awarding attorney's fees to the prevailing defendant.[94]

The test the U.S. Supreme Court adopted in Christianburg, awarding attorney's fees to prevailing defendants only when the plaintiff's case is deemed "frivolous, unreasonable or groundless" is the standard that many state legislatures enacted expressly. Of the twenty state consumer fraud statutes that permit a court to award attorneys' fees to a prevailing defendant, fifteen of those states expressly clarify in the legislation, or in court interpretations of the legislation, that courts should only award attorneys' fees to prevailing defendants when the plaintiff's case is frivolous or in bad faith.[95] However, five states' consumer fraud statutes (Florida, Indiana, Kentucky, Oregon, and Rhode Island) provide for attorneys' fees to prevailing defendants without this clarifying condition, and published case law in those states have not yet clarified that the discretion is subject to this condition. In addition to the twenty states' consumer fraud statutes that permit a court to award attorneys' fees to prevailing defendants, five additional states mandate that a court do so, but only if the plaintiff's case is determined to be frivolous or in bad faith.[96]

We hypothesize that in the five states where the consumer fraud act permits a court in its discretion to award attorney's fees to a prevailing defendant without clarifying that this should only occur if the plaintiff's case is frivolous or brought in bad faith, and in the one state (Georgia) that mandates that the prevailing defendant is awarded attorney's fees, the consumer and attorney will be less likely to bring a legitimate fraud claim, even a strong one. We test this hypothesis through a survey of consumers and attorneys described in Part IV below. We also wondered what impact the frivolous standard might have in the bringing of good faith claims that are much less certain of success because the claim is based upon a policy argument seeking an extension or modification of case law interpreting the statute. We also sought to test if the frivolous standard for awarding attorneys' fees to prevailing defendants would deter the filing of bad faith claims, without deterring the bringing of a good faith claim that was less certain of success. The surveys we constructed and the results of these surveys are described in Part IV below.

IV. Empirically Testing Consumer and Attorney Responses

We surveyed consumers and attorneys on their willingness to bring consumer fraud cases against an insurance company under three scenarios. In all three scenarios, we asked consumers to imagine that they believed that they had been defrauded by their insurance company; and we asked attorneys to imagine that they had been approached by a consumer who believed that she had been defrauded by her insurance company. In all three scenarios, the attorney's fees to fight the case in court were likely to exceed the amount of the consumer's damages. The survey told the attorneys that the client did not want to pay the attorney any legal fees unless the fees came from her recovery against the insurance company. The first scenario was a clear case of fraud wherein the consumer had a very good chance of winning if they brought the case. We will call this scenario the "likely to win" scenario. The second scenario was less clear. If the court were to adopt a new interpretation of the consumer fraud act based upon a policy argument that had been accepted by some courts in other states but that had not yet been raised in their state, then they should win the case. It was uncertain, however, that the court would accept this policy argument as the basis to rule in their favor. We will call this scenario the "good faith extension" scenario. The third was a scenario wherein they would ultimately lose the case because there was no valid cause of action under the law. There was a chance, however, that they might persuade the insurance company to settle the case as the insurance company would want to avoid the time and attorney's fees in trying the case and the costs of an appeal in case a jury was to find against the defendant and perhaps even award punitive damages. We will call this scenario the "bad faith" scenario.

Participants rated their willingness to bring the consumer fraud case in each of these three scenarios under four consumer fraud statutory versions:

Statutory Version 1. The consumer fraud act permits a court in its discretion to award attorney's fees to either the prevailing plaintiff or a prevailing defendant.

Statutory Version 2. The consumer fraud act permits a court in its discretion to award attorney's fees to the prevailing plaintiff but not to a prevailing defendant, unless the defendant can show that the case was frivolous.

Statutory Version 3. The consumer fraud act requires a court to award attorney's fees to the prevailing plaintiff, but not to a prevailing defendant, unless the defendant can show that the case was frivolous.

Statutory Version 4. The consumer fraud act requires a court to award attorney's fees to the prevailing plaintiff, but not to a prevailing defendant.

Because Statutory Versions 3 and 4 made bringing a case more certain of recovery of attorney's fees and therefore more economically feasible, one might predict that more participants would be willing to bring cases under Statutory Versions 3 and 4 than under Statutory Versions 1 and 2. Since the case in the "likely to win" scenario would clearly not be frivolous, one might predict that a policy allowing the awarding of attorney's fees to the prevailing defendant only when cases are ruled frivolous would have no effect on participants' willingness to bring the case in the "likely to win" scenario. This reasoning suggests that in the "likely to win" scenario participants should have been just as likely to bring the case under Statutory Version 3 as under Statutory Version 4. However, we feared that any policy that allows the awarding of attorney's fees to the prevailing defendant even one that limits the awarding of attorney's fees to those cases that are ruled frivolous might have a chilling effect on people's willingness to bring even strong consumer fraud cases. If so, then participants in the "likely to win" scenario should have been less likely to bring the case under Statutory Version 3 than under Statutory Version 4.

We also wanted to investigate whether a policy of allowing the awarding of attorney's fees to the prevailing defendant when cases are ruled frivolous is necessary to discourage people from bringing the case in the "bad faith" scenario. If in the "bad faith" scenario people were particularly likely to bring the case under statutory version 4, but not under statutory version 3, this finding would suggest that allowing the awarding of attorney's fees to the prevailing defendant when cases are ruled frivolous is necessary to discourage "bad faith" cases. However, doing so might have a chilling effect on "good faith extension" type cases which for policy reasons one might want to encourage. We, therefore, wanted to investigate how a policy of allowing the awarding of attorney's fees to the prevailing defendant only when cases are ruled frivolous would affect participants' willingness to bring "good faith extension" type cases.

Study 1: Survey of Consumers

Study 1 queried consumers on the likelihood that they would bring consumer fraud cases in each of the three scenarios described above. Although consumers often have difficulties bringing cases on their own without the aid of attorneys, cases would not be brought to court without consumers. The likelihood that they would seek the aid of an attorney to bring cases under each statutory version is the first step in determining which cases are brought to court.

Method

Participants. Three hundred fifty four consumers, none of whom were law students or lawyers, volunteered to participate after law students approached them and asked them to participate. Eighty of these participants rated their willingness to bring cases under Statutory Version 1; 78 rated their willingness to bring cases under Statutory Version 2; 99 rated their willingness under Statutory Version 3; and 97 rated their willingness under Statutory Version 4.

Method and Procedure. Consumers were first asked about their willingness to bring the case under the "likely to win" scenario. They were instructed to imagine that they felt that they had been cheated by their insurance company and that their attorney told them that they had a very good chance of winning a case against the insurance company under the state's consumer fraud act, but that is was likely that it would cost them more in attorney's fees to fight the case in court than the amount that they had been damaged by the insurance company. They then were asked to rate their willingness to hire the attorney to take on the case in this "likely to win" scenario assuming that the attorney's fees provisions of their state's consumer fraud act read as either Statutory Version 1, 2, 3, or 4. We were concerned that the descriptions of these statutory versions presented above might have had too much legal jargon for lay people, so we rephrased these four versions asking these consumers to assume one of the following:

Statutory Version 1. Assume that under the consumer fraud act, if you win the court might, but is not required to, order the insurance company to pay you back what you spent on attorney's fees; while if you lose the court might, but is not required to, force you to pay the insurance company's attorney's fees.

Statutory Version 2. Assume that under the consumer fraud act, if you win the court might, but is not required to, order the insurance company to pay you back what you spent on attorney's fees. Also assume that if you lose the court can only force you to pay the insurance company's attorney's fees if the insurance company shows that your case was frivolous.

Statutory Version 3. Assume that under the consumer fraud act, if you win the court is required to order the insurance company to pay you back what you spent on attorney's fees. Also assume that if you lose the court can only force you to pay the insurance company's attorney's fees if the insurance company shows that your case was frivolous.

Statutory Version 4. Assume that under the consumer fraud act, if you win the court is required to order the insurance company to pay you back what you spent on attorney's fees.

Those consumers who received Statutory Version 2 or Statutory Version 3 were assured that their attorney had advised them that their case in this "likely to win" scenario was not frivolous. So they should have felt safe to bring the case since they presumably would never have to pay the insurance company's attorney's fees. Consumers then rated their willingness to hire the attorney to take on the case on a 5-point scale where 1 represented that they were "highly unwilling to hire the attorney to bring the case" and 5 represented that they were "highly willing to hire the attorney to bring the case."

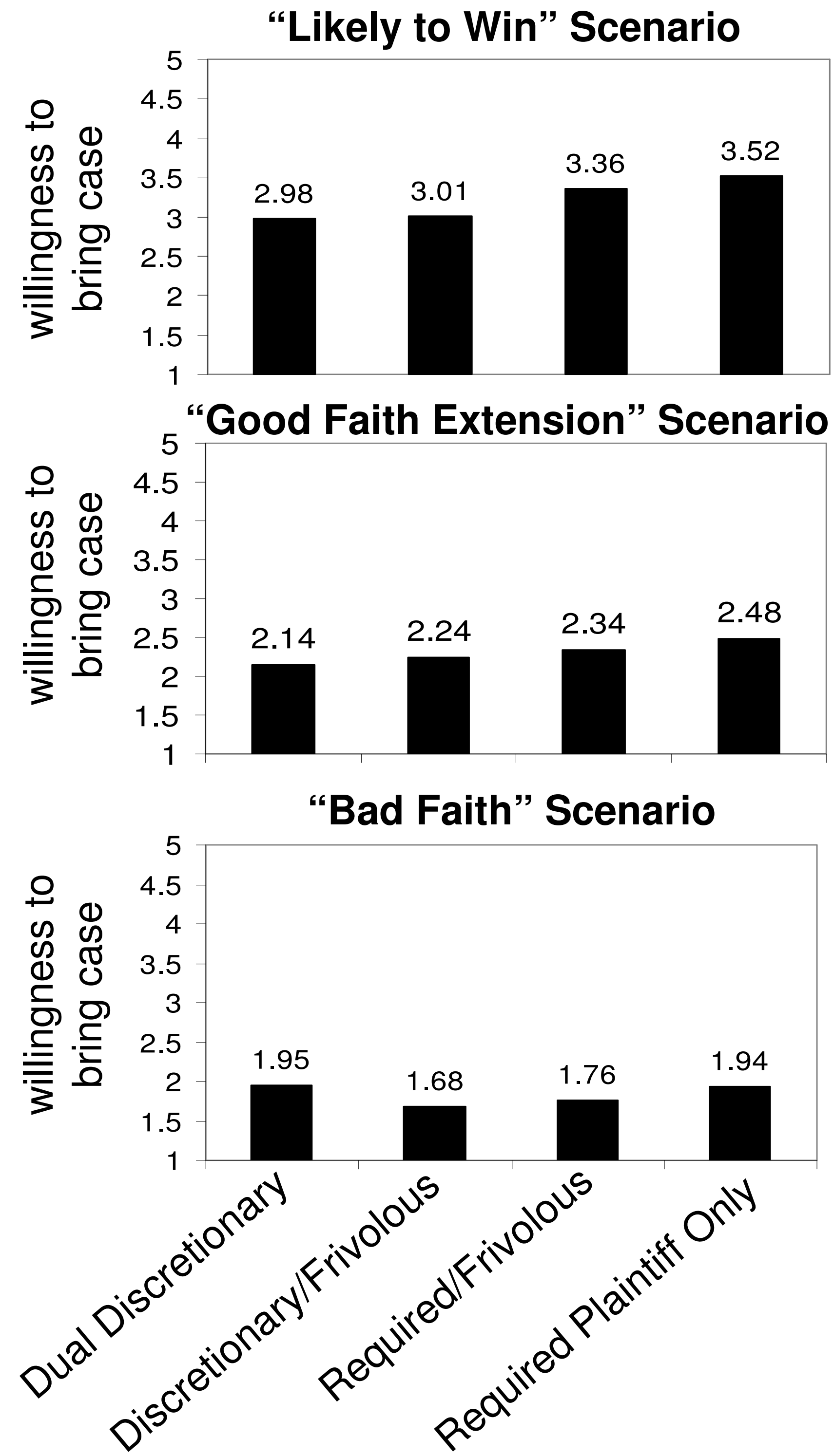
Next, these consumers were asked about their willingness to bring the case under the "good faith extension" scenario. They were again instructed to imagine that they felt that they had been cheated by their insurance company, but this time their attorney told them that it was unclear whether they would win or lose the case against the insurance company under the state's consumer fraud act. Their attorney told them that if the court were to adopt a new interpretation of the consumer fraud act based upon a policy argument that their attorney would raise then they should win the case. This policy argument had been accepted by some courts in other states but it had not yet been raised in their state and it was uncertain whether the court would accept this policy argument as the basis to rule in their favor. They then rated their willingness to hire the attorney to bring the case under the same statutory version that they had assumed for the "likely to win" scenario.

Finally, these consumers were asked about their willingness to bring the case under the "bad faith" scenario. Their attorney told them that they would ultimately lose the case under the state's consumer fraud statute once the case had made its way through the court system. Although a jury might have been sympathetic to their situation, on appeal a judge would ultimately rule that the insurance company could do what they did. There was a chance, however, that they might have been able to persuade the insurance company to settle the case after their attorney brought a lawsuit, because the insurance company would have wanted to avoid the time and attorney's fees in trying the case. The survey also told the consumer that the insurance company might also have wanted to settle because they might have feared that a jury could misapply the law and rule against the insurance company requiring the company to pay damages and possibly even triple the amount of the damages as a penalty. And even though the insurance company on appeal should still have won the case, causing the jury verdict to be over-turned and ineffective, the insurance company would still have had to hire attorneys to work on that appeal which might have caused them to agree to settle the case. They then rated their willingness to bring the case under the same statutory version that they had assumed for the "likely to win" and "good faith extension" scenarios.

Results

The results of Study 1: Survey of Consumers is shown in Figure 1. There was a statistically significant effect of the scenario on consumer's willingness to bring a consumer fraud case against the insurance company such that consumers were statistically more likely to bring a case in the "likely to win" scenario than in the "good faith extension" scenario and statistically more likely to bring a case in the "good faith extension" scenario than in the "bad faith" scenario.[97] There was also a statistically significant interaction between the statute version and the scenario.[98] The interaction was such that in the "likely to win" scenario, but not the "good faith extension" or the "bad faith" scenarios, Statutory Version 4 made consumers statistically more likely to bring cases than Statutory Versions 1 and 2. By contrast, in the "bad faith" and "good faith extension" scenarios, none of the apparent differences in likelihood to bring a case shown in Figure 1 reached statistical significance. These findings suggest that Statutory Version 4 is likely to encourage meritorious consumer fraud cases that are based upon established precedent without unduly encouraging bad faith cases. Conversely, these findings suggest that Statutory Versions 1, 2 and 3 are likely to discourage the bringing of meritorious consumer fraud cases. Unfortunately, Statute Version 4 is not likely to be as effective in encouraging good faith extensions of precedent by consumers. However, Study 2 of attorneys, *infra*, found that attorneys were statistically more likely to take on a good faith extension case under Statutory Version 4 than under the other statutory versions.

Figure 1. **Results of Study 1, survey of consumers**, although consumers were more likely to want to bring bad faith cases than attorneys (see Study 2 and Figure 2), the apparent effects of statutory version failed to reach statistical significance in the “bad faith” scenario (third panel).



Study 2: Survey of Attorneys

Study 2 queried attorneys on the likelihood that they would take consumer fraud cases in the "likely to win," "bad faith," and "good faith extension" scenarios described above. Unlike the survey of consumers (Study 1) wherein each participant was only asked about the likelihood that she would bring cases under one of the four statutory versions, this survey of attorneys questioned attorneys on their willingness to take cases under all four statutory versions: Statute Versions 1, 2, 3, and 4. Although consumers might want to bring cases to court, they will often have difficulty without the aid of an attorney. The likelihood that attorneys will accept cases is, therefore, often a necessary step in determining which cases are brought to court.

Method

Participants. One hundred thirty three attorneys volunteered to participate after being recruited from Chicago-area law firms, the John Marshall Law School alumni list serve, and the John Marshall Law School faculty.

Method and Procedure. Attorneys were first asked about their willingness to take the case under the "likely to win" scenario. They were instructed to assume that they had an active general litigation practice with no conflict of interest in representing a consumer in a lawsuit against an insurance company. A potential client met with them to seek their representation of her. She told them of how she was defrauded by her insurance company and they determine that they would have a very good chance at winning the case under the state's consumer fraud act, but that it was likely that it would cost more to litigate the case than the amount that she had been damaged by her insurance company. They were also instructed to assume that the client did not want to pay them any legal fees unless the fees came from her recovery against the insurance company. They then were instructed to rate their willingness to take on the case in this "likely to win" scenario on a 5-point scale where 1 represented that they were "highly unwilling to take on the case" and 5 represented that they were "highly willing to take on the case" under Statutory Version 1, then Statutory Version 2, then Statutory Version 3, then Statutory Version 4.

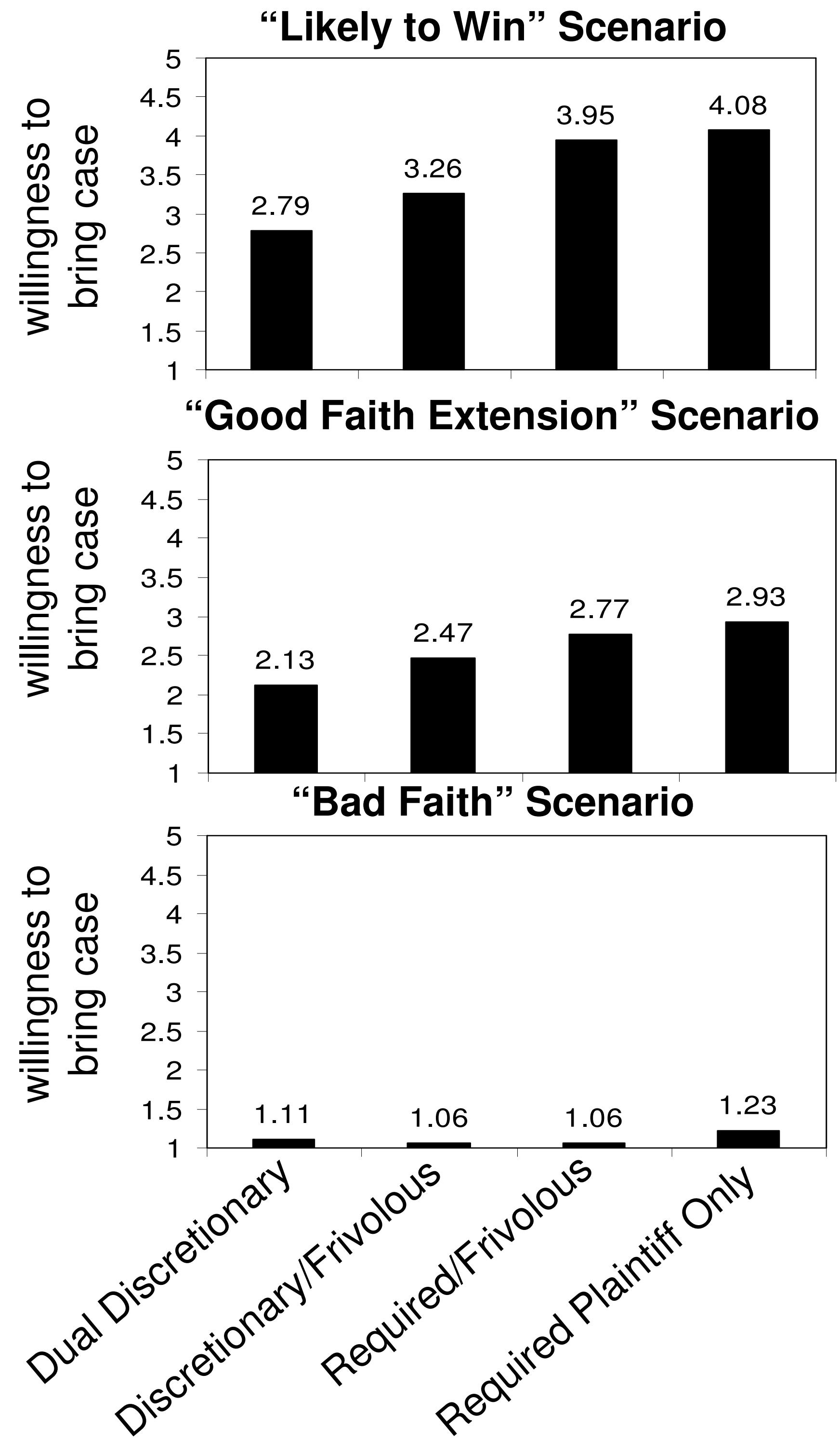
Attorneys were next asked about their willingness to take the case in the "bad faith" scenario. In this scenario, they were instructed to imagine that they determined that they would ultimately lose the case if it were litigated because they had no valid cause of action under the law. The only way that they could recover anything from the insurance company would be by bringing the lawsuit in the hope that the insurance company would settle the case as a means to avoid the time and expense of litigating the case. In calculating this time and expense, the insurance company might also have factored in the possibility that a jury would misapply the law and even award punitive damages, requiring the insurance company to pay for an appeal of the case. Attorneys then rated their willingness to take on the case in this "bad faith" scenario under each of the four statutory versions.

Finally, attorneys were asked about their willingness to take the case in the "good faith extension" scenario. In this scenario, they were instructed to imagine that they determined that it was unclear whether they would win or lose the case. They determined that if the court were to adopt a new interpretation of the consumer fraud act based upon a policy argument that they would raise then they should win the case. This policy argument had been accepted by some courts in other states but it had not been raised in their state and it was uncertain whether the court would accept this policy argument as the basis to rule in their client's favor. They then rated their willingness to take on the case in this "good faith extension" scenario under each of the four statutory versions.

Results

The results of Study 2, Survey of Attorneys, are shown in Figure 2. As in the Survey of Consumers, there was a statistically significant effect of the scenario on attorney's willingness to take a consumer fraud case against the insurance company such that attorneys were statistically more likely to bring a case in the "likely to win" scenario than in the "good faith extension" scenario and statistically more likely to bring a case in the "good faith extension" scenario than in the "bad faith" scenario[99] There was also a statistically significant interaction between the statute version and the scenario.[100] The interaction was such that in the "likely to win" and "good faith extension" scenarios, all of the apparent effects of statutory version reached statistical significance. That is, Statutory Version 2 was statistically greater than Statutory Version 1 (i.e. attorneys were more statistically willing to take the case in Statutory Version 2 than in Statutory Version 1), Statutory Version 3 was statistically greater than Statutory Versions 1 and 2 (i.e. attorneys were statistically more willing to take the case in Statutory Version 3 than in Statutory Versions 1 and 2), and Statutory Version 4 was statistically greater than Statutory Versions 1, 2, and 3 (i.e. attorneys were statistically more willing to take the case in Statutory Version 4 than in Statutory Versions 1, 2, or 3). By contrast, in the "bad faith" scenario, only Statutory Version 4 was statistically greater than the other statutory versions. That is, in the "bad faith" scenario attorneys were statistically more willing to take the case in Statutory Version 4 than in Statutory Versions 1, 2, or 3. Although Statutory Version 4 is statistically more likely to encourage bad faith cases than the other statutory versions, attorneys rated themselves very unlikely to take these "bad faith" cases. Even under statutory Version 4, the average rating was 1.23 on a scale from 1 to 5 where 1 represented that they were "highly unwilling to take on the case."

Figure 2. **Results of Study 2, survey of attorneys**, attorneys were much less likely to take on cases in the "bad faith" scenario than in the "likely to win" or "good faith extension" scenarios.



V. Proposed Reform In Light of Legislative Goals and Empirical Data

Based upon the results of our surveys and the goals of the consumer fraud statutes, including the goal of encouraging legitimate, good faith, consumer claims and discouraging, bad-faith or frivolous claims, we recommend that the best approach among the four versions of attorney's fees provisions, is that taken by ten states that require that the prevailing plaintiff be awarded her attorney's fees with no special additional rule for the prevailing defendant to recover her attorney's fees (i.e. relying instead upon Rule 11 type sanctions for bad-faith/frivolous actions that generally exist under federal or state rules of civil procedure) [Version 4 in our survey, which is followed by: Massachusetts, Michigan, New Hampshire, New Jersey, North Dakota, South Carolina, Vermont, Washington, Wisconsin, and Wyoming].

The results from the attorney surveys make clear that in the context of the "likely to win" scenario, attorneys are in fact statistically more likely to bring this type of meritorious case under the Version 4 of attorney's fees than under Versions 1, 2, and even 3. Under Version 1 (attorney's fees to be awarded to the prevailing party at the court's discretion) attorneys rated a willingness of only 2.79 on a 5 point scale to take on a case where their defrauded client was likely to succeed. That figure goes up to 4.08 under Version 4 where the court is required to award the prevailing plaintiff her attorney's fees. There is a similar, though less dramatic, impact on the willingness to bring a case based on the version of the attorney's fees provisions in the context of a "good faith extension" of the law case, with attorney's being statistically more likely to bring this type of case under Version 4 than under Versions 1, 2, and 3. It is obvious that legislatures wish to encourage the bringing of consumer fraud cases where the consumer's case is so strong that an attorney determines that if the case is brought the consumer is very likely to win. But "good faith extension" cases are also ones that legislatures would wish to encourage as well since such a case, if successful, can set a precedent that will assist the general consumer public in the future.

Notwithstanding the foregoing, even though the overriding intent of state legislatures in providing for attorney's fees in the consumer fraud statutes was to achieve the five goals enumerated earlier, it is also a secondary legislative goal in general to discourage the bringing of bad faith or frivolous cases. We thus explored how the four versions of attorney's fees provisions impacted an attorney's willingness to take on a "bad faith" case (one where the attorney knows she will ultimately lose the case if tried, but is bringing the case to try to induce a settlement). We did find that attorneys were statistically more likely to bring a bad faith claim under Version 4 than under Versions 1, 2 or 3. However, it is important to note the extremely low level of willingness by attorneys to take on a bad faith claim under any of these four versions of attorney's fees. Even under Version 4, attorney's rated themselves on a scale from 1 to 5 on average only 1.23 willing to take on the "bad faith" claim (contrast this with the 4.08 for a "likely to win" scenario and the 2.93 for the "good faith extension" claim). Because attorneys expressed such a strong unwillingness to take on the bad faith type claim even under Version 4, it appears that the possible imposition of fees under the statute to a prevailing defendant for a frivolous claim, is not necessary to dissuade attorneys from taking on bad faith claims (perhaps because of the ethical rules and rules of civil procedure that already exist regarding taking on frivolous claims).

Since Version 4 is necessary to encourage the widest pool of attorneys to take on a legitimate consumer fraud case and so few attorneys are willing to take on a bad faith case, even under Version 4, we conclude that Version 4 best meets all of the legislative goals regarding consumer fraud statutes. Indeed, the results from our studies could apply to any other statute enacted by Congress or the States where the legislature is similarly trying to encourage the bringing of lawsuits to combat a problem of public concern (such as anti-discrimination laws) as its primary goal, but at the same time not wanting to encourage frivolous or bad faith claims as a general, secondary goal.

Version 3 (which eight states currently follow: Alabama, California, Colorado, Idaho, Louisiana, New Mexico, Oklahoma, and Texas) is the next best approach to awarding attorney's fees since it discourages the most bad faith filings by attorneys (attorneys rated themselves only 1.06 willing to take on a bad faith claim which was not significantly different from Versions 1 and 2) and, after Version 4, is most likely to encourage attorneys to take on a "likely to win" case or a "good faith extension" case (although still statistically significantly less likely to encourage such cases than Version 4). Version 2 (which twelve states currently follow: Hawaii, Illinois, Kansas, Maryland, Missouri, Montana, North Carolina, Ohio, Oregon, Tennessee, Utah, and West Virginia) is the next best approach (under which attorneys rated themselves 3.26 willing to take on a "likely to win" case, 2.47 willing to take on a "good faith extension" case, and 1.06 willing to take on a "bad faith case) followed by Version 1 (which five states currently follow: Florida, Indiana, Kentucky, Nebraska, and Rhode Island) which is the worst approach to encouraging the bringing of legitimate consumer fraud claims (attorneys under Version 1 rated themselves only 2.79 willing to take on a "likely to win" case, 2.13 willing to take on a "good faith extension case" and 1.11 willing to take on a "bad faith" case).[101]

The results from the consumer survey provide even greater support for applying Version 4. Our results indicated that consumers' willingness to bring "bad faith" type cases was not affected by the statute version to a statistically significant degree. So Version 4 does not make consumers statistically more likely to bring a "bad faith" claim than under Versions 1, 2, and 3. Similar to the results from the attorney survey, in the "likely to win" scenario, consumers were statistically more willing to bring a case under Version 4, than under Versions 1 or 2. But, under the consumer survey in the context of a "good faith extension" case, the differences among the four versions of attorney's fees provisions do not reach statistical significance.[102] Although consumers reported a willingness of 3.52 under Version 4 and a willingness of only 3.36 under Version 3, this difference is not statistically significant. Although, these results also indicate that Version 4 was not more likely than Versions 1, 2, and 3 to encourage consumers to bring "good faith extension" cases, Version 4 made attorneys statistically more willing to bring "good faith extension" cases than under Versions 1, 2 and 3.

Conclusion:

Does engaging in fraud "pay" for unscrupulous businesses due to the fact that consumers and their attorneys are unlikely in a typical consumer fraud situation to bring a case against the company for fraud?[103] Although forty-five states try to address the economic feasibility problem with bringing a typical consumer fraud case by providing for attorney's fees to a prevailing plaintiff, our survey of consumers shows that when the consumer fraud statutes make the awarding of attorney's fees to the prevailing plaintiff at the court's discretion, consumers rated themselves as statistically less willing to bring a "strong meritorious" claim than when the statute mandated for the awarding of such fees only to the prevailing plaintiff.[104] Our survey of attorneys reflected that attorneys rated themselves as statistically less willing to bring both a "strong meritorious claim" and a "good faith extension of the law" type claim when the attorney's fees provision was discretionary rather than mandatory.[105]

Currently, twenty-three states' statutes merely permit (or have been interpreted to permit) rather than mandate that a court award attorney's fees to the prevailing plaintiff.[106] Based upon our survey of consumers and attorneys, it is clear that the laws in these states impede the legislative goals of encouraging the bringing of meritorious claims to make consumers whole and of deterring and punishing consumer fraud. Furthermore, we have seen no countervailing legislative policy that would explain why a court should, in its discretion, elect not to award attorney's fees to a prevailing consumer. We thus urge these twenty-three states (Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, and West Virginia) to amend their statutes to make clear that attorney's fees are mandatory rather than discretionary for prevailing plaintiffs. Of course we also recommend that the five consumer fraud states (Arizona, Delaware, Iowa, Mississippi, and South Dakota) that currently do not provide at all for attorney's fees to a prevailing plaintiff be amended to mandate attorney's fees to a prevailing plaintiff.

A second, more complicated, problem with the attorney's fees provisions in consumer fraud statutes derives from the secondary goal that some legislatures and courts have articulated, which is to deter consumers from bringing frivolous or bad faith claims. Concern has been raised by some commentators[107] that consumers and their attorneys might be taking advantage of the consumer fraud statutes (in particular, the possibility of punitive damages under some) to bring frivolous cases in the hope of extracting a settlement from a business with deep pockets.[108] Due to concern with the possibility of consumers bringing frivolous cases, twenty-eight states' consumer fraud statutes require or provide for the possibility of awarding attorney's fees to a prevailing defendant, but only twenty of these state statutes clarify that the fees should or can be awarded to prevailing defendants only when the plaintiff's case is frivolous or in bad faith (the eight states by statute, or court interpretation of the statute, permit or require a court to award attorney's fees to a prevailing defendant without requiring that the plaintiff's case is frivolous or in bad faith are: Alaska, Florida, Georgia, Indiana, Kentucky, Nevada, Oregon, and Rhode Island) . We hypothesized that the possibility of awarding attorney's fees to a prevailing defendant would not only discourage bad faith or frivolous claims, but would also discourage good faith claims and perhaps even strong meritorious claims. Based upon our survey of consumers and attorneys, this hypothesis proved correct; both were statistically less willing to bring a strong meritorious case when the applicable statute permitted a court in its discretion to award attorney's fees to prevailing defendants, and, among attorneys, also when the statute provided that a court could only award fees to a prevailing defendant if the plaintiff's claim was frivolous, than if the statute simply awarded attorney's fees to a prevailing plaintiff. This hypothesis also proved correct from our survey of attorneys in the context of a good faith extension of the law type case; attorneys were less likely to bring a good faith extension of the law claim when the statute provided that the prevailing defendant could recover attorney's fees both in the court's absolute discretion and when the statute required that the plaintiff's case was frivolous.

Considering the negative impact awarding attorney's fees to a prevailing defendant has (even when limited to the situation of a frivolous case by the plaintiff) on the bringing of meritorious cases, one must ask if it is necessary to provide for this in the consumer fraud statutes in order to curb the filing of frivolous cases? Our survey results suggest that it is not necessary. Even when the statute only provided for attorney's fees to a prevailing plaintiff, attorneys on average rated themselves only 1.23 on a scale of 1-5, willing to bring a frivolous claim. We suspect that the reason why attorneys are highly unwilling to bring a frivolous case, even when the consumer fraud statute does not provide for attorney's fees to a prevailing defendant in a frivolous case, is that there already exist safeguards under the rules of ethics and civil procedure to prohibit the bringing of frivolous claims that attorneys are aware of but that consumers might not be.[109]

Because attorneys are already adequately dissuaded from bringing a frivolous claim,[110] and statutory provisions in a consumer fraud act that provide for attorney's fees to a prevailing defendant have been shown to discourage the willingness of consumers and attorneys to bring meritorious claims, it is better for the consumer fraud statutes to simply provide for attorneys fees to prevailing plaintiffs to best achieve both the primary and secondary legislative goals. We thus propose that the twenty-eight states' consumer fraud statutes that require or provide for the possibility of attorney's fees to be awarded to a prevailing defendant (Alabama, Alaska, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, and West Virginia), be amended to delete this language from their statutes, and for those jurisdictions instead to rely upon the rules of civil procedure and ethics that sanction the bringing of frivolous cases to deter the filing of frivolous or bad faith cases.

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[1] Debra Pogrund Stark is a professor of law at The John Marshall Law School who teaches, writes, and engages in pro bono work relating to consumer fraud, and served as the Vice-Chairperson of the American Bar Association, Real Property Section's Pro Bono Committee, which prepared training materials on combating predatory lending and which is available on the Section's website. Professor Stark acknowledges with deep appreciation all of the students at The John Marshall Law School who assisted her with the legal research necessary to complete a 50 state survey of consumer fraud statutes and court interpretations of these statutes: Daniel Moons, the initial researcher who compiled the basic information, Daniel Concannon, who updated this information, and the following student research assistants who verified this information: Shadbanou Azad, Kathryn Christian, Andrew Goczkowski, Nicole Kerman, Debra Mandl, Joshua Rudolfi, and Yuri Ter-Sarkissov. She also acknowledges with appreciation, the research assistance on other facets of this article from Caitlin Groh, Jennifer Jeck, Brian Flores and Greta Hendricks. She also thanks the students in her spring '08 Real Estate Transactions course who assisted in collecting the consumer surveys, Laurel Hajeck, Director of Career Services, and Sheri Berendt, Director of Alumni Relations, at JMLS who assisted in collecting the attorney surveys, and Andrew Yassan, who provided feedback on the wording of the consumer surveys. She also thanks the faculty and alumni at The John Marshall Law School and the local attorneys in the City of Chicago who responded to the attorney surveys. Finally, she thanks Dean John Corkery and Associate Dean Ralph Reubner of The John Marshall Law School for their financial support for this project.
[2] Jessica M. Choplin, Ph.D, is an assistant professor of psychology at DePaul University who teaches and writes on human judgment and decision making.
[3] 587 S.E. 2d 581 (Va. 2003).
[4] *See infra* Part I.

[5] Because the state's resources are limited, providing for attorney's fees to a prevailing plaintiff will encourage more lawsuits which not only will lead to compensation of past victims but also potentially reduce future fraud.

[6] *See, e.g.,* ALA. CODE §8-19-10 (2007); ALASKA STAT. § 45.50.537 (2008); CAL. CIV. CODE §1780 (Deering 2007); COLO. REV. STAT. §6-1-113 (2007); GA. CODE ANN. §10-1-373 (2007); IDAHO CODE ANN. §48-607 (2007); LA. REV. STAT. ANN. §51:1409 (2008); MASS. ANN. LAWS ch. 93A,§9 (LexisNexis 2007); 5 ME. REV. STAT. ANN. §213 (2008); N.H. REV. STAT. ANN. 358-A:10 (LexisNexis 2008); N.J. REV. STAT. §56:7-32 (2007); N.D. CENT. CODE §51-15-10 (2007); OKLA. STAT. tit. 15, §761.1 (2007); N.M. STAT. ANN. §57-12-10 (LexisNexis 2007); S.C. CODE ANN. §37-5-202 (2006); TEX. BUS. & COM. CODE ANN. §17.50 (Vernon 2007); VT. STAT. ANN. tit. 9, §2461 (2007); WASH. REV. CODE. ANN. §19.86.090 (2008); WIS. STAT. §425.308 (2006); WYO. STAT. ANN. §40-12-108 (2007).

[7] *See, e.g., Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.* 117 P.3d 60 (Colo. App. 2004) (clarifying that Colorado's Consumer Protection Act mandates reasonable attorney fees to a successful claimant), but *overruled by Crowe v. Tull* 125 P.3d 196, 207 (Colo. 2006) (where the court ruled that "an injured party who prevails under the Colorado Consumer Protection Act *may* recover treble damages and attorney fees"); *See also Advanced Constr. Corp. v. Pilecki* 901 A.2d 189 (Me. 2006) ("a person who has suffered a loss of money or property as the result of an unfair or deceptive trade practice under the Unfair Trade Practices Act *may* also be awarded reasonable attorney's fees").

[8] *See, e.g.,* CONN. GEN. STAT. §42-110g (2007), FLA. STAT. ANN. §501.2105 (LexisNexis 2007), HAW. REV. STAT. ANN. §481A-4 (LexisNexis 2007), 815 ILL. COMP. STAT. ANN. 505/10a (2008), IND. CODE ANN. §24-5-0.5-2 (LexisNexis 2007); KAN. STAT. ANN. §50-634 (2006); KY. REV. STAT. ANN. §367.220 (LexisNexis 2008); MD. CODE ANN. COMM. LAW §13-408 (LexisNexis 2008); MICH. COMP. LAWS SERV. §445.911 (LexisNexis 2008); MINN. STAT. §325F.694 (2007); MO. REV. STAT. §407.025 (2007); MONT. CODE ANN. §30-14-133 (2007); N.Y. GEN. BUS. LAW §349 (Consol. 2008); N.C. GEN. STAT. §75-16 (2007); OHIO. REV. CODE. ANN. §1345.09 (LexisNexis 2008); OR. REV. STAT. §646.638 (2005); 73 PA. CONS. STAT. §201-9.2 (2007); R.I. GEN. LAWS §6-13.1-5.2 (2007); TENN. CODE ANN. §47-18-109 (2008); UTAH CODE ANN. §13-11-19 (2007); VA. CODE ANN. §59.1-444 (2007); W.VA. CODE ANN. §46A-5-104 (LexisNexis 2007).

[9] *See, e.g.,* CAL. CIV. CODE §1780 (2007) (where a plaintiff's prosecution is not in good faith); HAW. REV. STAT. §481A-4 (2007) (where the plaintiff's action is groundless); IDAHO CODE ANN. §48-608 (2007) (where a plaintiff's action is spurious or brought for harassment purposes); 815 ILL. COMP. STAT. 505/10a (LexisNexis 2007) and IND. CODE ANN. §24-5-0.5-4 (LexisNexis 2007) (where the defendant prevails); KAN. STAT. ANN. §50-634 (2006) (where the consumer brings an action he knows to be groundless); KY. REV. STAT. ANN. §367.220 (LexisNexis 2008) (where the defendant is the prevailing party); LA. REV. STAT. ANN. 51:1409 (2008) (where an action is groundless and brought in bad faith or for purposes of harassment) ; MD. CODE ANN. §13-408 (LexisNexis 2008) (where an action is brought in bad faith or is frivolous); MISS. CODE ANN. §75-24-15 (2007) (where an action is frivolous or filed for the purpose of harassment or delay); MONT. CODE ANN. §30-14-133 (2007) (where the defendant prevails); OH. REV. CODE ANN. 1345.09 (LexisNexis 2008) (where the plaintiff's action is groundless or filed in bad faith), OR. REV. STAT. §646.638 (where the defendant prevails, except in a class action); TENN. CODE ANN. §47-18-109 (2008) (where plaintiff's action is frivolous, without merit, or brought for the purpose of harassment); UTAH CODE ANN. §13-11-19 (2007) (where the defendant is the prevailing party and the plaintiff brought an action he knew to be groundless); W.VA. CODE ANN. §46A-5-104 (LexisNexis 2007) (where the action is brought in bad faith and for the purposes of harassment).

[10] Courts have interpreted attorney's fees in consumer protection statutes to encourage consumer litigation for a variety of reasons, such as "to remove…disincentive for individuals to bring legal actions…because the amount of pecuniary loss is often small…, to enforce not only his or her individual rights but, in the aggregate, the public's rights as well, to strengthen the bargaining power of consumers, and …provide a necessary backup to the state's enforcement powers," *Shands v. Castrovinci* 115 Wis.2d 352, 358-359 (1983); "To promote and encourage prosecution of individual consumer claims," *Gramatan Home Investors Corp. v. Starling* 143 Vt. 527, 536 (1983); To make up for the "inability of the New York State Attorney-General to adequately police false advertising and deceptive trade practices", Governor's Approval Memorandum, NY Legis. Ann. At 147 (1980) (cited in *Beslity v. Manhattan Honda* 467 N.Y.S.2d 471, 474 (1983)); "To equalize the position of the parties," Rowe, *The Legal Theory of Attorney Fee-Shifting: A Critical Overview*, 1982 DUKE L. J. 651, 663-4 (1982) (cited in *St. Luke Evangelical Lutheran Church v. Smith* 318 Md. 337, 360 (1990))

[11] However, bringing a bad-faith or frivolous claim is a violation of ethical rules. *See* MODEL RULES OF PROF'L CONDUCT R3.1 (2002) Rule 3.1 states "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law" (most states follow the format of the ABA

Model Rules or Model Code of Professional Conduct except for California, which has developed its own rules. See American Ethics Library, http://www.law.cornell.edu/ethics/comparative/index.htm#3.1. Not only are such claims an ethical violation, but they also violate federal and state rules of civil procedure. *See* FED. R. CIV. P. 11, CAL. CIV. PROC. CODE § 128.5 (West 2008); FLA. STAT. ANN. § 57.105 (West 2007); ILL. SUP. CT., R 137 (2007); MD. CODE ANN., Gen. Prov. § 1-341 (West 2008); N.Y. R. & REGS 130-1.1 (2008); OHIO REV. CODE ANN. §2323.51 (West 2008). Rule 11 states that representations to the court must be "warranted by existing law or by a non frivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). Upon violating this rule, the court has the authority to impose sanctions on the attorney in breach. FED. R. CIV. P. 11(c)(2). The parties to the action may be liable for sanctions as well. *See De Vaux v. Westwood Baptist Church*, 935 So. 2d 677 (1st. Dist. 2007) (sanctions may be applied to an "attorney or an attorney and his client for filing meritless actions, motions, defenses, and appeals"); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1361 (9th Cir. 1990) (sanctioning an attorney whose inclusion of defendant in the cause of action was "essentially vindictive"); *West Coast Dev. v. Reed,* 2 Cal. App. 4th 693, 704 (1992) (sanctioning plaintiff where his complaint included frivolous counts). Prior to amendment of Rule 11 in 1993, the overwhelming majority of cases imposed attorney's fees of the opposing party as the "sanction "and in response to criticism of this, Rule 11 was amended to state that the court may order payment of "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" if such cost-shifting is "warranted for effective deterrence." Bebchuk and Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL. STUD. 371, 384 (1996).

[12] *Id.*

[13] Les Christie, *CNNMoney.com*, *Wow, I could've had a prime mortgage,* http://money.cnn.com/2007/05/29/real_estate/could_have_had_a_prime/index.htm (May 30, 2007); *see also* Jonathan Peterson, Lenders Pledge Better Updates, L. A. Times (February 8, 2008) (*available at* http://www.latimes.com/business/printedition/la-fi-loans8feb08,0,1343248.story) (reporting that in 2007 alone, 931,000 delinquent subprime borrowers received assistance because they could not keep up payment on these high cost loans).

[14] *See Hughes v. Cardinal Fed. Sav. Loan Ass'n*, 97 F.R.D. 653, 656 (S.D. Ohio 1983) (explaining that the lack of motivation for consumers to bring individual TILA claims against lenders is largely due to the high litigation costs and difficulty in proving actual damages).

[15] However, where the bank is subject to federal regulation, the ability of a consumer to bring a claim under a state consumer protection law may be thwarted by preemption of federal banking regulatory statutes, which are typically less restrictive. *See generally Watters v. Wachovia,* 127 S.Ct. 1559 (2007) (where Michigan state bank registration laws were in conflict with The National Bank Act's licensing, reporting, and visitorial schemes, the state law was preempted); *Office of the Comptroller of the Currency v. Spitzer,* 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (where New York's enforcement of and investigation into antidiscrimination lending laws directly conflicted with the National Bank Act, the state law was preempted and the Attorney General was prohibited from investigating unfair lending practices of national banks and their subsidiaries)**;** *Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate,* 308 F.3d 762 (7th Cir. 2002) (where new Illinois regulations blocked state lenders from extending credit on terms open under the federal Alternative Mortgage Transaction Parity Act of 1982**,** the state law was preempted when the lenders complied with the federal regulations); *U.S. Bank National Ass'n v. Clark,* 837 N.E.2d 74 (Ill. 2005) (where the Illinois Interest Act placed a limitation on lender fees for mortgages with certain interest rates, the cap was preempted by the federal Depository Institutions Deregulation and Monetary Control Act of 1980, which placed a limit on such caps); *Tokarz v. Frontier Federal Savings & Loan Ass'n,* 656 P.2d 1089 (Wis. Ct. App. 1982) (where Washington's Consumer Protection Act specifically provided that the Comptroller of the Currency has primary jurisdiction to regulate and resolve disputes arising in the bank-customer relationship and state court decisions could *potentially* conflict with the Comptroller's decisions and regulations, plaintiffs could not bring a consumer protection claim against their lender for breach of fiduciary duty and fraud). *But see Aiello v. First Alliance Mortgage Co.,* 280 B.R. 246 (Bankr. C.D. Cal. 2002) (consumer class's California unfair business practices claim under state consumer protection laws were not preempted by the federal Truth in Lending Act (TILA) because there was no conflict between the two laws and TILA specifically allows state law to supplement its enforcement scheme); *Anderson v. Wells Fargo Home Mortgage, Inc.*, 259 F. Supp. 2d 1143 (D. Wash. 2003) (where defendant mortgage company did not properly disclose the Yield Spread Premium (YSP) paid to it by plaintiff's lender, in violation of the Real Estate Property Settlement Act (RESPA) and TILA, the plaintiff's claim under Washington's Consumer Protection Act was not foreclosed by the federal acts); *Brazier v. Security Pacific Mortgage, Inc.,* 245 F. Supp. 2d 1136 (D. Wash. 2003) (where defendant failed to disclose the YSP to the plaintiff as well as the fact that it

was acting as both lender and broker in plaintiff's second mortgage loan, the plaintiff's RESPA, TILA, and Consumer Protection Act claims all survived summary judment); *Washington Mutual Bank v. The Superior Court of Los Angeles County, 75* Cal. App. 4th 773, (1999) (plaintiff's unfair and deceptive business practices action was not preempted by RESPA and related Regulation X since those federal statutes did not expressly preempt private rights of action under state laws for violations of their provisions); *Johnson v. Matrix,* 820 N.E.2d 1094 (Ill. App. Crt. 2004) (where a consumer is harmed by an illegal kickback under RESPA, that consumer should be afforded the opportunity to seek redress under Illinois' Consumer Fraud Act as well).

[16] KEITH B. ANDERSON, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY, FTC STAFF REP. (2004) at p.28, *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[17] The median losses to victims who reported experiencing one or more of the types of fraud investigated by the FTC lost $220 (although the median loss from credit repair fraud came in at $300 and seventy-five percent of those surveyed who had experienced a loss from fraud said they paid or lost $630 or less). FTC STAFF REP., *supra* note 16 at 38-39.

[18] Interview with attorney who litigates consumer fraud cases on behalf of consumers indicated that the amount of hours necessary to litigate a consumer fraud case varies greatly based on the reaction of the defendant. Some cases may settle quickly, but plaintiffs run the risk of engaging in litigation that may take over two years costing upwards $50,000-60,000. A home improvement fraud case can take this long because of the multitude of discovery that is required along with expert testimony. Interview by Caitlin Groh, research assistant to Professor Stark, with a consumer fraud attorney, in Chicago, Ill. (March 7, 2008). Note that the person interviewed did not want name disclosed.

[19] FTC RELEASES TOP 10 CONSUMER COMPLAINT CATEGORIES FOR 2004, http://www.ftc.gov/opa/2005/02/top102005.shtm.

[20] FTC STAFF REP., *supra* note 16 at 80.

[21] FTC STAFF REP., *supra* note 16, at 80, 103-04.

[22] For example, Rule 23 of the Federal Rules of Civil Procedure sets forth four requirements that the plaintiff must satisfy to obtain class certifications: (i) the class is so numerous that joinder of all members is impracticable ("numerosity"), (ii) there are questions of law or fact common to the class ("commonality"), (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"), and (iv) the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). FED. R. CIV. P. 23. Many state rules of civil procedure have similar requirements to these federal rules, but because some states rules were more liberal with certifying class actions, this led to forum shopping and complaints from business interests. This, in turn, led Congress to enact the "Class Action Fairness Act of 2005" (Pub. L. No. 109-2, 119 Stat. 12, [West 2005]), which expanded diversity jurisdiction for larger classes to facilitate removal of the cases to the federal courts.]

[23] *See*, *e.g.*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F. 3d 331, 340-1 (4th Cir. 1998); Glover v. Standard Federal Bank, 283 F.3d 953 (8th Cir. 2002); O'Sullivan v. CountryWide, 319 F. 3d 732 (5th Cir. 2003); and Turpeau v. Fidelity Financial Serivces, Inc., 936 F. Supp. 975, 978 (N.D. Ga. 1996).

[24] Those categories are: advance fee loans, buyers' clubs, credit card insurance, credit repair, prizes, internet services, pyramid schemes, information services, government job offers, and business opportunities. FTC STAFF REP., *supra* note 17, at p.29 (fig.3-1).

[25] Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing,* "Table A-7," http://www.jchs.harvard.edu/publications/markets/son2007/son2007.pdf (2007).

[26] Les Christie, *supra* note 13; Jonathan Peterson, *supra* note 13.

[27] Edmund L. Andrews and Louis Uchitelle, Rescues for Homeowners in Debt Weighed, N.Y. Times (February 22, 2008) (*available at* http://www.nytimes.com/2008/02/22/business/22homes.html).

[28] Center of Responsible Lending, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners*, http://www.responsiblelending.org/pdfs/CRL-foreclosure-rprt-1-8.pdf (December 2006).

[29] Center of Responsible Lending, *Subprime Spillover,* http://www.responsiblelending.org/pdfs/subprime-spillover.pdf (January 18, 2008).

[30] Office of the Illinois Attorney General, *Top Ten Consumer Complaints of 2006,* http://www.ag.state.il.us/pressroom/2007_01/20070129.html (2006).

[31] FTC STAFF REP., *supra*, note 16 at 3.

[32] Under the common law action for fraud, courts commonly required that the followings elements be proven: (i) the defendant made a false statement of material fact to the plaintiff, (ii) the defendant knew the statement was false and

intended for the plaintiff to detrimentally rely on it, (iii) the plaintiff detrimentally and reasonably or justifiably relied on the statement, (iv) the plaintiff was harmed from the false statement. Some of these elements are difficult for a consumer to prove when they have been defrauded or deceived by a supplier of goods or services such as proving the defendant "knew" the statement was false (*See, e.g., U.S. v. Hopps*, 331 F. 2d 332, 337-38 (4th Cir. 1964) ("Fraudulent intent, as a mental element of crime, (it has been observed) is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud."), and, thus, consumer fraud statutes have eliminated the requirement that the plaintiff show that the defendant knew his statement was false. See, e.g. "Acquiring an Historical Understanding of Duties to Disclose, Fraud, and Warranties, 104 Com. L.J. 168, 188 (1999) ("…it is easier for a plaintiff to prevail under a consumer fraud claim because the scienter element of common law fraud is absent, and intent is not as difficult to prove.") Another difficult to prove element under the common law action for fraud is that the plaintiff "reasonably" relied on the false statement. For example, if the defendant lied to the plaintiff (say about the extent of termite damage to a home), and the plaintiff relied upon what she was told, and did not independently investigate the truth of what she was told even when she has notice of a problem from the termite report (although the true extent of the problem was not disclosed in the termite report), under the common law action for fraud she would lose because she had not "reasonably" relied on the seller's and broker's false statements. The trial court in *Roberson v. Boyd*, 363 S.E.2d 672 (Ct. App. N.C. 1988) took this approach, but the court of appeals affirmed in part and reversed in part. The appeals court affirmed the trial court's ruling for the defendants under the common law action for fraud, but ruled that under the state's consumer fraud act the plaintiff did not have to reasonably rely (i.e. the defense of contributory negligence by the plaintiff was not available). Id. at 675-76. Because consumers are typically not sophisticated, and rely on what they are told without carefully reviewing the contract they sign to verify the truth of what they have been told, consumer fraud statutes, typically do not require a showing of "reasonable" reliance. See, e.g., *Robertson v. Boyd* at 676 ("the plaintiff in *Libby Hill* [Where the court in a common law fraud action ruled against the plaintiff based on the defense of "contributory negligence"] was a sophisticated corporation engaged in an expensive business venture…"[as contrasted with the home purchaser in the Robertson case]). Indeed many of the consumer fraud statutes do not explicitly require reliance at all, but instead, simply require that the plaintiff show that the defendant's false or deceptive statement caused the plaintiff damages, but some argue that this "causation" requirement expressed in the statutes implies the "reliance" element as well. *See*, "Reining in Abuse" *infra* note 107, at 23 and 43. But even if the causation requirement implies reliance, this leaves open whether the legislatures intended not only "reliance" but "reasonable" or "justifiable" reliance. Some courts, have ruled that legislatures did not intend to bar actions by consumers who are typically unsophisticated from recovering on the basis that their reliance was unreasonable or unjustifiable. See, e.g., *Wiegand v.Walser Automotive Groups, Inc.*, 683 N.W. 2d 807, 812-13 (S.Ct Minn. 2004) ("…the Consumer Fraud Act reflects the legislature's intent 'to make it easier to sue for consumer fraud than it had been to sue for fraud at common law'…a private consumer fraud class action does not necessarily require the justifiable reliance standard of common law fraud. We conclude that the existence of a written contract that contradicts Walser's alleged oral misrepresentations does not, as a matter of law, negate any possibility of Weigand and potentially others proving a causal nexus between oral representations and consumer injuries.").

[33] The Legal Assistance Fund of Metropolitan Chicago suggested that the cases they take involving alleged predatory lending and foreclosure usually take approximately twenty-four months until a settlement is reached. This time frame encompasses over 100 hours spent on most cases, while some may take over 200 hours. A conservative estimate of 150 hours spent per case totals approximately $30,000. The typical remedy sought is a loan modification or a payoff where the borrower pays off the loan at the lower amount and obtains a loan elsewhere at an affordable rate. There is no monetary award, but this allows the borrower to save their home, retain equity, or even increase equity. There have been cases where $50,000 in equity was saved, but the savings can often times be even more than this. Interview by Caitlin Groh with Daniel P. Lindsey, Supervising Attorney of the Home Ownership Preservation Project, Legal Assistance Foundation of Metropolitan Chicago, in Chicago, Ill. (Feb. 28, 2008 and Mar. 6, 2008).

[34] 503 S.E. 2d 458 (S.C. 1998)

[35] 537 N.W. 2d 471 (Mich. Ct. App. 1995)

[36] *Id.* at 474.

[37] *See, e.g.,* The Clayton Act, 38 Stat. 731, 15 U.S.C. §15; The Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. §216(b); The Packers and Stockyards Act, 42 Stat. 165, 7 U.S.C. §210(f); The Truth in Lending Act, 82 Stat. 157, 15 U.S.C.§1640(a); and The Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. §1227.
See also Alabama's Litigation Accountability Act, ALA. CODE §12-19-272 (LexisNexis 2007) (for "any civil action

commenced or appealed in any court of record in the state"); Alaska's Wage and Hour Act, ALASKA STAT. §23.10.110 (2007); Arizona's Uniform Child Custody Jurisdiction and Enforcement Act , ARIZ. REV. STAT. §25-1062 (LexisNexis 2007); California's Code of Civil Procedure, CAL. CIV. PROC. CODE §1021.5 (Deering 2007) (attorney's fees may be recovered "in any action which has resulted in the enforcement of an important right affecting the public interest"); Colorado's Liability for Computer Dissemination of Indecent Material to Children Act, COL. REV. STAT. §13-21-1003 (2007); Connecticut's Occupational Safety and Health Act (for retaliation of whistleblower), CONN.GEN. STAT. §31-379 (2007); Florida's Civil Practice & Procedure Act, FLA. STAT. §68.086 (2007) (for a plaintiff who is awarded proceeds in a civil action); Idaho Code of Civil Procedure Act, IDAHO CODE ANN. §12-117 (2007) (for any civil action "involving as adverse parties a state agency, a city, a county, or other taxing district and a person"); The Illinois Nursing Home Care Act, 210 Ill. Comp. Stat. Ann. 45/3-602 (Lexisnexis 2008); New Jersey Civil Rights Act, N.J. REV. STAT. §10:6-2 (2007); Oregon Unlawful Discrimination in Employment, Public Accommodations, and Real Property Transactions Act, OREG. REV. STAT. §659A.885 (2005); Rhode Island Equal Rights of Blind and Deaf Persons to Public Facilities Act, R.I. GEN. LAWS §40-9.1-3 (2007).

[38] The Federal Trade Commission Act, 15 U.S.C.A. §41-58, was amended in 1938 to prohibit unfair or deceptive acts or practices, http://ftc.gov/opp/gpra/append1.shtm.

[39] Senate Committee, *Statement to the Senate Bill No. 199* (1960), *cited in Cox v. Sears Roebuck & Co.* 138 N.J. 2, 14 (N.J. 1994).

[40] *Governor's Press Release for Assembly Bill No. 2402*, at 2 (June 29, 1971), *cited in Cox*, 138 N.J. at 15.

[41] *Skeer v. EMK Motors, Inc.* 187 N.J. Super. 465, 472-473 (App. Div. 1982).

[42] Special Message, 63rd[d] Minn. Leg. April. 23, 1963 (audio tape).

[43] Joint Center for Housing Studies of Harvard University, *supra* note 24**.**

[44] *Taylor v. Medenica, supra* note 28 at 459.

[45] *See, e.g.*, *Lettenmaier v. Lube Connection, Inc.*, 741 A.2d 591, 593 (S.Ct. N.J. 1999) "The Consumer Fraud Act has three main purposes: to compensate the victim for his or her actual loss; to punish the wrongdoer through the award of treble damages…and by way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual"; *Showpiece Omes Corp. v. Assurance Company of America*, 38 P. 3d 47, 51 (S.Ct Col. 2001) "The CCPA is a remedial statute intended to deter and punish deceptive trade practices committed by businesses in dealing with the public…The CCPA's broad legislative purpose is 'to provide prompt, economical, and readily available remedies against consumer fraud.'…This purpose is achieved through injunctions and civil penalties such as treble damages and attorney's fees…The availability of treble damages and attorney's fees is also intended to promote private enforcement of the CCPA…The statute thus provides both for enforcement by the attorney general and a private right of action to any person injured by the deceptive acts or practices committed by a business"; *Sprovach v. Bob Ross Buick, Inc.,* 628 N.E. 2d 82, 84 (Ct. App. Ohio 1993) "The object of R.C. Chapter 1345 is to provide a remedy to consumers who have been harmed by unfair, deceptive, or unconscionable sales practices. The object specifically of ..[the attorney's fees provision] is to ensure that consumers will be capable of pursuing that remedy. Actions brought under R.C. Title 13 typically involve relatively small damages, yet the cost of recovering those damages may be enormous, as the offending suppliers may stoutly defend themselves just as appellant has done. Confronted with the likelihood of incurring very much more debt in attorney fees than could be recovered in damages, most consumers would never bring or continue to prosecute an action for a private remedy"; and *Tanksley v. Cook*, 821 A. 2d 524, 527 (Superior Ct. N.J. 2003) "Plaintiff is entitled to recover the fees he was obligated to pay his counsel for collecting on the judgment. Denial would leave him less than whole and dilute the damage award intended by the Legislature against fraudulent merchants."

[46] Included in the five states that do not provide for a prevailing plaintiff's attorney's fees is Iowa. Iowa currently has a bill pending that would provide for them. See *infra* the Attorneys' Fees Summary in the Appendix.

[47] *See infra* the Attorneys' Fees Summary in the Appendix.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id*.

[57] *Id. See* Appendix *infra* for defendant attorney fees in Alabama, Colorado, New Mexico, Oklahoma, and Texas.
[58] *Id.*
[59] *Id. See* Appendix *infra*.
[60] *Id*. *See* Appendix *infra* for Alaska, Florida, Georgia, Indiana, Kentucky, Nevada, Oregon, and Rhode Island
[61] *Deadwyler v. Volkswagen of America, Inc.*, 748 F. Supp. 1146, 1155 (W. D. N.C. 1990).
[62] *See supra* note 39.
[63] *See supra* Part I.
[64] See supra note 32.
[65] Conversation with colleagues at the law school who were asked to participate in the survey raised this point as did conversation with alumni who teach at the law school and handle specialized areas of law.
[66] E-Mail from one of the attorneys contacted to complete the survey, to Debra Pogrund Stark, professor of law at The John Marshall Law School (Jan. 29, 2008 06:15:08 CST) (on file with author).
[67] As noted in Part II, a handful of states require that the defendant's false statement be "willful" or "knowing" but many state statutes already require that the false statement be willful or knowing for the plaintiff to recover any damages. *See, e.g*., OR. REV. STAT. §646.605 (2003) (willful); S.D. CODIFIED LAWS §37-24-6(1) (2004) (knowing and intentional); UTAH CODE ANN. §13-11-4(2) (2001) (knowing or intentional); WYO. STAT. ANN. §40-12-105(a) (2005) (knowing). In addition, two states require also that the plaintiff had not rejected a "reasonable" settlement in order to obtain attorney's fees from the defendant. GA. CODE ANN. §10-1-399 (2007); N.C. GEN. STAT. §75-16.1 (2007).
[68] However, some statutes provide for punitive damages that also promote this goal. *See, e.g.,* CAL. CIV. CODE §1780(a)(4) (West Supp. 1991); CONN. GEN. STAT. ANN. 42-110g (West 1992); D.C. CODE ANN. 28-3905(k)(C) (1988); GA. CODE ANN. §106-1210 (1990); IDAHO CODE §48-608 (Supp. 1990); KY. REV. STAT. ANN. §367.220 (1987); MO. REV. STAT. 407.025 (1990); OR. REV. STAT. §646-638(1) (1987); and R.I. GEN. LAWS 6-13.1-5.2 (1992). Further, where the statute itself does not allow punitives, consumers may still recover punitive-"like" damages. *See* MASS. GEN. LAWS ANN. Ch. 93A, §1 (does not authorize punitives, but encourages "multiple damages which are essentially punitive in nature*," McEvoy Travel Bur., Inc. v. Norton Co.* 408 Mass. 704, 717 (1990)).
[69] Although, again, in states that award punitive damages, *see supra* note 64, such award should also accomplish the goal of deterrence.
[70] We have not tried to empirically test this hypothesis, but applying a cost/benefit analysis to engaging in fraud, assuming that unscrupulous businesses are rational decision makes, would lead to this conclusion. Testing this hypothesis is beyond the scope of this paper.
[71] 861 N.E. 2d 633 (2006)
[72] 434 U.S. 412 (1978).
[73] *Krautsack*, 861 N.E. 2d at 645-47
[74] *Id*. at 646
[75] *Id*.
[76] *Id*. at 559. Among the other factors that Illinois courts had considered in deciding whether to award damages to a prevailing defendant were: the ability of the opposing party to satisfy an award of fees, whether an award of fees against the opposing party would deter others from acting under similar circumstances, whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the act, and the relative merits of the parties' positions. *Id*. at 554
[77] *Id*.
[78] *Id*. at 648.
[79] *Id*. at 651.
[80] *Id*. at 652.
[81] 434 U.S. 412.
[82] *See*, *e.g.*, *Deadwyler*, 748 F. Supp. at 1155; *Morris-Smith v. Moulton Niguel Water Dist.*, 44 F. Supp. 2d 1084, (C.D. Cal. 1999)**;** *Akin v. Cabrera*, 2001 U.S. Dist. LEXIS 24265 (W.D. Okla. 2001).
[83] *Id.* at 413.
[84] *Christianburg*, 434 U.S. at 418.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Christianburg,* 434 U.S. at 419.

[89] *Id.*
[90] *Christianburg*, 434 U.S. at 420.
[91] *Christianburg*, 434 U.S. at 422.
[92] *Id.*
[93] *Id.*
[94] *Christianburg*, 434 U.S. at 423.
[95] *See infra* the Attorney's Fees Summary in the Appendix.
[96] *Id.*
[97] These results were analyzed using a 3 (scenario: "likely to win," "good faith extension," "bad faith") x 4 (statutory version: dual discretionary, discretionary/frivolous, required frivolous, required plaintiff only) mixed factors analysis of variance. The main effect of scenario was highly significant, $F(2,700)=283.16$, $MSE=0.61$, $p<.01$. All of the simple effects presented here were analyzed using Fischer's Least Significant Difference tests. All p's<.05.
[98] $F(2,700)=2.92$, $MSE=0.61$, $p<.01$.
[99] These results were analyzed using a 3 (scenario: "likely to win," "good faith extension," "bad faith") x 4 (statutory version: dual discretionary, discretionary/frivolous, required frivolous, required plaintiff only) within-subjects analysis of variance. The main effect of scenario was highly significant, $F(2,264)=393.02$, $MSE=1.99$, $p<.01$. All of the simple effects presented here were analyzed using Fischer's Least Significant Difference tests. All p's<.05.
[100] $F(6,792)=54.50$, $MSE=0.21$, $p<.01$.
[101] The four versions only add up to thirty-five states because, of the 45 states that provide for attorney's fees, ten states vary somewhat from these four versions and in several cases lead to situations where only one or two states could be grouped together in terms of combination of approaches. The largest of these groups involved six states (Connecticut, Maine, Minnesota, New York, Pennsylvania and Virginia) that provided for attorney's fees to a prevailing plaintiff at the court's discretion and no fees to a prevailing defendant.
[102] One explanation for why consumers were less likely to bring a frivolous claim under Versions 2 and 3 (which talk about paying the defendant's fees if the claim they file is frivolous) than under Versions 1 and 4 (which do not talk about this) is that lawyers already know that they and their client could be sanctioned for bringing a frivolous claim, while consumers are not as likely to know that.
[103] There are many additional reasons why so few consumers and attorneys are willing to bring meritorious fraud claims, *see supra* discussion in Part ___ and note ___, but this article has focused only on the economic feasibility issue.
[104] *See supra* Part IV.
[105] *Id*.
[106] Our tally of twenty-one mandatory states and twenty-two discretionary states of course does not add up to the forty-five states that provide for attorney's fees to a prevailing plaintiff. This is because it is difficult to classify the statutes in Arkansas and Nebraska.
[107] Schwartz and Silverman, *Common-Sense Construction of Consumer Protection Acts* 54 Kan. L. Rev. 1 (2005) (hereafter "Common-Sense") and Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Element* 43 Harv. J. on Legis. 1 (2006) (hereafter "Reining in Abuse").
[108] *See*, *Reining in Abuse supra* note 107 at 1, which focuses on how class action cases under consumer fraud statutes can be abused "these class actions become more akin to corporate blackmail than to consumer protection."; *See also*, "Common Sense" *supra* note 107 at 5, noting the "flood of 'shakedown' lawsuits against small businesses for technical violations of state laws or regulations, such as using too small of a font size in advertisements, even when no one has been harmed." Schwartz and Silverman also decry the loosening of the strict common law fraud requirements such as eliminating the requirement to prove intent to defraud by the defendant (especially if treble damages are being sought) and the requirement that the plaintiff relied on any false statement. *Id*. at 67. Although the authors provide analysis for why plaintiffs should have to show they have been harmed by the false or deceptive statement, the authors, without any policy or empirical analysis, recommend that awards of reasonable attorneys' fees to prevailing plaintiffs should continue, but be discretionary, with fees also to be awarded to either a prevailing plaintiff or defendant, when "exceptional circumstances warrant such an award." These recommendations are particularly troubling because they are incorporated in a proposed Model Act on Private Enforcement of Consumer Protection Statutes, which was adopted by the "American Legislative Executive Council." The American Legislative Executive Council describes itself in its website as "A bi-partisan membership association for conservative state lawmakers who share a common belief in limited government, free markets, federalism, and individual liberty among America's state legislators" whose list of public and private sector state chairs according to their website (as of November 2, 2006) were comprised of 56 Republicans, 4 Democrats, and one senator not affiliated as a

Republican or Democrat. The proposed Model Act would only award attorney's fees to a prevailing plaintiff if the plaintiff could show that the defendant's violation of the act was "willful" or with "knowledge" the defendant was violating the act (only four states currently require this: Hawaii, North Carolina, North Dakota, and Ohio) and to a prevailing defendant if the plaintiff's case was "groundless in fact or law or brought in bad faith, or brought for the purpose of harassment." Id. at 70. As the data from our survey of consumers and attorneys reflects, it is important for attorneys' fees provisions in the consumer fraud statutes to be mandatory to a prevailing plaintiff rather than discretionary in order to achieve the legislative goals of encouraging meritorious cases, with attorneys rating themselves more likely to bring a meritorious claim when attorney's fees to a prevailing plaintiff are mandatory rather than discretionary. Our data also shows that attorneys are highly unlikely to bring frivolous or bad faith claims (rating themselves willing only 1.23 on a five point scale), even when the consumer fraud statute does not provide for attorney's fees to a prevailing defendant, but that attorneys rated themselves less willing to bring a meritorious case when the consumer fraud statute provided for attorney's fees to a prevailing defendant. See, Part IV infra. Thus, we recommend, contrary to the proposed Model Act, that consumer fraud statutes not include attorneys' fees to prevailing defendants, and instead that states rely on the rules of ethics and civil procedure which already prohibit and sanction the bringing of frivolous or bad faith claims**.**

[109] *See supra*, Introduction; *see supra*, *note* 11.

[110] In creating the "bad faith" scenario we emphasized the possibility of extracting a settlement from the life insurance company, especially in light of the possibility that the insurance company could fear a large verdict, including possible punitive damages, from a jury against them to see if any attorneys would be persuaded to raise the claim to obtain this result. Yet, the attorneys were not so persuaded, contrary to what some commentators have alleged. *See Common-Sense* and *Reining In Abuse*, *supra* note 107.

APPENDIX: Attorney Fees and Consumer Protection Acts – 50 States

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Alabama	*Deceptive Trade Practices Act* ▪ *1981*	Plaintiff:[i]	YES	Mandatory	Successful Plaintiff	*Verifies*: An award of attorney fees for a successful plaintiff is mandatory[ii]
		Defendant:[iii]	YES	Mandatory[iv]	Plaintiff's claim was frivolous or brought in bad faith or for the purposes of harassment[v]	No Case Found
Alaska	*Unfair Trade Practices and Consumer Protection Act* ▪ *1970*	Plaintiff:	YES	Mandatory	Prevailing Plaintiff	*Verifies*: Prevailing plaintiff's attorney fees are mandatory [vi]
		Defendant:	YES	Mandatory	Prevailing at court rate OR Prevailing reasonable rate[vii]	No case found
Arizona	*Consumer Fraud Act* ▪ *1967*	Plaintiff:	Silent[viii]	Silent	Silent	*Clarifying:* No Attorney Fees[ix]
		Defendant:	Silent	Silent	Silent	*Clarifying:* No Attorney Fees[x]
Arkansas	*Deceptive Trade Practices Act* ▪ *1971*	Plaintiff:	YES	Silent	Prevailing Plaintiff[xi] must show actual damages[xii]	Case law is unclear whether attorney fees are mandatory or discretionary[xiii]
		Defendant:	Silent	Silent	Silent	No Case Found
California	*Consumer Legal Remedies Act* ▪ *1970*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies:* Prevailing plaintiff's attorney fees are mandatory[xiv]
		Defendant:	YES	Discretionary[xv]	Prevailing and plaintiff's claim was brought in bad faith[xvi]	*Opposes:* Prevailing Defendant's attorney fees are mandatory[xvii]
Colorado	*Colorado Consumer Protection Act* ▪ *1963*	Plaintiff:	YES	Mandatory	Successful	*Verifies*: Prevailing plaintiff attorney fees mandatory[xviii]
		Defendant:	YES	Mandatory	Plaintiff's claim was groundless and in bad faith[xix] or for the purpose of harassment	No Case Found
Connecticut	*Unfair Trade Practices Act* ▪ *1973*	Plaintiff:	YES	Discretionary	Silent	*Verifies*: Attorney fees at the discretion of the court. Plaintiff does not have to establish "prevailing party" status[xx]
		Defendant:	Silent	Silent	Silent	Not to defendant[xxi]

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Delaware	*Consumer Fraud Act* ▪ *1965*	Plaintiff:	Silent	Silent	Silent	*Clarifying:* Attorney fees may not be awarded if statute is silent[xxii]
		Defendant:	Silent	Silent	Silent	No Case Found
Florida	*Florida Deceptive and Unfair Trade Practices Act* ▪ *1973*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies:* Award of attorney fees are discretionary to prevailing party[xxiii]
		Defendant:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is discretionary to prevailing party[xxiv]
Georgia	*Fair Business Practices Act* ▪ *1973*	Plaintiff:	YES	Mandatory	Injured; Special provisions regarding the impact of rejection of settlement[xxv]	*Clarifying:* Defendant's actions must have the potential to harm the consumer public, not just an individual for a cause of action under the statute[xxvi]
		Defendant:	YES	Mandatory	Special provisions regarding the impact of settlement rejection	No Case Found
Hawaii	*Uniform Deceptive Trade Practice Act* ▪ *1969*	Plaintiff:	YES	Discretionary	If defendant willfully engaged in deceptive trade practices	No Case Found after statute amended
		Defendant:	YES	Discretionary	If the plaintiff knew the claim is groundless	*Verifies:* Attorney fees discretionary to prevailing Defendant if Plaintiff knew claim groundless[xxvii]
Idaho	*Idaho Consumer Protection Act* ▪ *1971*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies:* Award of attorney fees are mandatory[xxviii]
		Defendant:	YES	Discretionary	Court finds that the plaintiff's action is spurious or brought for harassment purposes	*Verifies*: Defendants entitled to attorney fees if case brought frivolously, unreasonably or without foundation[xxix]
Illinois	*Consumer Fraud and deceptive Business Practices Act* ▪ *1961*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies:* Award of attorney fees is at the sound discretion of the court[xxx]
		Defendant:	YES	Discretionary	Prevailing	*Clarifying:* Award of attorney fees if Plaintiff’s claim in bad faith, and then at discretion of the court[xxxi]

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Indiana	*Deceptive Consumer Sales Act* ▪ *1971*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is at the court's discretion[xxxii]
		Defendant:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is at the court's discretion[xxxiii]
Iowa	*Consumer Fraud Act* ▪ *None*[xxxiv]	Plaintiff:	Silent	Silent	Silent	*Clarifying:* No private right of action[xxxv]
		Defendant:	Silent	Silent	Silent	*Clarifying*: No private right of action[xxxvi]
Kansas	*Consumer Protection Act* ▪ *1973*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is at the discretion of the court[xxxvii]
		Defendant:	YES	Discretionary	Prevailing and plaintiff knew claim was groundless	*Verifies*: Award of attorney fees is at the discretion of the court[xxxviii]
Kentucky	*Consumer Protection Act* ▪ *1972*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is at the discretion of the court[xxxix]
		Defendant:	YES	Discretionary	Prevailing	*Verifies*: Award of attorney fees is at the discretion of the court[xl]
Louisiana	*Unfair Trade Practices and Consumer Protection Law* ▪ *1972*	Plaintiff:	YES	Mandatory	Prevailing and actual damages have been awarded	*Verifies*: Award of attorney fees shall be awarded for a plaintiff that has been awarded actual damages[xli]
		Defendant:	YES	Discretionary	The action is groundless, brought in bad faith or for purposes of harassment	No Case Found
Maine	*Unfair Trade Practices Act* ▪ *1969*	Plaintiff:	YES	Mandatory	Prevailing	*Opposes:* Awards of attorney fees are discretionary[xlii]
		Defendant:	Silent	Silent	Silent	No Case Found
Maryland	*Consumer Protection Act* ▪ *1957*	Plaintiff:	YES	Discretionary	Has been awarded damages	*Verifies*: Attorney fees may be awarded[xliii]
		Defendant:	YES	Discretionary	Plaintiff's claim was brought in bad faith or is of a frivolous nature	No Case Found
Massachusetts	*Regulation of Business for Consumer Protection Act* ▪ *1967*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies*: Attorney fees are mandatory[xliv]
		Defendant:	Silent	Silent	Silent	No Case Found

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Michigan	*Consumer Protection Act* ▪ *1977*	Plaintiff:	YES	Silent	Silent	*Clarifying*: Attorney fees are mandatory[xlv]
		Defendant:	Silent	Silent	Silent	No Case Found
Minnesota	*Prevention of Consumer Fraud Act* ▪ *1963*	Plaintiff:	YES[xlvi]	Discretionary	Plaintiff must be injured	*Verifies*: Attorney fees may be awarded to the plaintiff[xlvii]
		Defendant:	Silent	Silent	Silent	No Case Found
Mississippi	*Regulation of Business for Consumer Protection Act* ▪ *1974*	Plaintiff:	Silent	Silent	Silent	*Clarifying:* A prevailing plaintiff may not be awarded attorney fees[xlviii]
		Defendant:	YES	Discretionary	Prevailing and plaintiff's claim is found to be frivolous, filed for the purpose of harassment or delay	*Verifies*: Defending party is entitled to attorney fees.[xlix]
Missouri	*Merchandising Practices Act* ▪ *1967*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: Plaintiff may be awarded attorney fees[l]
		Defendant:	YES	Discretionary	Prevailing	*Clarifying:* Plaintiff's action must be frivolous, unreasonable, or groundless[li]
Montana	*Consumer Protection Act* ▪ *1973*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies:* Attorney fees at court's discretion[lii]
		Defendant:	YES	Discretionary	Prevailing	*Clarifying:* Plaintiff's claim was found to be frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith[liii]
Nebraska	*Consumer Protection Act* ▪ *1974*	Plaintiff:	YES	Silent	Prevailing	*Verifies*: Prevailing Plaintiff entitled to attorney fees at court's discretion[liv]
		Defendant:	Silent	Silent	Silent	No Case Found
Nevada	*Deceptive Trade Practices Act* ▪ *1973*	Plaintiff:	YES	Mandatory	Prevailing[lv]	No Case Found
		Defendant:	Silent	Silent	Silent	*Clarifyng:* A prevailing defendant is entitled to attorney fees at court's discretion [lvi]
New Hampshire	*Regulation of Business Practices for Consumer Protection Act* ▪ *1970*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies:* Awards of attorney fees is mandatory[lvii]
		Defendant:	Silent	Silent	Silent	No Case Found

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
New Jersey	*Trade-Marks and Unfair Trade Practices Act* ▪ *1960*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies*: Awards of attorney fees is mandatory for a prevailing plaintiff[lviii]
		Defendant:	Silent	Silent	Silent	No Case Found
New Mexico	*Unfair Trade Practices Act* ▪ *1953*	Plaintiff:	YES	Mandatory	Prevailing	*Verifies*: Award of attorney fees is mandatory[lix]
		Defendant:	YES	Mandatory	Plaintiff's action was groundless[lx]	*Clarifying*: A claim is groundless if it is frivolous under facts or law[lxi]
New York	*Consumer Protection from Deceptive Acts and Practices* ▪ *1970*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: Awards of attorney fees is discretionary[lxii]
		Defendant:	Silent	Silent	Silent	No Case Found
North Carolina	*Consumer Protection Act* ▪ *1969*	Plaintiff:	YES	Discretionary	Defendant willfully[lxiii] engaged in the unlawful acts and unwarranted refusal by defendant to resolve the matter	*Verifies*: Awards of attorney fees is discretionary[lxiv]
		Defendant:	YES	Discretionary	Plaintiff should have known or knew that the action was frivolous and malicious[lxv]	*Verifies*: Awards of attorney fees is discretionary[lxvi]
North Dakota	*Unlawful sales or Advertising Practices* ▪ *1965*	Plaintiff:	YES	Mandatory	Defendant knowingly committed the unlawful act	*Verifies*: Award of attorney fees is mandatory if the defendant knowingly committed the unlawful act [lxvii]
		Defendant:	Silent	Silent	Silent	No Case Found
Ohio	*Consumer Sales Practices Act* ▪ *1972*	Plaintiff:	YES	Discretionary	Defendant knowingly[lxviii] committed the unlawful act	*Verifies*: An award of attorney fees is discretionary[lxix]
		Defendant:	YES	Discretionary	Plaintiff action is found groundless[lxx] or brought in bad faith[lxxi]	*Verifies*: An award of attorney fees is discretionary[lxxii]

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Oklahoma	*Consumer Protection Act* ▪ *1972*	Plaintiff:	YES	Mandatory	Prevailing	*Clarifying:* Plaintiff must show actual damages[lxxiii]
		Defendant:	YES	Mandatory	Plaintiff's action was brought in bad faith[lxxiv] or was not well grounded in fact[lxxv]	*Verifies:* The defendant is allowed attorney fees if plaintiff's action was in bad faith[lxxvi]
Oregon	*Unlawful Trade Practices Act* ▪ *1977*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: A prevailing plaintiff may be awarded attorney fees at the discretion of the court[lxxvii]
		Defendant:	YES	Discretionary	Prevailing but not allowed in class actions	Nothing since statute amended
Pennsylvania	*Unfair Trade Practices and Consumer Protection Law* ▪ *1968*	Plaintiff:	YES	Discretionary	Silent	*Verifies*: An award of attorney fees is at the discretion of the court[lxxviii]
		Defendant:	Silent	Silent	Silent	No Case Found
Rhode Island	*Unfair Trade Practice and Consumer Protection Act* ▪ *1968*	Plaintiff:	YES	Discretionary	Prevailing	No Case Found
		Defendant:	YES	Discretionary	Prevailing	No Case Found
South Carolina	*Unfair Trade Practices Act* ▪ *1962*	Plaintiff:	YES	Mandatory	Prevailing	*Verifying*: An award of attorney fees is mandatory for a prevailing plaintiff[lxxix]
		Defendant:	Silent	Silent	Silent	*Clarifying*: A prevailing defendant may not be awarded attorney fees[lxxx]
South Dakota	*Deceptive Trade Practices and Consumer Protection Act* ▪ *1971*	Plaintiff:	Silent	Silent	Silent	No Case Found
		Defendant:	Silent	Silent	Silent	No Case Found
Tennessee	*Consumer Protection Act* ▪ *1977*	Plaintiff:	YES	Discretionary	Defendant violated the act	*Verifies*: An award of attorney fees is at the discretion of the court[lxxxi]
		Defendant:	YES	Discretionary	Plaintiff's claim is frivolous, without legal or factual merit,[lxxxii] or brought for the purpose of harassment	*Verifies*: An award of attorney fees is at the discretion of the court[lxxxiii]

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
Texas	*Deceptive Trade Practice Act* ▪ *1973*	Plaintiff:	YES	Mandatory	Prevails	*Verifies*: An award of attorney fees is mandatory for a prevailing plaintiff[lxxxiv]
		Defendant:	YES	Mandatory	If the action was groundless [lxxxv] in fact or law, brought in bad faith,[lxxxvi] or brought for the purpose of harassment[lxxxvii]	*Verifies*: Attorney fees are mandatory if the plaintiff's action is groundless, in bad faith, or brought for the purpose of harassment[lxxxviii]
Utah	*Consumer Sales Practices Act* ▪ *1973*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies:* An award of attorney fees is discretionary[lxxxix]
		Defendant:	YES	Discretionary	Prevailing and plaintiff knew his claim was groundless	*Verifies*: Court authorized to award attorney fees if the party bringing the claim knew it was groundless[xc]
Vermont	*Consumer Fraud Act* ▪ *1967*	Plaintiff:	YES	Mandatory	Sustains damages or injuries	*Verifies*: An award of attorney fees is mandatory[xci]
		Defendant:	Silent	Silent	Silent	*Clarifying*: The Consumer Fraud act does not authorize attorney fees to the prevailing defendant[xcii]
Virginia	*Consumer Protection Act* ▪ *1977*	Plaintiff:	YES	Discretionary	Prevailing	*Verifies*: The court may award attorney fees but damages is a condition precedent[xciii]
		Defendant:	Silent	Silent	Silent	*Clarifying:* Only a prevailing plaintiff may be awarded attorney fees[xciv]
Washington	*Consumer Protection Act* ▪ *1961*	Plaintiff:	YES	Mandatory	Injured	*Verifies*: An award of attorney fees is mandatory[xcv]
		Defendant:	Silent	Silent	Silent	*Clarifying*: Only a claimant is allowed to recover attorney fees[xcvi]
West Virginia	*Consumer Credit and Protection Act* ▪ *1974*	Plaintiff:	YES	Discretionary	Defendant's conduct was unlawful under the act and the plaintiff suffered a loss	*Verifies*: An award of attorney fees is at the discretion of the court[xcvii]
		Defendant:	YES	Discretionary	Plaintiff brought the action in bad faith or for the purpose of harassment	*Verifies*: An award of attorney fees is at the discretion of the court[xcviii]

State (Category 1)	***Statute and First Year Enacted*** (Category 2)	***Parties:*** (Category 3)	***Statute Language Indicates*** (Category 4)	***Mandatory Or Discretionary*** (Category 5)	***Standard for Granting Attorney Fees*** (Category 6)	***Case Law Indicates re: Category 4 ,5, and 6 Search Done: 03/2008*** (Category 7)
<u>Wisconsin</u>	*Consumer Act* ▪ *1971*	Plaintiff:	YES	Mandatory	Prevailing	<u>*Verifies*</u>: An award of attorney fees to a prevailing plaintiff is mandatory if injury shown[xcix]
		Defendant:	Silent	Silent	Silent	No case found after statute amended
<u>Wyoming</u>	*Consumer Protection Act* ▪ *1973*	Plaintiff:	YES	Mandatory	Plaintiff suffered actual damages	No Case Found
		Defendant:	Silent	Silent	Silent	No Case Found

[i] This table is based upon actions from a private plaintiff and not a governmental plaintiff.

[ii] *Ford Motor Co. v. Dee-Witt Sperau*, 708 So. 2d 111 (Ala. 1997).

[iii] This table is based upon actions against a private defendant and not a governmental defendant.

[iv] Mandatory means the statute used the language of "shall."

Example: "On a finding by the court that an action or counterclaim under this section was frivolous or brought in bad faith or for the purpose of harassment, the court *shall* award to the defendant reasonable attorney's fees and costs." (ALA. CODE §8-19-10 (LexisNexis 2007))

[v] In interpreting the statute, case law has defined "frivolous" as an action, claim, or defense that is "without substantial justification", "groundless in fact", "groundless in law", "vexatious", or "interposed for any improper purpose", *Pacific Enterprises Oil Co. v. Howell Petroleum Corp.*, 614 So. 2d 409, 418 (Ala. 1993); "Bad faith" has been equated to "malicious intent", *Sam v. Beaird*, 685 So. 2d 742, 745 (Ala. Civ. App. 1996).

[vi] *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1260 (Ala. 2004).

[vii] The statute defines "frivolous" as either "not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law; or "brought to harass the defendant or to cause unnecessary delay or needless expense." ALASKA STAT. §45.50.537(e) (2008).

[viii] Silent means that the statute does not address the matter.

[ix] *Nahom v. Blue Cross & Blue Shield,* 885 P.2d 1113, 1124 (Ariz. App. Crt. 1994).

[x] *Id*.

[xi] *Thomas v. Olson*, 364 Ark. 444 (Ark. 2005) ("[t]he plain reading of the statute requires that an award for actual damages or attorney's fees is predicated on prevailing on the claim or claims asserted.").

[xiii] *Wallis v. Ford Motor Co*., 208 S.W.3d 153, 161 (Ark. 2005) (emphasizing that there must be "actual damages or injury" for a privant litigant to recover pursuant to section 4-88-113(f)). *Id.*.

[xiv] *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1077 (Cal. 1999).

[xv] Discretionary means the statute used the language of "may".

Example: "Reasonable attorney's fees *may* be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." (CAL. CIV. CODE §1780(d) (Deering 2007))

xvi Courts have defined "bad faith" as existing when a tactic or action utterly lacks merit, *Dolan v. Buena Eng'rs,* 29 Cal. Rptr. 2d 903, 906 (Cal. Ct. App. 1994) or in the alternate, if the court finds that the plaintiff had a belief that the claim was meritorious, then there will be a finding of good faith, *Shelton v. Rancho Mortgage & Inv. Corp.,* 115 Cal.Rptr.2d 82, 89 (Cal. Ct. App. 2002).

xvii *Broughton,* 21 Cal. 4th at 1077.

xviii *Holcomb* ***v.*** *Steven D. Smith, Inc.***,** 170 P.3d 815 (Colo.App. 2007) ("Plaintiff requests attorney fees under section 6-1-113(2)(b), C.R.S.2006. This section mandates costs and reasonable attorney fees in favor of a successful CCPA claimant).

xix "Bad faith" is defined in the statute as "fraudulent, willful, knowing, or intentional conduct that causes injury." COLO.REV.STAT.§6-1-113 (2007). "Groundless" is defined by case law as "a claim or defense . . . if the allegations of the complaint, although sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence. A claim is groundless if the proponent has a valid legal theory, but can offer little or no evidence to support the claim." *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063 (Colo. 1984); *Bilawsky v. Faseehudin,* 916 P.2d 586 (Colo. App. 1995).

xx *Fabri v. United Technologies International*, 387 F.3d 109, 119, 130 (2nd Cir. 2004) (applying CT law); *Heller v. Fish Realty Co.*, 890 A.2d 113, 119 (Ct. App. Crt 2006).

xxi Prior to a 1976 amendment, the court could award attorney's fees to the defendant in addition to the plaintiff. *Staehle v. Michael's Garage*, 646 A.2d 888, 890 at fn 8 (Ct. App. Crt. 1994). The 1976 amendment deleted fees for a defendant. *Id.*

xxii *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1078 (Del. 1983).

Under Delware's "Lemon Law," Title 6, Subtitle II, Chapter 50, §§ 5001– 09, " the court, in its discretion, may award the plaintiff's costs and reasonable attorney's fees or, if the court determines that the action is brought in bad faith or is frivolous in nature, may award reasonable attorney's fees to the defendant." Id. at §5005. This provision applies only to breach of an express warranty related to sale of an automobile. Note also that 6 Del. C. § 4909A(c) provides that a court may award "reasonable attorneys' fees" to a customer who successfully sues an automotive repair facility for repair fraud. These provisions do not technically fall under the Deleware Consumer Fraud Act, but they do share consumer protection goals.

xxiii *GMAC v, Laesser,* 791 So. 2d 517, 519 (Fla. App. Crt 2001).

xxiv *Id*.

xxv The statute states:

> If the court finds in any action that there has been a violation of this part, the person injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with said action; provided, however, the court shall deny a recovery of attorneys' fees and expenses of litigation which are incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of the written demand for relief required by this Code section; provided, further, that, if the court finds the action continued past the rejection of such reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of litigation to the adverse party.

GA. CODE ANN. § 10-1-399(d)(2007).

xxvi Brown v. Morton, 617 S.E.2d 198, 202 (Ga. App. Crt. 2005).

xxvii *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222 (Ha. 2002). Note that the court also mentioned that a court may impose against *either* party reasonable attorney fees upon a specific finding that a claim or defense was frivolous. *Id.* at fn 5, *citing* HRS § 607-14.5(a) (1993). Section 607-14.5(a) has remained unchanged as of the date of this article (2008).

xxviii *Fehn v. Noah*, 133 P.3d 1240, 1246 (ID 2006).

xxix *Id*.

xxx *Krautsack v. Anderson*, 861 N.E.2d 633, 643 (Ill. 2006).

xxxi *Id*. The Illinois Supreme Court interpreted the Consumer Fraud and Deceptive Practices Act to permit a court in the court's discretion to award a prevailing defendant's attorney's fees after a showing that Plaintiff's case was in "bad faith" but did not limit bad faith to a Rule 137 situation where sanctions could apply. *Krautsack v. Anderson*, 861 N.E.2d 633, 647-49 (Ill. 2006).

xxxii *Missi v. CCC Custom Kitchens, Inc.*, 731 N.E.2d 1037, 1041 (Ind. App. Crt. 2000).

xxxiii *Id*.

xxxiv House File 2142, the currently pending "Iowa Consumer Rights Act," would give rise to a private right of action to an injured consumer and reasonable attorney fees are mandated for a prevailng plaintiff) (http://coolice.legis.state.ia.us/Cool-ICE/default.asp? category= billinfo&service=billbook&GA=82&hbill=HF2142) (last visited March 12, 2008).

xxxv *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222 (Iowa 1998) (confirming that there is no private right of action and therefore there is no right to attorney's fees).

xxxvi *Id*.

xxxvii *Equitable Life Leasing Corp. v. Abbick,* 757 P.2d 304, 308 (Kan. 1988).

xxxviii *Waggener v. Seever Systems, Inc*., 664 P.2d 813 (Kan. 1983).

xxxix *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303 (Ky. 2000).

xl *Id*.

xli *Pelican Point Operations, L.L.C. v. Carroll Childers Co.*, 807 So. 2d 1171, 1178 (La. Crt. App. 2002).

xlii *Advanced Constr. Corp. v. Pilecki*, 901 A.2d 189 (Me. 2006) ("a person who has suffered a loss of money or property as the result of an unfair or deceptive trade practice under the Unfair Trade Practices Act *may* also 'be awarded reasonable attorney's fees' ") (emphasis added). The court deleted shall when quoting the statute. *Id*.

xliii *Hoffman v. Stamper*, 843 A.2d 153, 158 (Md. 2004).

xliv *Hershenow v. Enter. Rent-A-Car Co. of Boston, 840 N.E.2d 526, 531* (Mass. 2006) xlv The consumer protection act allows a person who suffers a loss as a result of a violation of the act to bring an action to recover reasonable attorney fees including fees for services rendered on appeal. *Smolen v Dahlmann Apartments, Ltd.* , 463 NW2d 261 (Mich. App. Crt 1990).

Although no "frivolous" language appears in the Michigan Consumer Protection Act (MCPA), there is a statutory requirement in the state's rules of civil procedure awarding a prevailing party's attorney's fees where that party makes a motion to recover costs and fees in connection with a frivolous claim made under the MPCA. MICH. COMP. LAWS SERV.§600.2591 (LexisNexis 2008). The civil statute lists three definitions for frivolous, any of which will satisfy the requirement: (a) that "the party's primary purpose" for filing or defending the action "was to harass, embarrass, or injure the prevailing party, " (b) that there was no "reasonable basis to believe that the facts underlying the party's legal position were in fact true," or (c) "the party's legal position was devoid of arguable merit." *Id.*

xlvi The Minnesota Prevention of Consumer Fraud Act does not specifically provide a plaintiff with reasonable attorney fees. However, Minnesota's Chapter on Additional Duties of Attorney General; Subd. 3a. Private remedies, provides that "any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court." MINN. STAT. §8.31 (2007).

xlvii *Yost v. Millhouse*, 373 N.W.2d 826, 831-32 (Minn. App. 1985); *Hutchinson Utils. Comm'n v. Curtis-Wright Corp.*, 775 F.2d 231, 243 (1985) (applying Minn. law).

xlviii *Wilson v. Nelson Hall Chevrolet*, 871 F. Supp. 279, 281 (S.D. Miss. 1994).

xlix *Id*.

l *Sunset Pools of St. Louis v. Schaefer*, 869 S.W.2d 883, 886 (Mo. Ct. App. 1994).

li *Deadwyler v. Volkswagen of America, Inc.*, 748 F.Supp. 1146 (W.D. N.C. 1999) (interpreting Mo. law).

lii *Plath v. Schonrock*, 64 P. 3d 984, 991 (Mont. 2003).

liii *Tripp v. Jeld-Wen, Inc.,* 112 P.3d 1018, 1025-26 (Mont. 2005) (adopting the reasoning of the U.S. Supreme Court in *Christianburg,* 434 U.S. 412).

liv *Eicher v. Mid Am. Fin. Inv. Corp.,* 702 N.W.2d 792, 806 (Neb. 2005) (affirming that the prevailing plaintiffs were entitled to an award of attorney fees under the Consumer Protection Act, which permits such an award under statute).

lv The Deceptive Trade Practices Act does not specifically provide attorney fees for a plaintiff. However, under Montana's Remedies and Special Actions and Proceedings statute, the section on Actions by Victims of Fraud provides that "an action may be brought by any person who is a victim of consumer fraud….if the claimant is the prevailing party, the court shall award him…..his costs in the action and reasonable attorney's fees." NEV. REV. STAT. §41.600 (2007)

lvi The court in *State ex. rel. List v. Courtesy Motors* affirmed the lower court's refusal to grant attorney's fees to a prevailing defendant in an action by the state and state agencies for deceptive trade practices. 590 P.2d 163 (Nev. 1979). In so holding, the court stated, because the statute in Nevada is silent as to whether a defendant is entitled to attorney's fees when it is the prevailing party, it is within the court's discretion to award the fees. Therefore the lower court did not commit error in refusing attorney's fees to the prevailing defendant, stating "we have repeatedly held that attorney's fees may not be awarded in the absence of a statute, rule or contract which so provides." *Id.* at 166.

lvii *Carter v. Lachance*, 766 A.2d 717 (2001).

[lviii] *Cox v. Sears Roebuck & Co*., 647 A.2d 454, 465 (NJ 1994).

[lix] *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398, 1403 (10th Cir. 1993).

[lx] "Groundless" has been defined by the New Mexico Supreme Court as "frivolous." The court further provided that this means "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so…which includes a good faith argument for an extension, modification or reversal of existing law." *G.E.W. Mechanical Contractors, Inc. v. Johnston Co.,* 115 N.M. 727 (1993). Another definition for "frivolous" offered by the court in a separate action under the Unfair Trade Practices Act was "without merit." *Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc*., 80 N.M. 646, 649 (1969).

[lxi] *Marchman v. NCNB Texas Nat'l Bank*, 898 P.2d 709, 728 (New Mex. 1995).

[lxii] *Independent Living Aids, Inc. v. Maxi-Aids*, 25 F. Supp.2d 127, 131 (E.D.N.Y. 1998).

[lxiii] The North Carolina Court of Appeals has defined "willfully" as "something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority – careless whether [the defendant] has the right or not – in violation of law." *Envirosafe Paints, Inc. v. Conklin,* 616 S.E.2d 693 (N.C. Ct. App. 2005).

[lxiv] *Blankenship v. Town and Country Ford, Inc.,* 622 S.E.2d 638, 643 (N.C. App. 2005).

[lxv] The two terms "frivolous" and "malicious" go together and are defined, respectively, as a claim where "a proponent can present no rational argument based upon the evidence or law in support of [it]" and "a claim that is "wrongful and one intentionally without just cause or excuse or as a result of ill will." *Blyth v. McCrary*, 646 S.E.2d 813, 819 (N.C. Ct. App. 2007).

[lxvi] *Basnight v. Diamond Developers, Inc*., 178 F. Supp. 2d 589, 592 (M.D. N.C. 2001).

[lxvii] *Jorgenson v. Agway, Inc*., 627 N.W.2d 391, 393-94 (2001).

[lxviii] "'Knowingly' merely requires proof of knowledge of the acts that constitute the offense." *Charvat v. Ryan* 116 Ohio St. 3d 394, 398 (2007); *see also Einhorn v. Beau Townsend Ford, Inc.* 1988 Ohio App. LEXIS 2645 (Ohio Ct. App. 1988) ("knowingly committed" for purposes of attorney's fees pursuant to R.C. 1345.09(F) (Ohio's Consumer Sales Practices Act) means that the supplier knows, at the time of its act or practice, that that act or practice violates Chapter 1345). *Id.*

[lxix] *Einhorn v. Ford Motor Co.,* 548 N.E.2d 933, 935 (Ohio 1990)

[lxx] The Ohio Appeals Court has defined "groundless" for purposes of assessing attorney fees, "if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by credible evidence at trial," *Palmer v. Daniel Troth & Son Builders,* 1988 Ohio App. 2211, 13-14 (Ohio Ct. App. 1988). This test assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim. *Id.*

[lxxi] Further, the court defines "bad faith" as "a lack of good faith…and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrong-doing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces the actual intent to mislead or deceive another." *Id* at 16.

[lxxii] *Parker v. I&F Insulation Co.,* 730 N.E.2d 972, 975 (Ohio 2000); *but see Duckworth v. Burger King,* 824 N.E.2d 592 (Ohio Crt. App. 2005) ("Because Burger King prevailed on its statute of

limitations defense, and because it alleged attorney's fees as a counterclaim, it was the 'prevailing party' within the meaning of R.C. 1345.09(F) and 'may' be entitled to attorney fees under the statute.").

lxxiii *Tibbets v. Sight 'n Sound Appliance Cntrs, Inc.*, 77 P.3d 1042, (Okla. 2003).

lxxiv "Bad faith" as discussed in *Green Bay Packaging v. Preferred Packaging*, is when a claim is made for "oppressive, abusive, or wasteful reasons." 932 P. 2d 1091, 1098-1099 (Okla. 1996). The court further reasoned that bad faith involved the intent of the actor who brought the claim, not the quality or the quantity of the evidence presented. *Id* at 1099.

lxxv The statute further states that the defendant can also be awarded attorney fees if the plaintiff's claim "was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." OKLA. STAT. tit. 15, §761.1 (2007).

lxxvi *Whitlock v. Bob Moore Cadillac, Inc.*, 938 P.2d 737 (Okla. 1997).

lxxvii *Pelfrey v. Kuni Cadillac, Inc.*, 619 P.2d 662, 663 (Ore. Crt. App. 1980)

lxxviii *Hammer v. Nikol*, 659 A.2d 617, 620 (Pa. Comw. 1995); *Sewak v. Lockhart*, 699 A.2d 755 (Pa. Super. 1997).

lxxix *Taylor v. Medenica,* 503 S.E.2d 458*,* 460 (S.C. 1998)

lxxx *Id*.

lxxxi *Miller v. United Automax*, 166 S.W.3d 692, 697 (Tenn. 2005).

lxxxii The court in *Glanton v. Bob Parks Realty*, in defining "without legal or factual merit," did not interpret the term to "mean without sufficient merit to prevail," but rather "as so utterly lacking in an adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed." 2005 Tenn. App. LEXIS 263, 30 (Tenn. App. 2005).

lxxxiii *Don Smith Ford, Lincoln-Mercury, Inc. v. Bolinger*, 2005 Tenn. App. LEXIS 172, *16 (Tenn. Crt. App. 2005).

lxxxiv *Continental Dredging, Inc. v. De-Kaizered, Inc.,* 120 S.W.3d 380, 396 (Tex. Crt. App. 2003).

lxxxv "Groundless" has been interpreted to mean "a claim having no basis in law or fact, and not warranted by any good faith argument for the extension, modification, or reversal of existing law." *See, e.g. Schlager v. Clements* 939 S.W.2d 183, 190 (Tex. App. 1996); *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S. W. 2d 634, 637 (Tex. 1989); *McDuffie v. Blassingame*, 883 S.W.2d 329, 335 (Tex. App. 1994); *Mosk v. Thomas* 183 S.W.3d 691, 695 (Tex. App. 2003). Further, the standard used in determining whether a suit is groundless is "whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim." *Schlager,* 939 S.W.2d at 190. Additionally, the court may "consider evidence that is legally inadmissible or subject to other defects in making this determination if there is some good faith belief that the tendered evidence might be admissible or that it could reasonably lead to the discovery of admissible evidence." *Id.*

lxxxvi A suit is brought in "bad faith" if it is motivated by malicious or discriminatory purpose. *See, e.g., Schlager*, 939 S.W.2d at 190; *McDuffie,* 883 S.W.2d at 335; *Central Texas Hardware, Inc. v. First City Texas-Bryan, N.A.*, 810 S.W.2d 234, 237 (Tex. App. 1991).

lxxxvii "For purposes of harassment" has been interpreted to mean that a case "was brought for the sole purpose of harassment," *Donwerth,* 775 S.W.2d at 638. Another court has noted that "because any purpose for recovering money damages, however small, as a motivating factor would defeat such a finding, it is difficult to conceive of a case which was not groundless but was brought for purposes of harassment," *Rutherford v. Riata Cadillac Co.,*809 S.W.2d 535, 539 (Tex. App. 1991).

lxxxviii *Intertex, Inc. v. Cowden*, 728 S.W.2d 813, 820 (Tex. Crt. App. 1986).

lxxxix *Andreason v. Felsted*, 137 P.2d 1, 6 (Utah Crt. App. 2006).

xc *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 953 (Utah 1996).

xci *Gramatan Home Investors Corp. v. Starling*, 470 A.2d *115,* 1162 (Vt. 1983); *L'Esperance v. Benware*, 830 A.2d 675, 683 (Vt. 2003) (following *Gramatan*).

xcii *State v. Whitingham Sch. Bd*, 438 A.2d 394, 408-10 (Vt. 1981).

xciii *Pitchford v. Oakwood Mobile Homes, Inc*., 212 F. Supp. 2d 613 (W.D. Va. 2002) (granting of damages after an adjudication on the merits of a claim is a condition precedent to an award of attorney's fees); *see also Nigh v. Koons Buick Pontiac GMC, Inc*., 384 F. Supp. 2d 915, 918 (E.D. Va. 2005) ("VCPA attorney's fees and court costs "may be awarded" in addition to damages . . . TILA, however, *directs* the Court to award attorney's fees and costs) (emphasis added).

xciv *Pitchford, 212 F. Supp.2d at 620.*

xcv *State v. Black*, 676 P.2d 963, 907 (Wash. 1984)

xcvi *Sato v. Century 21 Ocean Shores Real Estate*, 681 P.2d 242, 245 (Wash. 1984).

xcvii *Chevy Chase Bank v. McCamant*, 512 S.E.2d 217, 227 (W.Va. 1998).

xcviii *Id*.

xcix *First Wisconsin Nat'l Bank v. Nicolaou*, 335 N.W.2d 390, 396 (Wisc. 1983).