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The Arkansas Deceptive Trade Practices Act: The Arkansas Supreme Court Should Adopt the Specific-Conduct Rule

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I. INTRODUCTION

The Arkansas Deceptive Trade Practices Act (ADTPA)[1] contains a catch-all provision providing a private right of action for all deceptive trade practices in any business.[2] The ADTPA defines some deceptive trade practices,[3] while other substantive areas of law define different deceptive practices.[4] This article examines two related issues: (1) whether regulated industries enjoy a categorical exemption from the ADTPA; and (2) whether conduct defined as deceptive in other areas of substantive law, such as the Insurance Code's Trade Practices Act (TPA),[5] supports an ADTPA claim.

Resolving these issues will require the Arkansas Supreme Court to adopt one of two rules concerning the construction of safe-harbor provisions in state DTPAs.[6] The

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1. ARK. CODE ANN. § 4-88-101 to -207 (Repl. 2011). This article refers generically to other states' deceptive-trade-practices acts with the acronym "DTPA."

2. ARK. CODE ANN. § 4-88-107(a)(10) ("Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to . . . [e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade . . . .").

3. *See* ARK. CODE ANN. § 4-88-107(a).

4. *See, e.g.*, ARK. CODE ANN. § 4-88-607(a)(1) (Repl. 2011) (defining spam email as a deceptive practice); ARK. CODE ANN. § 17-89-405 (Repl. 2010) (defining certain medical advertising as deceptive).

5. *See* ARK. CODE ANN. § 23-66-201 to -215 (Repl. 2012).

6. The safe-harbor provision in the ADTPA is codified at subsection 4-88-101(3) of the Arkansas Code. It provides:

> This chapter does not apply to: . . . (3) Actions or transactions permitted under laws administered by the Insurance Commissioner, the Securities

two rules are: (1) the majority "specific conduct" rule, which looks to whether state law permits or prohibits the conduct at issue and only exempts permitted conduct from DTPA claims; and (2) the minority "general activity" rule, which looks to whether a state agency regulates the conduct, in which case a regulated party enjoys a full exemption from the DTPA.[7]

The rule adopted in any given state is largely dependent on the precise language of that state's safe-harbor provision. In most states where a safe-harbor provision exempts "permitted," "authorized," or "required" conduct, the specific-conduct rule permits DTPA claims over conduct that any area of substantive law prohibits as deceptive.[8] Conversely, in most states where a safe-harbor provision exempts conduct "regulated by" or "subject to the jurisdiction of" a state agency, the general-activity rule exempts all regulated industries (such as insurance) from DTPA claims.[9] The ADTPA contains the former type of safe-harbor provision, exempting only conduct permitted by various regulatory bodies.[10]

Despite these general trends around the country, a few courts, including the District Court for the Eastern District of Arkansas, have defined the term "permitted" to mean "regulated" in the context of DTPA safe-harbor provisions.[11] Under this interpretation of "permitted," for example, if a DTPA does not apply to conduct "permitted" by insurance regulations, then the DTPA will not apply to

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> Commissioner, the State Highway Commission, the Bank Commissioner, or other regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests the Attorney General to implement the powers of this chapter . . . .

ARK. CODE ANN. § 4-88-101(3).

7. *See infra* Part III.A.

8. *See, e.g.*, Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 56 (Colo. 2001) (en banc) (holding that the insurance industry was not exempt from Colorado's consumer-protection act).

9. *See, e.g.*, Ferguson v. United Ins. Co. of Am., 293 S.E.2d 736, 737 (Ga. Ct. App. 1982) (holding that insurance transactions were exempt from Georgia's Fair Business Practices Act).

10. ARK. CODE ANN. § 4-88-101(3).

11. *See, e.g.*, Williams v. State Farm Mut. Auto. Ins. Co., No. 5:10CV00032 JLH, 2010 WL 2573196, at *4 (E.D. Ark. June 22, 2010).

any insurance activity—even if insurance laws explicitly prohibit the activity.[12] Because the terms "permitted" and "prohibited" are mutually exclusive, however, rules of statutory construction dictate against defining "permitted" to mean "regulated" when "regulated" can also mean "prohibited."[13] For this reason, many more courts have rejected the general-activity rule than have adopted it because such a rule violates a plain-meaning interpretation of safe-harbor provisions that exempt only permitted conduct.[14]

No Arkansas appellate decision has expressly chosen between the specific-conduct and general-activity rules. The District Courts for the Eastern and Western Districts of Arkansas have applied different rules in resolving these questions.[15] The current status of Arkansas law creates uncertainty for courts and litigants alike; therefore, the Arkansas Supreme Court should resolve this unsettled question.

Part II of this article clarifies the link between the ADTPA and other areas of substantive law. Part III analyzes other states' caselaw concerning safe-harbor provisions resembling the Arkansas statute, Arkansas state-court cases on ADTPA claims, and Arkansas federal cases addressing the ADTPA's safe-harbor provision. Finally, Part IV surveys how all fifty states handle DTPA claims against insurance companies. Part V concludes that the Arkansas Supreme Court should adopt the specific-conduct rule.

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12. *See id.*

13. *See infra* Part III.B.

14. *See infra* Part IV.B.

15. *Compare* Willsey v. Shelter Mut. Ins. Co., Civil No. 12-2320, 2013 WL 4453122, at *3 (disagreeing with the approach taken by the Eastern District and concluding that "[t]he plain meaning of the safe harbor provision only excludes activity permitted by the Insurance Trade Act"), *with Williams*, 2010 WL 2573196, at *4 (holding that the ADTPA's insurance-activity exception excludes all insurance activity regardless of whether it is permissible).

II. THE LINK BETWEEN THE ADTPA AND OTHER AREAS OF SUBSTANTIVE LAW

A. The ADTPA Expressly Prohibits Certain Types of Conduct, and Its Catch-All Provision Expands the ADTPA's Reach to Deceptive Conduct in Other Substantive Areas of Law

The ADTPA lists conduct it defines as deceptive, such as taking advantage of someone due to physical infirmity; bait-and-switch advertising; selling flood-damaged goods without identifying them as such; or using a phony caller-identification name.[16] Over the years, the Arkansas General Assembly has added additional subchapters to the ADTPA; generally speaking, these new laws responded to technological developments (e.g., prohibiting telephone "[s]lamming"[17] and spam email[18]) or defined deceptive conduct more precisely for particular circumstances (e.g., prohibiting price gouging after natural disasters[19]).

In some instances, one could construe conduct by a regulated party as violating one or more of these specifically enumerated provisions of the ADTPA. Without considering the Insurance Code, some insurance activities may reflect improper deceptive trade practices under the ADTPA. For example, in *State Farm Mutual Auto Insurance Co. v. Campbell*, the United States Supreme Court confirmed that the following conduct is actionable: "an indifference to or a reckless disregard of the health or safety of others,"[20] taking advantage of "financial vulnerability,"[21] and "prey[ing] on consumers who would be unlikely to defend themselves."[22]

However, in many other circumstances, the ADTPA does not expressly prohibit a regulated actor's deceptive conduct. Although the list of prohibited conduct in the

16. ARK. CODE ANN. §§ 4-88-107(a)(5)–(6), (8)(A), (11) (Repl. 2011).

17. ARK. CODE ANN. § 4-88-401(3) (Repl. 2011) (defining "[s]lamming" as improperly changing a subscriber's selection of telephone toll-service provider).

18. ARK. CODE ANN. §§ 4-88-601 to -607 (Repl. 2011).

19. ARK. CODE ANN. § 4-88-301 (Repl. 2011).

20. 538 U.S. 408, 419 (2003).

21. *Id.*

22. *Id.* at 433 (Ginsburg, J., dissenting). Although *Campbell* was a bad-faith case, it confirms that some insurance-company conduct can fall within the definition of deceptive acts without reaching an insurance code's definition of deceptive trade practices.

ADTPA is impressive, "the General Assembly could not be expected to envision every conceivable violation."[23] Because predicting and outlawing every deceptive trade practice would have been impossible, the Arkansas General Assembly inserted the following provision into the ADTPA: "Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to . . . [e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade . . . ."[24] The Arkansas Supreme Court has interpreted this language as a broad catch-all provision that encompasses conduct defined as deceptive under other substantive areas of law.[25]

B. The Insurance Code Defines Certain Conduct as "Deceptive Acts" in the Business of Insurance

Other areas of the Arkansas Code define certain conduct as deceptive. One such area of substantive law is the Insurance Code's Trade Practices Act (TPA),[26] which states:

> The following are defined as . . . unfair or deceptive acts or practices in the business of insurance:
>
> . . . .
>
> (13) "Unfair claims settlement practices" means committing or performing with such frequency as to indicate a general business practice any of the following:
>
> (A) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
>
> (B) Failing to acknowledge and act reasonably and promptly upon communications with respect to claims arising under insurance policies;

23. State *ex rel.* Bryant v. R & A Inv. Co., 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999).

24. ARK. CODE ANN. § 4-88-107(a)(10) (Repl. 2011).

25. *See, e.g.*, *Bryant*, 336 Ark. at 295-97, 985 S.W.2d at 302-03 (applying the ADTPA to claims arising out of the usury prohibition in the Arkansas Constitution).

26. ARK. CODE ANN. § 23-66-201 to -215 (Repl. 2012).

(C) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(D) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(E) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(F) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

(G) Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured;

(H) Making claim payments to policyholders or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(I) Delaying the investigation or payment of claims by requiring an insured or claimant, or the physician of either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(J) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts of applicable law for denial of a claim or for the offer of a compromise settlement;

(K) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by those insureds;

(L) Attempting to settle a claim for less than the amount to which a reasonable person

> would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application;
>
> (M) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
>
> (N) Failing to promptly settle claims, when liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and
>
> (O) Requiring as a condition of payment of a claim that repairs must be made by a particular contractor, supplier, or repair shop . . . .[27]

Again, the plain language of the TPA defines the above conduct as "deceptive acts or practices in the business of insurance."[28] As such, these acts clearly fall within the ADTPA's catch-all provision prohibiting "other . . . deceptive act[s] or practice[s] in business, commerce, or trade."[29]

On occasion, insurers engage in a pervasive pattern of misconduct.[30] For example, the Arkansas Supreme Court recently confirmed that testimony concerning an insurer's "core practices," "training," and "training manuals" was relevant to the insurer's "course of conduct . . . in accordance with their national claims practices and procedures to curb . . . claims" and force claimants into litigation.[31] Many

27. ARK. CODE ANN. § 23-66-206(13).

28. ARK. CODE ANN. § 23-66-206.

29. ARK. CODE ANN. § 4-88-107(a)(10) (Repl. 2011).

30. *See, e.g.*, Allstate Ins. Co. v. Dodson, 2011 Ark. 19, at 19-20, 376 S.W.3d 414, 427-28.

31. *Compare* ARK. CODE ANN. § 23-66-206(13)(K) (Repl. 2012) (defining "[u]nfair claims settlement practices" as frequently "compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by those insureds"), *with Dodson*, 2011 Ark. at 19-21, 27, 376 S.W.3d at 427-28, 431.

articles and books address national insurance carriers adopting zero-sum strategies designed to boost corporate profits at the expense of policyholders.[32]

Some regulated actors argue they are exempt from a private right of action because the TPA does not create it.[33] Although the TPA does not create a private right of action, it also does not extinguish any private right of action.[34] Section 23-66-202 of the TPA provides:

> (a) The purpose of this subchapter is to regulate trade practices in the business of insurance in accordance with the intent of the United States Congress as expressed in Pub. L. No. 79-15 by defining, or providing for the determination of, all practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.
>
> (b) However, no provisions of this subchapter are intended to *establish or extinguish* a private right of action for a violation of any provision of this subchapter.[35]

The TPA is relevant because it defines deceptive conduct.[36] The Arkansas General Assembly enacted the original deceptive-conduct portion of the insurance TPA in 1959.[37]

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32. *See, e.g.*, DAVID J. BERARDINELLI, FROM GOOD HANDS TO BOXING GLOVES: THE DARK SIDE OF INSURANCE 17-19 (2008); JAY FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT 186-88 (Penguin Group 2010) (quoting an adjuster who stated: "You might as well get a lawyer because Shelter [Mutual Insurance Company] was not going to pay the house off."); Jay M. Feinman, *The Insurance Relationship as Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 566-67 (2009).

33. *See, e.g.*, Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 ARK. L. REV. 165, 209 (1997) ("[The Trade Practices Act] explicitly states that 'no provisions of this subchapter are intended to establish or extinguish a private right of action for a violation of any provision of this subchapter.' Therefore, there is no private right of action under the Trade Practices Act." (footnote omitted) (quoting ARK. CODE ANN. § 23-66-202(b) (Repl. 2012)).

34. *Id.*

35. ARK. CODE ANN. § 23-66-202 (Repl. 2012) (emphasis added).

36. *See* ARK. CODE ANN. § 23-66-206 (Repl. 2012).

37. *See* Act 148, 1959 Ark. Acts 419, 581-84 (codified as amended at ARK. CODE ANN. § 23-66-206 (Repl. 2012)).

Twelve years later, in 1971, the General Assembly enacted the ADTPA.[38]

The ADTPA's private right of action came much later in 1999.[39] The Arkansas Supreme Court's rules for statutory construction provide that "the earlier statute must yield to the later enactment."[40] Furthermore, the act implementing the ADTPA's private right of action states that "[a]ll laws and parts of laws in conflict with this act are hereby repealed."[41] When the ADTPA created a private right of action for deceptive trade practices in *any* business, it foreclosed the argument that section 23-66-202 precludes the insurance TPA from providing a private right of action for deceptive trade practices by insurers.[42]

III. THE ARKANSAS SAFE-HARBOR STATUTE SUPPORTS ADOPTION OF THE SPECIFIC-CONDUCT RULE RATHER THAN THE GENERAL-ACTIVITY RULE

A. The Two Rules

Courts apply two primary rules for determining whether a regulated actor is exempt from a DTPA claim. The first rule is the "specific conduct" rule, which only exempts conduct permitted or authorized by state law.[43] The second rule is the "general activity" rule, which exempts all conduct by a regulated actor, regardless of whether substantive state law explicitly authorizes or prohibits the conduct.[44] This section discusses several representative cases from around the country to illustrate how states with safe-harbor provisions similar to the Arkansas statute apply the two competing rules.

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38. Act 92, 1971 Ark. Acts 257 (codified as amended at ARK. CODE ANN. § 4-88-101 to -207 (Repl. 2011)).

39. *See* Act 990, 1999 Ark. Acts 3662, 3662-64 (codified as amended at ARK. CODE ANN. § 4-88-113(f) (Repl. 2011)).

40. Steward v. Statler, 371 Ark. 351, 356, 266 S.W.3d 710, 714-15 (2007) (holding that a 2007 act repealed an earlier statute by implication).

41. Act 990, 1999 Ark. Acts 3662, 3665.

42. *See* ARK. CODE ANN. § 4-88-107(a)(10) (Repl. 2011); ARK. CODE ANN. § 4-88-113(f) (Repl. 2011).

43. *See infra* Part III.A.1.

44. *See infra* Part III.A.2.

1. The Specific-Conduct Rule: Conduct Is Exempt from a DTPA Claim When Expressly Permitted by State or Federal Law

a. Tennessee

Tennessee is one of the few states to consider both the specific-conduct and general-activity rules. The Tennessee safe-harbor provision exempts "[a]cts or transactions required or specifically authorized" under state law.[45] In *Skinner v. Steele*, the Tennessee Court of Appeals ruled that the Tennessee Consumer Protection Act (CPA)[46] permitted the insurance code and the CPA to apply concurrently.[47] The court cited the cumulative-powers language in the CPA for the following proposition:

> The powers and remedies provided in this chapter . . . shall be cumulative and supplementary to all other powers and remedies otherwise provided by law. The invocation of one power or remedy herein shall not be construed as excluding or prohibiting the use of any other available remedy.[48]

The court then explained that the insurance code's explicit purpose is:

> [T]o regulate trade practices in the business of insurance in accordance with the intent of the Congress of the

45. *See* TENN. CODE ANN. § 47-18-111(a)(1) (West 2013).

46. TENN. CODE ANN. § 47-18-101 to -130 (West 2013). Some states have DTPAs, some have CPAs, and some even have both. *See generally* Donald M. Zupanec, Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979) (examining cases where courts have considered conduct prohibited by their state's DTPA or CPA). Generally speaking, these types of laws seek to protect consumers against unscrupulous trade practices. *See id.* In many instances, the language of one state's CPA is virtually identical to the language of another state's DTPA. *See infra* note 48. The references to DTPAs and CPAs in this article use the language chosen by the particular state being discussed; general reference to these types of laws use the term "DTPA." The terminology used is not intended to signal that the acts have different language or meanings.

47. 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987).

48. *Id.* (quoting prior version of TENN. CODE ANN. § 47-18-112 (West 2013)). Arkansas has a similar cumulative-powers clause in the ADTPA, which states: "The deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state." ARK. CODE ANN. § 4-88-107(b) (Repl. 2011). This article discusses these similarities later. *See infra* Part III.D.

> United States as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress; ch. 20, 59 Stat. 33), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.[49]

The *Skinner* court held this and other language from the insurance code showed that "[i]t was not the intent of the legislature to exempt the insurance industry from other *Tennessee* statutes."[50] Finally, the court noted: "The mere existence of one regulatory statute does not affect the applicability of a broader, non-conflicting statute."[51]

The Tennessee Supreme Court, in *Myint v. Allstate Insurance Co.*, later adopted *Skinner*'s holding.[52] The *Myint* court rejected the contention that the insurance code provided the sole remedy "for regulating unfair or deceptive insurance acts or practices."[53] The provision of the Tennessee insurance TPA at issue stated:

> No person shall engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to § 56-8-108 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.[54]

The Tennessee Supreme Court explained that this language does not limit the remedies outside the Tennessee insurance TPA because the scope of the CPA and the insurance TPA are different—the purpose of the CPA is remedial, whereas

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49. *Skinner*, 730 S.W.2d at 337 (quoting prior version of TENN. CODE ANN. § 56-8-101 (West 2013)). This statute is virtually identical to Arkansas's insurance TPA. *See* ARK. CODE ANN. § 23-66-202 (Repl. 2012).

50. *Skinner*, 730 S.W.2d at 337-38 (emphasis in original).

51. *Id.* at 338.

52. *See* 970 S.W.2d 920, 926 (Tenn. 1998) ("[T]he mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company."); *see also* Morris v. Mack's Used Cars, 824 S.W.2d 538, 539-40 (Tenn. 1992) (approving the Tennessee Court of Appeal's holding in *Skinner*).

53. *Myint*, 970 S.W.2d at 925.

54. *Id.* (quoting prior version of TENN. CODE ANN. § 56-8-103 (West 2014)). This provision is virtually identical to its counterpart in the Arkansas TPA. *See* ARK. CODE ANN. § 23-66-205 (Repl. 2012).

the insurance TPA is regulatory.[55] Thus, the court held that the code provisions are cumulative:

> [T]he mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company. In this context, the legislature has enacted a trilogy of statutes which, on their faces, apply to unfair and deceptive insurance trade acts and practices. *We consider the Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act as complementary legislation that accomplishes different purposes, and we conclude, accordingly, that the acts and practices of insurance companies are generally subject to the application of all three*.[56]

The *Myint* court also held that the catch-all provision prohibits "'[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person.'"[57] Ultimately, the court found that exempting insurance companies from a private right of action would frustrate the purposes of the CPA—protecting consumers.[58]

b. Colorado

The Colorado Supreme Court surveyed cases from other jurisdictions before reaching the same conclusion as Tennessee.[59] The court, in *Showpiece Homes Corp. v. Assurance Co. of America*, found that the Colorado CPA "was meant to work in conjunction with, not to the exclusion of, the [Colorado insurance TPA] as the statutes achieve

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55. *Myint*, 970 S.W.2d at 925.

56. *Id.* at 926 (emphasis added). Like Tennessee, Arkansas has a DTPA and an insurance TPA. *See* ARK. CODE ANN § 4-88-101 to -207 (Repl. 2011) (ADTPA); ARK. CODE ANN. § 23-66-201 to -213 (Repl. 2012) (insurance TPA). Also, like Tennessee, Arkansas has a bad-faith law that developed in the early 1900s. *See generally* Nathan Price Chaney, *A Survey of Bad Faith Insurance Tort Cases in Arkansas*, 64 ARK. L. REV. 853 (2011) (discussing the development of Arkansas's bad-faith law and examining bad-faith cases against insurers).

57. *Myint*, 970 S.W.2d at 925 (quoting prior version of TENN. CODE ANN. § 47-18-104(b)(27) (West 2014)).

58. *See id.* at 925-26 (quoting prior version of TENN. CODE ANN. § 47-18-102 (West 2014)).

59. Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 55 (Colo. 2001) (en banc).

different but complementary results."[60] The court rejected the argument "that this interpretation renders the statutory exclusion [for conduct 'in compliance' with state law] a nullity."[61] In framing the question of whether the exemption applies in a given case, the court adopted the following proposition: "[T]he inquiry . . . is not whether the conduct is subject to regulation, but rather whether the conduct is 'specifically authorized.'"[62]

c. South Carolina

South Carolina is another one of the few jurisdictions to weigh both general-activity and specific-conduct rules explicitly.[63] Indeed, the South Carolina Supreme Court acknowledged in *Ward v. Dick Dyer Associates, Inc.* that it had previously adopted the general-activity rule as set forth by the Rhode Island Supreme Court a decade earlier.[64] After examining both rules, the *Ward* court concluded that the general-activity rule rendered the South Carolina DTPA meaningless because "[a]lmost every business is subject to some type of regulation."[65] Thus, the court reversed its earlier decision, agreeing with the South Carolina Court of Appeals that the general-activity rule was too broad an interpretation of that state's safe-harbor provision,[66] which only exempted actions or transactions permitted by state law.[67]

The South Carolina Supreme Court cited the legislature's intent to prohibit unfair trade practices and

60. *Id.*

61. *Id.* at 56 (adopting the reasoning of Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987)).

62. *Showpiece Homes*, 38 P.3d at 56 (quoting Robertson v. State Farm & Cas. Co., 890 F. Supp. 671, 676 (E.D. Mich. 1995)).

63. *See* Ward v. Dick Dyer & Assocs., Inc., 403 S.E.2d 310, 311-12 (1991). *Ward* is not an insurance case, but insurers have a full, express exclusion from DTPA cases under a South Carolina statute that goes beyond the language in South Carolina's safe-harbor provision. *See* S.C. CODE ANN. § 39-5-40(c) (West 2013).

64. *Ward*, 403 S.E.2d at 311 (citing State *ex rel.* Mcleod v. Rhoades, 267 S.E.2d 539, 541 (1980)). *See infra* Part III.A.2. (discussing the Rhode Island Supreme Court's adoption of the general-activity rule).

65. *Ward*, 403 S.E.2d at 311.

66. S.C. CODE ANN. § 39-5-40.

67. *Ward*, 403 S.E.2d at 312.

adopted the following reasoning of the Tennessee Court of Appeals:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendant's interpretation of the exemption *would deprive consumers of a meaningful remedy in many situations*.[68]

The *Ward* court further stated that its reasoning was buttressed by the fact that the DTPA's "powers and remedies [were] cumulative and supplementary to all powers and remedies otherwise provided by law."[69] Ultimately, the court held that a plain-language construction controlled, stating: "[T]he exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes."[70]

d. Kentucky

Like Colorado and Tennessee, Kentucky has also addressed whether an insurer is subject to a deceptive-trade-practices claim. In *Stevens v. Motorists Mutual Insurance Co.*, the Kentucky Supreme Court surveyed cases from nine different jurisdictions before applying the specific-conduct rule to Kentucky's Consumer Protection Act (CPA).[71] The *Stevens* court concluded that insurance was a "service" covered by the CPA.[72] In adopting the specific-conduct rule,

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68. *Id.* (emphasis added) (quoting Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987)).

69. *Id.* (quoting S.C. CODE ANN. § 39-5-160 (West 2013)).

70. *Id.*

71. 759 S.W.2d 819, 820-21 (Ky. 1988) (citing cases from Illinois, Louisiana, Massachusetts, Michigan, Montana, Pennsylvania, Texas, Vermont, and Washington).

72. *Id.* at 820 (internal quotation marks omitted). The *Stevens* court did not address an exemption; rather, the court simply had to determine whether insurance was a "service" to which a deceptive-trade-practices action applied. *Id.* (internal

the court noted that three of the four states applying the general-activity rule to exempt insurers[73] had statutes explicitly exempting insurance companies because their activity was "regulated."[74] The court justified not applying the general-activity rule by noting that "[t]he results from these jurisdictions turn[ed] on the precise language of the consumer protection act in question."[75]

In distinguishing Kentucky's CPA from those of the other jurisdictions, the *Stevens* court reasoned: "[T]he Kentucky legislature created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts. In addition, . . . the statutes of this Commonwealth are to be liberally construed."[76] The court ultimately adopted the specific-conduct rule, holding that "the Kentucky Consumer Protection Act provides a homeowner with a remedy against the conduct of their own insurance company."[77]

e. Takeaways

The decisions from Tennessee, Colorado, South Carolina, and Kentucky show reasoned analysis of safe harbor-provisions similar to the one in Arkansas and of the public policy underlying complementary legislation. All of these decisions concluded that a private right of action was necessary for consumers to address specific instances of regulated-actor wrongdoing. According to these courts, the proper rule for exempting conduct from a DTPA claim is whether a statute specifically authorized the conduct alleged in the DTPA claim. If the conduct is not authorized, then

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quotation marks omitted). However, this case demonstrates some of the public-policy reasons why regulated actors, including insurers, should be subject to DTPA claims.

73. The following four states have declined to apply consumer-protection laws in insurance cases: (1) Louisiana; (2) Michigan; (3) Montana; and (4) Vermont. *Id.* at 821 (citing Comeaux v. Pa. Gen. Ins. Co., 490 So. 2d 1191 (La. Ct. App. 1986); Bell v. League Life Ins. Co., 387 N.W.2d 154 (Mich. Ct. App. 1986); Britton v. Farmer Ins. Grp. (Truck Ins. Exch.), 721 P.2d 303 (Mont. 1986); Wilder v. Aetna Life & Cas. Ins., 433 A.2d 309 (Vt. 1981)).

74. *See id.* (Louisiana, Michigan, and Montana).

75. *Stevens*, 759 S.W.2d at 821.

76. *Id.*

77. *Id.*

consumers have a private right of action for deceptive conduct under the DTPA.

2. The General-Activity Rule: A Business Activity Is Exempt from a DTPA Claim When Regulated by a State or Federal Agency

In contrast to the specific-conduct-rule cases, the two main appellate cases adopting the general-activity rule amid DTPA exemptions for permissive conduct both fail to adequately analyze the text of the safe-harbor provision, public policy, and caselaw trends around the country.

In the first case, *State v. Piedmont Funding Corp.*, Rhode Island's DTPA exempted "actions or transactions permitted under laws administered by [state agencies]."[78] In applying a blanket exclusion, the Rhode Island Supreme Court applied the "plain meaning" rule[79] but interpreted "permitted" under state law to include "activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers."[80] The determinative factor in the court's decision was that "the conduct at issue was clearly subject to the control of governmental agencies."[81] The court neither discussed the public policy underlying the different pieces of legislation nor surveyed other cases interpreting the applicability of the safe-harbor provision. The logical problem with this opinion is that it acknowledges Rhode Island's prohibition on deceptive insurance practices[82] but fails to explain how state law somehow "permits" these prohibited practices.

The second case adopting a general-activity rule under statutory language similar to that in Arkansas is the Georgia Court of Appeals' decision in *Ferguson v. United Insurance Co. of America*.[83] This short opinion contains even less analysis than Rhode Island's *Piedmont Funding* case. In *Ferguson*, Georgia's safe-harbor provision exempted

78. 382 A.2d 819, 822 (R.I. 1978) (quoting of R.I. GEN. LAWS ANN. § 6-13.1-4 (West 2013)).

79. *Id.* (citing Andreozzi v. D'Antuono, 319 A.2d 16, 18 (R.I. 1974)).

80. *Id.*

81. *Id.*

82. *See id.*

83. *See* 293 S.E.2d 736, 737 (Ga. Ct. App. 1982).

"specifically authorized" conduct.[84] The Georgia Court of Appeals held that because the Insurance Commissioner had the power to enforce the Insurance Code, which regulates unfair trade practices in the insurance industry, all insurance transactions were exempt from the DTPA.[85] This court characterized the activity alleged in the complaint as a deceptive trade practice, yet it failed to explain how the Insurance Code specifically authorized this conduct.[86] That is, the case failed to provide a cogent explanation of how the phrase "specifically authorized" can mean "regulated" when "regulated" also means "prohibited." The court assumed, rather than explained, this equivalency.

These two cases from Georgia and Rhode Island equated the terms "authorized" or "permitted" with the term "regulated." But even these cases acknowledged that their state's DTPA prohibits some regulated conduct. According to this logic, specifically prohibited conduct can somehow meet a statutory definition of permitted conduct. This contradiction in terms yields an absurd result, and courts cannot construe statutes to yield absurd results.[87]

B. The ADTPA Provides Safe Harbor to "Permitted" Activity and Prohibits Unfair Claims-Settlement Practices

The Arkansas safe-harbor provision provides that the ADTPA does not apply to "[a]ctions or transactions *permitted* under laws administered by the Insurance Commissioner."[88] Stated another way, the ADTPA provides safe harbor to conduct that is expressly allowed by other substantive law (in our example, the Insurance Code and regulations). In contrast, Arkansas's insurance TPA explicitly *prohibits* insurance business practices defined as unfair or deceptive.[89]

84. *Id.* at 737 (quoting GA. CODE ANN. § 10-1-396(1) (West 2013)).
85. *Id.*
86. *See id.*
87. Doss v. Norris, 2010 Ark. 199, at 3, 2010 WL 1726826, at *3 (citing State v. Owens, 370 Ark. 421, 426, 260 S.W.3d 288, 292 (2007)).
88. ARK. CODE ANN. § 4-88-101(3) (Repl. 2011) (emphasis added).
89. ARK. CODE ANN. § 23-66-202(a) (Repl. 2012).

Arkansas courts must construe a statue "just as it reads" and give its words "their plain and ordinary meaning."[90] Further, "a fundamental principle of statutory construction [is] that the express designation of one thing may be properly construed to mean the exclusion of another."[91] Thus, the statutory language exempting "permitted" conduct should not extend to "prohibited" conduct.

C. Decisions Under Arkansas Law Touch Upon the Specific-Conduct and General-Activity Rules, but They Do Not Expressly Adopt One or the Other

The Arkansas Supreme Court has only once touched on the precise safe-harbor language in the ADTPA.[92] In *DePriest v. AstraZeneca Pharmaceuticals, L.P.*, the court affirmed the dismissal of a class action that alleged AstraZeneca violated the ADTPA by fraudulently marketing one its drugs.[93] The court applied the exemption because AstraZeneca's advertisements were consistent with the FDA-approved labeling for the drug.[94] The circuit court and the Arkansas Supreme Court both found that FDA rules permitted the labeling and, thus, fell within the safe-harbor provision of the ADTPA.[95]

Nothing in this case stands for the proposition that all regulated conduct is exempt pursuant to the general-activity rule. If anything, this case stands for the proposition that courts must determine whether substantive law actually permits the allegedly deceptive conduct before enforcing the exemption.[96] Although the Arkansas Supreme Court did not analyze or discuss the two competing rules, *DePriest* appears to be an implicit application of the specific-conduct rule since

90. Jones v. Double "D" Props., Inc., 352 Ark. 39, 46, 98 S.W.3d 405, 408-09 (2003).

91. Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC, 375 Ark. 379, 385, 291 S.W.3d 190, 195 (2009) (citing MacSteel v. Ark. Okla. Gas Corp., 363 Ark. 22, 210 S.W.3d 878 (2005)).

92. *See* DePriest v. AstraZeneca Pharms., L.P., 2009 Ark. 547, 351 S.W.3d 168.

93. *Id.* at 2, 21, 351 S.W.3d at 170, 182.

94. *Id.* at 18-19, 351 S.W.3d at 178.

95. *Id.* at 10, 18-19, 351 S.W.3d at 174, 178.

96. *See id.*

the court required a factual determination under substantive law.[97]

Another Arkansas Supreme Court case discusses, in dictum, a different safe-harbor provision in the ADTPA.[98] In *Mercury Marketing Technologies of Delaware, Inc. v. State ex rel. Beebe*, a telemarketer filed an interlocutory appeal from a preliminary injunction.[99] The telemarketer, Mercury, contended that it was exempt from the ADTPA because its practices were subject to, and complied with, an order administered by the Federal Trade Commission.[100] The court construed Mercury's argument as a jurisdictional challenge to the circuit court's jurisdiction to enter a preliminary injunction, and it declined to address the issue directly in the context of an interlocutory appeal.[101] However, the court commented in dictum that it "fail[ed] to see how Mercury [was] in compliance with an order administered by the FTC, which § 4-88-101 requires for the exception to take effect."[102] Instead of side-stepping the issue by noting that the ADTPA exemption was irrelevant to the appeal, or by commenting that the exemption could have blanket application on remand for statutory-interpretation reasons, the Arkansas Supreme Court observed that Mercury's conduct did not appear to comply with a regulatory order.[103] This observation shows that the Arkansas Supreme Court likely believes telemarketers—who are regulated actors[104]—are not exempt from the ADTPA when their conduct does not comply with regulatory orders.

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97. *See DePriest*, 2009 Ark. 547, at 19-20, 351 S.W.3d at 178.

98. Mercury Mktg. Techs. of Del., Inc. v. State *ex rel.* Beebe, 358 Ark. 319, 326-27, 189 S.W.3d 414, 418-19 (2004).

99. *Id.* at 320-21, 189 S.W.3d at 415.

100. *Id.* at 326–27, 189 S.W.3d at 418-19. Subsection 4-88-101(1) of the Arkansas Code, which governs the ADTPA's applicability, states: "This chapter does not apply to: (1) Advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission . . . ." ARK. CODE ANN. § 4-88-101(1) (Repl. 2011).

101. *See Mercury Mktg. Techs.*, 358 Ark. at 326-27, 189 S.W.3d at 418-19.

102. *Id.* at 327, 189 S.W.3d at 419.

103. *Id.*

104. *See* ARK. CODE ANN. § 4-99-101 to -112. (Repl. 2011).

A third Arkansas Supreme Court case, *Anderson v. Stewart*,[105] supports adopting the specific-conduct rule. In *Anderson*, the court affirmed a class-action award against a company and its shareholders for violating the ADTPA.[106] The case involved "payday lenders,"[107] who at the time were subject to the Arkansas Check-Cashers Act.[108] Importantly, the Arkansas Supreme Court upheld an ADTPA verdict even though the State Board of Collection Agencies regulated the payday lenders' conduct at the time.[109] Although the court did not address the safe-harbor provision, *Anderson* represents an implicit application of the specific-conduct rule to conduct regulated by a state agency.[110]

Furthermore, the Arkansas Attorney General, who enforces the ADTPA on behalf of the public, has also cited the safe-harbor provision.[111] In 1996, the State Bank Commissioner requested a formal opinion from Attorney General Winston Bryant concerning the propriety of certain conduct by banks.[112] The Attorney General concluded that if a bank's conduct "is permissible or not prohibited under applicable banking laws or regulations, it is not subject to action under the Arkansas Deceptive Trade Practices Act."[113] This conclusion implies that the corollary is also true: If conduct is prohibited under applicable insurance laws or regulations, it is subject to action under the ADTPA. The Attorney General's interpretation is consistent with the

105. 366 Ark. 203, 234 S.W.3d 295 (2006).

106. *Id.* at 204, 234 S.W.3d at 296.

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

108. *Id.* at 210, 234 S.W.3d at 301. The Arkansas Supreme Court declared the Arkansas Check-Cashers Act, ARK. CODE ANN. § 23-52-101 to -117 (Repl. 2006), unconstitutional in 2008. McGhee v. Ark. State Bd. of Collection Agencies, 375 Ark. 52, 65, 289 S.W.3d 18, 28 (2008). The General Assembly later repealed the Check-Cashers Act in 2011. Act 720, 2011 Ark. Acts 2691, 2691-2706.

109. *Anderson*, 366 Ark. at 211-12 & n.3, 234 S.W.3d 301 & n.3.

110. *See* ARK. CODE ANN. § 4-99-101(3) (Repl. 2011) (exempting "[a]ctions or transactions permitted under laws administered by . . . [a] regulatory body or officer acting under statutory authority of this state").

111. Ark. Att'y Gen. Op. No. 96-337, at 2 (Dec. 13, 1996), *available at* http://ag.arkansas.gov/opinions/docs/96-337.html.

112. *See id.* at 1. The Bank Commissioner is listed along with the Insurance Commissioner in the safe-harbor provision. ARK. CODE ANN. § 4-88-101(3) (Repl. 2011).

113. Ark. Att'y Gen. Op. No. 96-337, *supra* note 111.

specific-conduct rule; indeed, Attorney General Dustin McDaniel has since argued for the application of the specific-conduct rule in numerous unreported cases.[114]

The U.S. District Court for the Western District of Arkansas explicitly decided to apply the specific-conduct rule in two cases—*Moore v. Shelter Mutual Insurance Co.*[115] and *Willsey v. Shelter Mutual Insurance Co.*[116] In both cases, the plaintiff filed a DTPA complaint against an insurance company and sought certification of the safe-harbor question to the Arkansas Supreme Court.[117] In *Willsey*, the court declined to certify the question, reasoning that a plain-language analysis warranted application of the specific-conduct rule.[118] The court held: "As unfair claims settlement practices are not permitted by the Trade Practices Act, the Court finds they are not excluded by the ADTPA's safe harbor provision."[119] The court acknowledged that its opinion conflicted with several Eastern District of Arkansas cases, yet it still declined to certify the question to the Arkansas Supreme Court.[120]

Another case from the Western District of Arkansas supports applying the specific-conduct rule in interpreting the ADTPA's safe-harbor provision.[121] In *Godfrey v. Toyota*

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114. *See, e.g.*, Order Denying Defendant's Motion to Dismiss the Complaint at 1, 6, State *ex rel.* McDaniel v. Consumer Telcom, Inc., Case No. CV-10-414 (Pulaski Cty., Ark. Cir. Ct. Feb. 1, 2011) (denying a motion to dismiss the Attorney General's DTPA claim, reasoning that "[s]ince the [Arkansas Public Service Commission] did not authorize the conduct of which the State complains, the 'safe harbor' provision upon which [the defendant] relies does not deprive this Court of subject matter jurisdiction").

115. *See* No. 13-2092, slip op. at 6 (W.D. Ark. Aug. 26, 2013).

116. *See* Civil No. 12-2320, 2013 WL 4453122, at *3 (W.D. Ark. Aug. 16, 2013). The author was co-counsel for the insured in both *Willsey* and *Moore*, and the decisions are virtually identical.

117. *See Moore*, No. 13-2092; *Willsey*, 2013 WL 4453122, at *1.

118. *See Willsey*, 2013 WL 4453122, at *3 ("[T]his Court does not need to engage in speculation or conjecture regarding state law. The plain meaning of the safe harbor provision only excludes activity permitted by the Insurance Trade Act.").

119. *Id.*

120. *Id.* at *3 (citing Williams v. State Farm Mut. Auto. Ins. Co., No. 5:10CV00032 JLH, 2010 WL 2573196, at *4 (E.D. Ark. June 22, 2010); Kirby v. United Am. Ins. Co., No. 4:08CV00338 JLH, 2010 WL 961723, at *1 (E.D. Ark. Mar. 15, 2010); Jones v. Unum Life Ins. Co. of Am., No. 4:06CV00547 JLH, 2006 WL 3462130, at *3 (E.D. Ark. Nov. 29, 2006)).

121. *See* Godfrey v. Toyota Motor N. Am., Inc., No. 07-5132, 2008 WL 2397497, at *3 (W.D. Ark. June 11, 2008).

Motor North America, Inc., the plaintiffs alleged that a Toyota manufacturer and distributor improperly relied upon EPA fuel-economy estimates in marketing their new cars.[122] However, because a federal agency required the fuel-economy estimates, that agency specifically permitted the defendants' conduct, brining it within the safe-harbor provision.[123] Thus, the court impliedly followed the specific-conduct rule by analyzing whether the specific conduct alleged in the complaint was exempt.[124] Notably, the *Godfrey* court did not grant the car manufacturer and distributor a blanket exemption from ADTPA claims.

In contrast, in the insurance context, the Eastern District of Arkansas has followed the general-activity rule.[125] In a 2006 case, the court concluded that the safe-harbor provision "essentially includes all insurance activity in the State of Arkansas."[126] Later cases out of the Eastern District of Arkansas have continued to follow this precedent and apply the general-activity rule.[127] However, none of these cases analyzed both rules to determine what the Arkansas Supreme Court would do if faced with this issue.

The Eastern and Western Districts of Arkansas conflict over whether the specific-conduct rule or general-activity rule should apply. Arkansas trial courts have also disagreed about which test applies.[128] This conflict creates two problems: (1) forum shopping between circuit courts within the state, or between the Eastern and Western Districts of

122. *Id.* at *2.

123. *See id.* at *3.

124. *See id.* at *2-3 (noting that the defendants were subject to the jurisdiction of the Arkansas Motor Vehicle Commission for deceptive acts in connection with the sale of new motor vehicles).

125. *See, e.g.*, *Williams*, 2010 WL 2573196, at *4; *Jones*, 2006 WL 3462130, at *3.

126. *Jones*, 2006 WL 3462130, at *3.

127. *See Williams*, 2010 WL 2573196, at *4.

128. *Compare* Order Denying Defendant's Motion to Dismiss the Complaint, *supra* note 114, at 6 (denying motion to dismiss DTPA claim, reasoning that "[s]ince the [Arkansas Public Service Commission] did not authorize the conduct of which the State complains, the 'safe harbor' provision upon which [the defendant] relies does not deprive this Court of subject matter jurisdiction"), *with* Order Granting Stewart Title Guaranty Company, Inc.'s Motion to Dismiss Plaintiff's Arkansas Deceptive Trade Practices Act Claim, Speights v. Stewart Title Guar. Co., No. CV02-763-3 (Saline Cty., Ark. Cir. Ct. Oct. 19, 2005) (granting motion to dismiss DTPA claim because "regulatory authority triggers application of the ADTPA Exemption . . . and the Court has no subject matter jurisdiction to adjudicate that claim").

Arkansas; and (2) uncertainty over this issue. The direct collision between state- and federal-court decisions on the scope of the ADTPA exemption for permitted conduct necessitates the Arkansas Supreme Court's resolution of the issue.

D. Public Policy Supports Adoption of the Specific-Conduct Rule

1. The Public Policy of the ADTPA and the Insurance Code Is to Protect Consumers, Which Is Consistent with a Narrower Interpretation of the Safe-Harbor Provision

The legislative intent underlying the ADTPA is consumer protection. "The preamble to Act 92 reveals that the legislature's remedial purpose was 'to protect the interests of both the consumer public and the legitimate business community[.]' . . . Section 4-88-107(b) illustrates that liberal construction of the DTPA is appropriate."[129] Accordingly, the Arkansas Supreme Court approved the following interpretation: "The Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-107(a)(10), makes illegal any trade practice which is unconscionable, which includes conduct violative of public policy or statute."[130]

The ADTPA's broad application demonstrates that its purpose is similar to the purpose of DTPAs in other states, including Colorado, Kentucky, South Carolina, and Tennessee.[131] For example, the ADTPA supplements other causes of action that may arise over deceptive conduct.[132]

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129. State *ex rel.* Bryant v. R & A Inv. Co., 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999).

130. Baptist Health v. Murphy, 365 Ark. 115, 128-29, 226 S.W.3d 800, 811 (2006) (quoting the circuit court's findings and concluding they were not clearly erroneous).

131. *See supra* Part III.A.1. (discussing Colorado, Kentucky, South Carolina, and Tennessee's respective interpretations of their DTPAs).

132. *Compare* ARK. CODE ANN. § 4-88-107(a)(10) (Repl. 2011) ("Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to . . . [e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade . . . ."), *and Bryant*, 336 Ark. at 295-97, 985 S.W.2d at 302-03 (construing subsection 4-88-107(a)(10) as a catch-all provision), *with* TENN. CODE ANN. § 47-18-112 (West 2013) ("The invocation of one power or remedy [from the DTPA] shall not be construed as excluding or prohibiting the use of any other available remedy."), *and* Myint v. Allstate Ins. Co., 970 S.W.2d 920, 925 (Tenn. 1998) (holding that the Tennessee DTPA's catch-all provision prohibited "'[e]ngaging in any other act or practice which is deceptive to the consumer

Moreover, the ADTPA has language identical to its counterpart in Colorado.[133] Likewise, Arkansas's insurance TPA resembles other states' insurance TPAs as they intend to regulate unfair insurance practices and use virtually identical language.[134] Given the strong similarities between the public policies and language in the DTPAs of Arkansas, Colorado, South Carolina, and Tennessee (including identical language in several of the statutes at issue), the Arkansas Supreme Court would likely give significant weight to the opinions of those states' supreme courts, which have adopted the specific-conduct rule.[135]

The Supreme Courts of Colorado, Kentucky, South Carolina, and Tennessee mentioned that some consumers would receive no redress against deceptive insurance practices without a private cause of action.[136] This limited avenue for redress is due to the finite amount of time and resources public servants have to handle a seemingly unlimited amount of work. The Arkansas Attorney General and Insurance Commissioner are no different. These officials must prioritize issues in their office according to public importance. Compared to the State's efforts in fighting billion-dollar prescription-drug battles, cleaning up oil spills, and deciding whether to expand Medicaid, the harm caused to one consumer by a deceptive trade practice might seem small, even insignificant. But in the eyes of that

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or to any other person'"). *See also supra* notes 69, 76 and accompanying text (discussing similar provisions and interpretations in South Carolina and Kentucky, respectively).

133. *Compare* ARK. CODE ANN. § 4-88-107(b) ("The deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state."), *with* COLO. REV. STAT. ANN. § 6-1-105(3) (West 2013) ("The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.").

134. *Compare* ARK. CODE ANN. § 23-66-202 (Repl. 2012) (stating the TPA's purpose as prohibiting unfair or deceptive insurance practices while preserving a private right of action), *with* TENN. CODE ANN. § 56-8-101 (West 2013) (using nearly identical language).

135. *See supra* Part III.A.1.

136. *See* Showpiece Homes Corp. v. Assurance Co. of Am. 38 P.3d 47, 55 (Colo. 2001) (en banc); Stevens v. Motorists Mut. Ins. Co., 759 S.W.2d 819, 820-21 (Ky. 1988); Ward v. Dick Dyer & Assocs., Inc., 403 S.E.2d 310, 311-12 (S.C. 1991); *Myint*, 970 S.W.2d at 925-26.

consumer, few issues will ever be of greater importance. Permitting a private right of action against regulated actors—including insurers—for deceptive trade practices will ease the enforcement burden on public officials and give the right of redress to the person actually harmed: the consumer.

2. The Specific-Conduct Rule Ensures Regulatory and Remedial Legislation Are Complementary, Not Totally Disjunctive

Courts adopting the general-activity rule have raised a public-policy argument to reject DTPA claims against insurers.[137] This argument claims that if a court were to allow DTPA claims against insurers, then the DTPA would apply to any insurance transaction alleged to be unlawful—meaning no insurance activity would be exempt from the DTPA.[138]

However, a few examples show that such a scenario is unlikely. The Tennessee Supreme Court thoroughly analyzed the issue of whether all insurance conduct should be exempted from the Tennessee DTPA.[139] After concluding that the DTPA provided no categorical exclusion, the court nonetheless held the consumer did not show prohibited conduct, so the Court excluded the claim from the purview of the DTPA.[140] The exclusion requires analysis of specific conduct, not general activity; if the specific conduct is authorized, the exclusion remains applicable.[141]

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137. *See* Williams v. State Farm Mut. Auto Ins. Co., No. 5:10 CV00032 JLH, 2010 WL 2573196, at *4 (E.D. Ark. June 22, 2010). *Cf.* State v. Piedmont Funding Corp., 382 A.2d 819, 822 (R.I. 1978).

138. *See Williams*, 2010 WL 2573196, at *4 (noting that the Arkansas Insurance Code contains a Trade Practices Act that prohibits dishonest practices but does not provide a private right of action and, therefore, holding that a private right of action under the ADTPA would conflict with this scheme). *Cf. Piedmont*, 382 A.2d at 822 (noting that Rhode Island's insurance code proscribes and, therefore, exclusively regulates deceptive practices in the sale of insurance).

139. *See Myint*, 970 S.W.2d at 925-26.

140. *See id.* at 926.

141. *See id.* The Western District of Arkansas applied a similar exclusion. *See* Godfrey v. Toyota Motor N. Am., Inc., No. 07-5132, 2008 WL 2397497, at *2-3 (W.D. Ark. June 11, 2008) (analyzing the claim that fuel-economy estimates on new motor vehicles were misleading and declining to grant defendants a blanket exemption).

For example, consider the following hypothetical: A plaintiff files suit against her insurer for violating the ADTPA. The basis for the plaintiff's claim is that the insurer altered the plaintiff's premiums. The changes to the plaintiff's premiums would modify the terms of the insurance contract during the policy period, and the plaintiff–policyholder would have no choice in the matter. The plaintiff may characterize raising her rates as a bait-and-switch scheme in violation of the ADTPA,[142] but the Insurance Commissioner expressly approves these actions.[143] Allowing the ADTPA suit over this approved conduct would result in two statutory regimes conflicting with one another; therefore, these activities would be exempt from the ADTPA. The purpose of the exemption is to ensure that the ADTPA and the Insurance Code remain complementary, such that the Insurance Commissioner approves certain conduct and private parties have a remedy for prohibited conduct.

When both the ADTPA and the Insurance Code define conduct as deceptive, the exemption is unnecessary because the statutes would not conflict. The ADTPA and the insurance TPA both define certain practices as deceptive per se.[144] Insurers should not be able to escape enforcement against these specifically prohibited acts due to an overly broad reading of the ADTPA's narrow exclusion for permitted conduct.

IV. FIFTY-STATE SURVEY: NEARLY ALL STATES WITH A SPECIFIC-CONDUCT SAFE-HARBOR PROVISION PERMIT A PRIVATE RIGHT OF ACTION AGAINST INSURERS UNDER THEIR DTPAS

This Part surveys safe-harbor provisions[145] and caselaw from all fifty states. The two middle columns in Table 1

142. *See, e.g.*, ARK. CODE ANN. § 4-88-107(a)(5) (Repl. 2011).

143. *See* ARK. CODE ANN. § 23-67-210 (Repl. 2012) (allowing certain insurance rates to be modified to reflect individual risks).

144. *Compare* ARK. CODE ANN. § 4-88-107(a) (listing trade practices prohibited by the ADTPA), *with* ARK. CODE ANN. § 23-66-206 (Repl. 2012) (listing insurance practices prohibited by the TPA).

145. Many safe-harbor provisions contain an exemption for newspapers and similar businesses, which run advertisements for other businesses, from claims that printed ads are deceptive. Arkansas is one of these states. *See, e.g.*, ARK. CODE ANN.

provide the safe-harbor provisions from each state and categorize them as containing specific-conduct language[146] or general-activity language[147] (i.e., "permitted" vs. "regulated"). The right-hand column provides each state's position on whether insurers are exempt from all DTPA claims under that state's safe-harbor provision.

Many states have a specific exemption for insurers, even though their DTPAs use specific-conduct language. One example is Idaho. Subsection 48-605(1) of the Idaho Code contains specific-conduct language, but subsection 48-605(3) states that the Idaho CPA does not apply to persons subject to the insurance code, which defines "unfair methods of competition or unfair or deceptive acts or practices in the business of insurance."[148] Accordingly, although the specific-conduct provision does not exempt insurers, the extra language in the very same statute does. Because the ADTPA does not contain similar additional language, it is distinguishable from statutes with explicit exemptions solely for insurers. For this reason, Table 1 notes the states having an extra, express exemption for insurers.

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§ 4-88-101(2) (Repl. 2011). This Part does not note these types of exemptions because they are irrelevant to this article. Thus, this survey lists several states as having no safe-harbor provision even though a particular state may have exemptions for advertisers.

146. States use slightly different terms in their safe-harbor provisions; specific-conduct language may exempt "permitted," "authorized," "specifically authorized," or "required" conduct. *Compare* ARK. CODE ANN. § 4-88-101(3) (Repl. 2011) (exempting "permitted" conduct"), *with* GA. CODE ANN. § 10-1-396 (West 2013) (exempting "specifically authorized conduct"); IND. CODE ANN. § 24-5-0.5-6 (West 2013) (exempting "required or expressly permitted" conduct). Some states interpret this language as meaning the exemption only applies where an express regulation or regulatory order permits the practice; others hold that a practice is permitted if no rule or order prohibits it.

147. States also use different language in the general-activity context that exempts "regulated" conduct or conduct subject to the jurisdiction of a "regulatory body." *Compare* ALASKA STAT. ANN. § 45.50.481 (West 2013) (exempting "regulated" conduct), *with* ARK. CODE ANN. § 4-88-101(3) (exempting "[a]ctions or transactions permitted under laws administered by . . . [a] regulatory body").

148. IDAHO CODE ANN. § 48-605(1), (3) (West 2013).

A. Survey of State Decisions Addressing Whether Insurers Are Exempt from DTPA Claims

Table 1. Safe-Harbor Survey

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Alabama	General Activity	"Any person or activity which is subject to the provisions of the Alabama Insurance Code . . . ."[149]	Yes[150]
Alaska	General Activity	"[A]n act or transaction regulated by a statute or regulation administered by the state, including a state regulatory board or commission . . . ."[151]	Yes—insurers have an express exemption[152]
Arizona	Specific Conduct (FTC-Regulated Conduct Only)	"[A]ny advertisement which is subject to and complies with the rules and regulations of, and the statues administered by the federal trade commission."[153]	No[154]

149. ALA. CODE § 8-19-7(3) (West 2013).

150. ALA. CODE § 8-19-7(3).

151. ALASKA STAT. ANN. § 45.50.481(a)(1).

152. ALASKA STAT. ANN. § 45.50.481(a)(3); *see also* O.K. Lumber Co. v. Providence Wash. Ins. Co., 759 P.2d 523, 528 (Alaska 1988) (applying exemption to case against insurer); Matanuska Maid, Inc. v. State, 620 P.2d 182, 186 (Alaska 1980) (exempting unfair acts or practices "only where the business is both regulated *and* unfair acts and practices are prohibited" (internal quotation marks omitted)).

153. *See* ARIZ. REV. STAT. ANN. § 44-1523 (West 2013).

154. *See* Stratton v. Am. Med. Sec., Inc., 266 F.R.D. 340, 348, 350 (D. Ariz. 2008) (stating that Arizona's DTPA "provide[s] an injured consumer with an implied private right of action against the violator of the [DTPA].").

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Arkansas	Specific Conduct	"Actions or transactions permitted under laws administered by the Insurance Commissioner . . . ."[155]	Doubtful[156]
California	N/A	None[157]	No[158]
Colorado	Specific Conduct	"Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency . . . ."[159]	No[160]

155. ARK. CODE ANN. § 4-88-101(3) (Repl. 2011).

156. *See generally* DePriest v. AstraZeneca Pharms., L.P., 2009 Ark. 547, 351 S.W.3d 168 (examining the conduct at issue and concluding that such conduct was authorized by federal law and, thus, exempt, but not analyzing or adopting either the specific-conduct rule or the general-activity rule).

157. *See* CAL BUS. & PROF. CODE § 17200 (West 2013) (prohibiting "any unlawful, unfair, or fraudulent business act or practice").

158. *See* Yanting Zhang v. Superior Court, 304 P.3d 163, 177 (Cal. 2013) (allowing plaintiffs to bring unfair-competition claims against insurers only if the conduct alleged violates statutory or common law *and* the California Unfair Insurance Practices Act). Thus, under California law, plaintiffs cannot bring DTPA claims for mere violations of the insurance code. *See id.*

159. COLO. REV. STAT. ANN. § 6-1-106(1)(a) (West 2013).

160. *See* Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 57-58 (Colo. 2001) (en banc) ("[T]he sale of insurance can be classified as a sale of goods, services or property and is thus subject to the CCPA.").

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Connecticut	Specific Conduct	"Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . . ."[161]	No[162]
Delaware	General Conduct	"[M]atters subject to the jurisdiction of the . . . Insurance Commissioner of this State."[163]	No[164]
District of Columbia	N/A	None[165]	No[166]

161. CONN. GEN. STAT. ANN. § 42-110c(a) (West 2014).

162. *See* Mead v. Burns, 509 A.2d 11, 18 (Conn. 1986); Wilson v. Firemen's Fund Ins. Co., 499 A.2d 81, 85 (Conn. 1985).

163. DEL. CODE ANN. tit. 6, § 2513(b)(3) (West 2013).

164. *See* Grand Ventures v. Whaley, 622 A.2d 655, 663 (Del. Super. Ct. 1992) (confirming the rejection of "preemption arguments despite language in the Consumer Fraud Act . . . specifically removing [the court's] jurisdiction from matters subject to the jurisdiction of the Insurance Commissioner").

165. *See* D.C. CODE § 28-3901 to -3913 (West 2013).

166. *See* Atwater v. D.C. Dep't of Consumer & Regulatory Affairs, 566 A.2d 462 (D.C. 1989) (upholding application of the D.C. Consumer Protection Procedures Act to an insurance dispute); *see also* Schiff v. Am. Ass'n of Retired Persons, 697 A.2d 1193, 1196-1197 (D.C. 1997) (stating in dicta that "[t]he sale of insurance would ordinarily be covered by" the Consumer Protection and Procedures Act (CPPA)).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Florida	General Activity	"Any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services."[167]	Yes[168]
Georgia	Specific Conduct	"[T]ransactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States . . . ."[169]	Yes[170]
Hawaii	Specific Conduct	"Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency . . . ."[171]	No[172]

167. FLA. STAT. ANN. § 501.212(4)(d) (West 2013).

168. Zarrella v. Pac. Life Ins. Co., 755 F. Supp. 2d 1218, 1226 (S.D. Fla. 2010) ("[The Florida DTPA] does not apply to insurance companies.").

169. GA. CODE ANN. § 10-1-396(1) (West 2013).

170. N.E. Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 676 S.E.2d 428, 433 (Ga. Ct. App. 2009) ("[I]nsurance transactions are . . . exempt from the [FBPA] . . . ." (quoting Ferguson v. United Ins. Co. of Am., 293 S.E.2d 736, 737 (Ga. Ct. App. 1982))).

171. HAW. REV. STAT. § 481A-5(a)(1) (West 2013).

172. *See* Jenkins v. Commonwealth Land Title Ins. Co., 95 F.3d 791, 799 (9th Cir. 1996) ("conclud[ing] that the Hawai'i Supreme Court would not read Article 13 of the Hawai'i Insurance Code as preempting private actions under the general unfair-

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Idaho	Specific Conduct	"Actions or transactions permitted under laws administered by the state public utility commission or other regulatory body or officer acting under statutory authority of this state or the United States."[173]	Yes—insurers have an express exemption[174]
Illinois	Specific Conduct	"Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."[175]	No[176]

competition law of Hawai'i"); *see also* Paragon Metals, Inc. v. Schnitzer Steel Haw. Corp., No. 08- 00292 DAE–LEK, 2009 WL 2700278, at *6 & n.9 (D. Haw. Aug. 24, 2009) (citing the exemption in support of a decision to rule against the plaintiff on the merits for failing to show a violation of an ordinance in support of a deceptive-trade-practices claim).

173. IDAHO CODE ANN. § 48-605(1) (West 2013).

174. IDAHO CODE ANN. § 48-605(3); *see also* Irwin Rogers Ins. Agency v. Murphy, 833 P.2d 128, 134 (Idaho Ct. App. 1992) (holding that Idaho's DTPA expressly excludes "unfair or deceptive acts or practices in the business of insurance").

175. 815 ILL. COMP. STAT. ANN. 505/10b(1) (West 2005), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997). Although the Illinois Supreme Court declared Illinois' safe-harbor statute unconstitutional in 1997, state and federal courts in Illinois have still considered whether defendants are exempt from DTPA claims under this provision. *See, e.g.*, Cima v. WellPoint Healthcare Networks, Inc., No. 05-CV-4127-JPG, 2006 WL 1914107, at *16-18 (S.D. Ill. July 11, 2006); Price v. Phillip Morris, Inc., 848 N.E.2d 1, 32-46 (Ill. 2005).

176. *See Cima*, 2006 WL 1914107, at *16-18. Illinois applies a two-prong test: "First, 'a regulatory body or officer must be operating under statutory authority[,]' and second, the 'action or transaction at issue [must be]' specifically authorized by laws administered 'by the regulatory body.'" *Id.* at *16 (quoting *Price*, 848 N.E.2d at 36). The exemption is an affirmative defense for an insurance company, which

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Indiana	Specific Conduct	"[A]ct or practice that is . . . required or expressly permitted by state law, rule, regulation, or local ordinance."[177]	Doubtful[178]
Iowa	Specific Conduct (FTC-Regulated Conduct Only)	"[A]ny advertisement which complies with the rules and regulations of, and the statues administered by the federal trade commission."[179]	Doubtful[180]
Kansas	N/A	None[181]	Yes—insurers have an express exemption[182]

ordinarily does not justify a motion to dismiss. *Id.* Under the facts in *Cima*, however, the "plaintiffs . . . pleaded themselves out of court" by attaching documents to the complaint sufficient for the court to make a determination on the pleadings. *Id.*

177. IND. CODE ANN. § 24-5-0.5-6(2) (West 2013).

178. *See* Anderson v. Gulf Stream Coach, Inc., 662 F.3d 775, 785-90 (7th Cir. 2011). In *Anderson*, the Seventh Circuit focused on a whether recreational-vehicle manufacturer was exempt from a deceptive-trade-practices claim because it complied with Federal Trade Commission regulations. *Id.* at 785-90. The claim survived summary judgment. *Id.* at 789-90. The court seems to have assumed that the exemption only applies when conduct complies with law, as opposed to merely being regulated.

179. *See* IOWA CODE ANN. § 714.16(14) (West 2014).

180. *See* State *ex rel.* Miller v. Pace, 677 N.W.2d 761, 770 (Iowa 2004) (detailing the Iowa Attorney General's use of the DTPA to prosecute fraud in the securities industry, which is a regulated industry).

181. *See* KAN. STAT. ANN. § 50-623 to -640, 675a to -679a (West 2013) (Kansas Consumer Protection Act).

182. *See* KAN. STAT. ANN. § 50-624(c) (West 2013) (excluding insurance contracts from the definition of "[c]onsumer transaction"); *see also* Earth Scientists (Petro Servs.), Ltd. v. U.S. Fid. & Guar. Co., 619 F. Supp. 1465, 1471 (D. Kan. 1985)

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Kentucky	N/A	None[183]	No[184]
Louisiana	General Activity	"[A]ctions or transactions subject to the jurisdiction of . . . the insurance commissioner . . . ."[185]	Yes[186]
Maine	Specific Conduct	"Transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the State or of the United States."[187]	No[188]

(holding that deceptive trade practices defined in the insurance code, standing alone, do not provide a private right of action).

183. *See* KY. REV. STAT. ANN. § 367.110–.990 (West 2013). Although Kentucky does not have an applicable state-harbor provision, it applies the specific-conduct rule in determining whether an activity is a good or service, which its CPA covers. *See supra* note 72 and accompanying text.

184. Stevens v. Motorists Mut. Ins. Co., 759 S.W.2d 819, 821 (Ky. 1988) (surveying cases in nine states and concluding that "the Kentucky Consumer Protection Act provides a homeowner with a remedy against the conduct of their own insurance company").

185. LA. REV. STAT. ANN. § 51:1406(1) (West 2013).

186. S. Gen. Agency, Inc. v. Safeway Ins. Co. of La., 769 So. 2d 606, 608-09 (La. Ct. App. 2000).

187. ME. REV. STAT. ANN. tit. 5, § 208(1) (West 2013). Maine's statute goes further by placing a burden on the defendant to show that "[i]ts business activities are subject to regulation by a state or federal agency" and that an agency, law, rule, or regulation authorizes, permits, or requires the specific activity. *See* ME. REV. STAT. ANN. tit. 5, § 208(1)(A)–(B).

188. *See* Campbell v. First Am. Title Ins. Co., 644 F. Supp. 2d 126, 134 (D. Me. 2009) (refusing to apply exemption because Maine law expressly prohibits the challenged conduct).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Maryland	General Activity	"The professional services of a[n] . . . insurance company authorized to do business in the State [or] insurance producer licensed by the State . . . ."[189]	Yes[190]
Massachusetts	Specific Conduct	"[T]ransactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States."[191]	No[192]

189. MD. CODE ANN., COM. LAW § 13-104(1) (West 2013).

190. Robinson v. Fountainhead Title Grp., 447 F. Supp. 2d 478, 489-90 (D. Md. 2006).

191. MASS. GEN. LAWS ANN. ch. 93A, § 3 (West 2013). This law goes further by placing the burden of proving an exemption on the person claiming it. MASS. GEN. LAWS ANN. ch. 93A, §3; *see also* Bierig v. Everett Square Plaza Assocs., 611 N.E.2d 720, 727 n.14 (Mass. App. Ct. 1993) ("The burden is a difficult one to meet. To sustain it, a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively *permits* the practice which is alleged to be unfair or deceptive." (internal quotation marks omitted)).

192. *See* Liquor Liab. Joint Underwriting Ass'n of Mass. v. Great Am. Ins. Co., 2003 WL 21048793, at *29 (Mass. Super. 2003) (noting that the Massachusetts DTPA specifically incorporates private actions against insurers for deceptive trade practices under the insurance code (citing Hopkins v. Liberty Mut. Ins. Co., 750 N.E.2d 943 (Mass. 2003))).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Michigan	Specific Conduct	"A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[193]	Yes—insurers have an express exemption[194]
Minnesota	Specific Conduct	"[C]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency . . . ."[195]	No[196]
Mississippi	N/A	None[197]	Yes[198]

193. MICH. COMP. LAWS ANN. § 445.904(1)(a) (West 2013).

194. MICH. COMP. LAWS ANN. § 445.904(3). Michigan courts considered this rule on multiple occasions with differing results; therefore, the legislature stepped in and granted an express exemption to insurers. *See generally* Gary M. Maveal, *Michigan Consumer Protection Act Gutted By Supreme Court "Globe-alization"*, 53 WAYNE L. REV. 833 (2007) (containing a detailed history and analysis of Michigan's "specifically authorized" language).

195. MINN. STAT. ANN. § 325D.46(1) (West 2013).

196. *See* Parkhill v. Minn. Mut. Life Ins. Co., 995 F. Supp. 983, 995 (D. Minn. 1998) (declining to exempt insurance company); *see also* Laysar, Inc. v. State Farm Mut. Auto Ins. Co., No. 04-4584JRTFLN, 2005 WL 2063929, at *3 (D. Minn. Aug. 25, 2005) (holding that whether an insurance company was abiding by the law, as expressed in the State's consent order, was a factual issue that survived summary judgment).

197. *See* MISS. CODE ANN. § 75-24-1 to -27 (West 2013).

198. Taylor v. S. Farm Bureau Cas. Co., 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007) (holding that an insurance policy is not subject to Mississippi's DTPA because it is neither a good nor service, and even if it was, the plaintiff failed to comply with a statute requiring participation in an informal dispute-settlement program).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Missouri	General Activity	"Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance . . . ."[199]	Yes[200]
Montana	Specific Conduct	"[A]ctions or transactions permitted under laws administered by the Montana public service commission or the state auditor . . . ."[201]	No[202]

199. MO. ANN. STAT. § 407.020(2)(2) (West 2013).

200. MO. ANN. STAT. § 407.020(2)(2). A nuanced argument exists that Missouri remains undecided based upon the statute's lack of clarity regarding coverage of insurers. *See* CAROLYN L. CARTER, NAT'L CONSUMER LAW CENTER, INC., A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 27 (2009), *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf. The State provided a private right of action after it passed the exemption statute; therefore, insurers may not be exempt even though Missouri courts have not yet decided the question. *Id.* app. B, at 84, *available at* http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

201. MONT. CODE ANN. § 30-14-105(1) (West 2013).

202. MONT. CODE ANN. § 33-18-242(1) (West 2013) (creating a private right of action against insurers for deceptive trade practices). *Cf.* Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont., 78 P.3d 499, 504 (Mont. 2003) (noting that the exemption's language does not "wholly exempt" the Public Service Commission's conduct, only that conduct permitted by the laws of the Commission).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Nebraska	Specific Conduct	(DTPA) "Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency . . . ."[203] (CPA) "Actions and transactions prohibited or regulated under the laws administered by the Director of Insurance shall be subject to section 59-1602 and all statutes which provide for the implementation and enforcement of section 59-1602."[204]	Probably—but the Nebraska Supreme Court has not ruled on the issue[205]

203. NEB. REV. STAT. ANN. § 87-304(a)(1) (West 2013).

204. NEB. REV. STAT. ANN. § 59-1617(2) (West 2013).

205. *See* Wineinger v. United Healthcare Ins. Co., No. 8:99CV141, 2000 WL 1277629, at *8 (D. Neb. Feb. 16, 2000) (noting that the Nebraska Supreme Court declined to address the issue and, thus, following an earlier federal-district-court opinion that held the DTPA did not provide a cause of action). Strangely, *Wineinger* fails to address the Nebraska CPA's safe-harbor provision containing specific-conduct language, thus subjecting insurers to actions brought under the CPA. *See* NEB. REV. STAT. § 59-1602 (West 2013).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Nevada	Specific Conduct	"Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency."[206]	No[207]
New Hampshire	General Activity	"Trade or commerce that is subject to the jurisdiction of . . . the insurance commissioner . . . ."[208]	Not necessarily[209]
New Jersey	N/A	None[210]	Depends on type of insurance transaction[211]

206. NEV. REV. STAT. ANN. § 598.0955(a)(1) (West 2013).

207. *See* Ming Chu Wun v. N. Am. Co. for Life & Health Ins., No. 2:11–CV–00760–KJD–CWH, 2012 WL 893750, at *3 (D. Nev. Mar. 15, 2012) (declining to apply exemption where alleged conduct violated state law).

208. N.H. REV. STAT. ANN. § 358-A:3(I) (West 2013).

209. Although the New Hampshire Supreme Court has held that the insurance trade is exempt from the CPA, a consumer may bring a private cause of action if the insurance commissioner finds that an act violates the insurance code. Bell v. Liberty Mut. Ins. Co., 776 A.2d 1260, 1263 (N.H. 2001) (citing N.H. REV. STAT. ANN. § 417:19(I) (West 2013)).

210. *See* N.J. STAT. ANN. § 56:8-1 (West 2013).

211. *See* Lemelledo v. Beneficial Mgmt. Corp., 696 A.2d 546, 551-52 (N.J. 1997). Although the *Lemelledo* court acknowledged that inferior New Jersey courts have prohibited consumer-protection claims arising out of claims-settlement practices, it held that the CPA's language was broad enough to include insurance-sales practices. *See id.* In reaching its holding, the New Jersey Supreme Court looked to whether the consumer-protection statutes would conflict with or complement the insurance code. *Id.* at 554-55.

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
New Mexico	Specific Conduct	"[A]ctions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States . . . ."[212]	No[213]

212. N.M. STAT. ANN. § 57-12-7 (West 2013).

213. State *ex rel.* Stratton v. Gurley Motor Co., 737 P.2d 1180, 1185 (N.M. Ct. App. 1987) (holding that safe-harbor provision does not exempt "individuals or entities who are engaged in activities that are not permitted by state or federal regulatory bodies"); *see also* Quynh Truong v. Allstate Ins. Co., 227 P.3d 73, 81-88 (N.M. 2010) (interpreting newer version of the statute).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
New York	Specific Conduct (FTC-Regulated Only)	"In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts."[214]	No[215]
North Carolina	N/A	Atypical exclusion for "professional services rendered by a member of a learned profession"[216]	No[217]

214. *See* N.Y. GEN. BUS. LAW § 349(d) (McKinney 2014).

215. Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 52 (2d Cir. 1992) (holding that New York's DTPA contains no exemptions for insurance companies).

216. N.C. GEN. STAT. ANN. § 75-1.1(b) (West 2013).

217. *See* Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co., 563 S.E.2d 269, 279 (N.C. Ct. App. 2002) (holding that a deceptive-trade-practices claim against an insurer may arise out of the DTPA or the insurance code).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
North Dakota	N/A	None[218]	No[219]
Ohio	Specific Conduct	"Conduct that is in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency . . . ."[220]	Maybe[221]

218. *See* N.D. CENT. CODE ANN. § 51-15-03 (West 2013) (exempting only media owners and operators).

219. A & R Fugleberg Farms, Inc. v. Triangle Ag, LLC, Case No. 3:09–CV–07, 2010 WL 1418870, at *4 (D. N.D. Apr. 7, 2010) ("'[A] private right of action is also apparent under North Dakota's consumer fraud statutes' in a case involving nursing home insurance policies purchased by senior citizens." (quoting Hanson v. Acceleration Life Ins. Co., No. CIV A3–97–152, 1999 WL 33283345, at *7 (D. N.D. Mar. 16, 1999))).

220. OHIO REV. CODE ANN. § 4165.04(A)(1) (West 2013).

221. *Compare* OHIO REV. CODE ANN. § 1345.01(A) (West 2013) (excluding insurance from the definition of "[c]onsumer transaction" for purposes of the Ohio DTPA), *with* Hometown Health Plan v. Aultman Health Found., No. 2006 CV 060350, 2009 Ohio Misc. LEXIS 550, at *38 (Ohio C.P. Tuscarawas Cty. Apr. 15, 2009) (denying summary judgment where a material issue of fact remained as to whether the Ohio CPA exemption applied to the alleged conduct).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Oklahoma	General Activity	"Actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority of this state or the United States . . . ."[222]	Yes[223]
Oregon	Specific Conduct	"Conduct in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency."[224]	No[225]
Pennsylvania	N/A	None[226]	No[227]

222. OKLA. STAT. ANN. tit. 15, § 754(2) (West 2013).

223. OKLA. STAT. ANN. tit. 15, § 754(2); Thomas v. Metro. Life Ins. Co., 540 F. Supp. 2d 1212, 1228-29 (W.D. Okla. 2008). *But cf.* Conatzer v. Am. Mercury Ins. Co., 15 P.3d 1252, 1255 (Okla. Civ. App. 2000) (allowing claim against insurer for title laundering regarding the sale of salvaged automobiles because the insurance code does not regulate such activity).

224. OR. REV. STAT. ANN. § 646.612(1) (West 2013).

225. *Cf.* Rathgeber v. Hemenway, Inc., 69 P.3d 710, 714 (Or. 2003) (holding in a real estate case that where the conduct alleged by the plaintiff "was not [c]onduct in compliance with a [state] statute[,]" the Oregon DTPA did not preclude a claim against a state-regulated business). *But cf.* OR. REV. STAT. ANN. § 646.605(6)(a) (West 2013) (excluding insurance from the definition of real estate).

226. *See* 73 PA. CONS. STAT. ANN. § 201-3 (West 2014) (exempting only media owners and operators).

227. *See* Hardinger v. Motorists Mut. Ins. Co., No. Civ. A. 03–CV–115, 2003 WL 21250664, at *2 (E.D. Pa. Feb. 27, 2003) (permitting a deceptive-trade-practices claim against an insurer for "unreasonableness, disingenuousness, unfairness and recklessness in the processing and investigation of the claim"); *see also* White v. Conestoga Title Ins. Co., 53 A.3d 720, 735 (Pa. 2012) (permitting a deceptive-trade-practices claim against a title insurer).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Rhode Island	Specific Conduct	"[A]ctions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States."[228]	Yes[229]
South Carolina	Specific Conduct	"Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law."[230]	Yes— insurers have an express exemption[231]

228. R.I. GEN. LAWS ANN. § 6-13.1-4 (West 2013).

229. State v. Piedmont Funding Corp., 382 A.2d 819, 822 (R.I. 1978).

230. S.C. CODE ANN. § 39-5-40(a) (West 2013).

231. S.C. CODE ANN. § 39-5-40(a), (c) (providing statutory exclusion for insurance claims); *see also* Great Am. Ins. Co. v. Mills, Civil Action No. 4:06-cv-01971-RBH, 2008 WL 2250256, at *11 (D.S.C. May 29, 2008) (exempting insurer's actions under subsections 39-5-40(a), (c) of the South Carolina Code).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
South Dakota	Specific Conduct	"Nothing in this chapter shall apply to acts or practices permitted under laws of this state or the United States or under rules, regulations, or decisions interpreting such laws."[232]	Unknown[233]
Tennessee	Specific Conduct	"Acts or transactions required or specifically authorized under the laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States . . . ."[234]	Yes—the Tennessee legislature passed an express exemption in 2011[235]

232. S.D. CODIFIED LAWS § 37-24-10 (West 2013) (amended 2014).

233. The author could not find any federal or state South Dakota decisions discussing the safe-harbor provision.

234. TENN. CODE ANN. § 47-18-111(a)(1) (West 2013).

235. 2011 Tenn. Pub. Acts 130 (codified at TENN. CODE ANN. § 56-8-113 (West 2013)); *see also* Davidoff v. Progressive Haw. Ins. Co., No. 3:12–00965, 2013 WL 124353, at *1 (M.D. Tenn. Jan. 9, 2013) (barring DTPA claim against insurer).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Texas	Specific Conduct	"[A]cts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission . . . ."[236]	No[237]
Utah	Specific Conduct	"[A]n act or practice required or specifically permitted by or under federal law, or by or under state law . . . ."[238]	Yes—insurers have an express exemption[239]
Vermont	N/A	None[240]	Unclear[241]

236. TEX. BUS. & COM. CODE ANN. § 17.49(b) (West 2013) (exempting practices authorized by the FTC and stating that "[a]n act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice").

237. TEX. BUS. & COM. CODE § 17.50(a)(4) (West 2013); TEX. INS. CODE ANN. art. 541.151 (West 2013).

238. UTAH CODE ANN. § 13-11-22(1)(a) (West 2013).

239. UTAH CODE ANN. § 13-11-3(2)(a) (West 2013); *see also* Wade v. Jobe, 818 P.2d 1006, 1014 (Utah 1991) (applying the statute's exemption).

240. *See* VT. STAT. ANN. tit. 9, § 2452 (West 2013) (exempting only media owners and operators).

241. The Vermont Supreme Court held under prior law that insurance companies were exempt from claims arising under the state's DTPA. *See* Wilder v. Aetna Life & Cas. Ins. Co., 433 A.2d 309, 310 (Vt. 1981). Following amendments to the DTPA, the Vermont Attorney General filed an amicus brief arguing that the Act's scope extended to insurance; however, the Vermont Supreme Court declined to reach this argument. Greene v. Stevens Gas Serv., 858 A.2d 238, 243 (Vt. 2004). Inferior Vermont courts are now split on whether such a claim can lie against an insurer. *Compare* Bertelson v. Union Mut. Fire Ins. Co., No. 834-04 Cncv, 2004 Vt. Super. LEXIS 25, at *5 (Vt. Super. Ct. Chittenden Cty. Nov. 22, 2004) (permitting claim against insurer), *with* Decision on Motion to Dismiss at 4, Nautilus Ins. Co. v. Loomis, No. 194-9-10 Oecv (Vt. Super. Ct. Orange Cnty. Feb. 29, 2012) (refusing claim against insurer).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Virginia	Specific Conduct	"Any aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States."[242]	Yes—insurers have an express exemption[243]

242. VA. CODE ANN. § 59.1-199(A) (West 2013).
243. VA. CODE ANN. § 59.1-199(D).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Washington	Specific Conduct	"[A]ctions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state . . . or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 . . . ."[244]	No[245]
West Virginia	N/A	None[246]	No[247]

244. WASH. REV. CODE ANN. § 19.86.170 (West 2013).

245. Indus. Indem. Co. v. Kallevig, 792 P.2d 520, 529 (Wash. 1990) ("[V]iolations of the insurance regulations are subject to the CPA.").

246. *See* W. VA. CODE ANN. § 46A-6-105 (West 2013) (exempting only media owners and operators).

247. West Virginia recognizes an implied private cause of action for a violation of its Insurance Trade Practices Act. Holloman v. Nationwide Mut. Ins. Co., 617 S.E.2d 816, 820 (W. Va. 2005) (quoting Dodrill v. Nationwide Mut. Ins. Co., 491 S.E.2d 1, 13 (W. Va. 1996)).

State	Specific Conduct or General Activity?	Safe-Harbor Exemption Language	Are Insurers Exempt from All DTPA Suits?
Wisconsin	N/A	The false-advertising section "does not apply to the insurance business."[248]	Unknown[249]
Wyoming	Specific Conduct	"Acts or practices required or permitted by state or federal law, rule or regulation or judicial or administrative decision . . . ."[250]	Unknown[251]

B. Summary of State Decisions Interpreting Safe-Harbor Provisions Using Specific-Conduct Language

To summarize, twenty-seven states have safe-harbor provisions similar to Arkansas's that contain language exempting permitted conduct. Six states expressly exempt insurers from their DTPA cases (which Arkansas does not do) notwithstanding safe-harbor provisions only for permitted conduct. Of the remaining twenty-one states, fourteen interpret safe-harbor provisions containing specific-conduct language to allow DTPA suits against insurers. Just three courts have adopted the general-activity rule when the language of the statute suggested adoption of

248. WIS. STAT. ANN. § 100.18(12)(a) (West 2013).

249. The author could not find any Wisconsin cases analyzing the issues raised in this article.

250. WYO. STAT. ANN. § 40-12-110(a)(i) (West 2013).

251. The author could not locate a case interpreting Wyoming's safe-harbor provision. However, one Wyoming case held that a plaintiff failed to state a claim under the Wyoming CPA against an insurance company for failing to provide notice. *See* Broderick v. Dairyland Ins. Co., 270 P.3d 684, 693 (Wyo. 2012). Another case held that a third party could not bring a consumer-protection claim against an insurer. Herrig v. Herrig, 844 P.2d 487, 491-92 (Wyo. 1992).

the specific-conduct rule instead. Four states, including Arkansas, have not directly addressed the question. A score of 14–3 shows that the vast majority of courts to address this precise question have determined insurers are not exempt from DTPA claims.

These results are summarized in the table below:

Table 2. Summary

DTPA Suits Against Insurers Fully Exempt?	**States**
No	**(14)** — Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Montana (suits arising under the insurance TPA subject to private action, but DTPA claims are not), Nevada, New Hampshire (after insurance commissioner rules against carrier), New Mexico, Oregon, Washington
Yes	**(3)** — Georgia, Nebraska, Rhode Island
Yes—with extra express statutory exemption	**(6)** — Idaho, Michigan, South Carolina, Tennessee, Utah, Virginia
Unclear	**(4)** — Arkansas (no cases), Ohio (insurance excluded from definition of consumer transaction in DTPA, but a CPA case permitted suit), South Dakota (no cases), Wyoming (no cases)

V. CONCLUSION

On balance, statutory language controls whether a state chooses the specific-conduct rule or the general-activity rule. Fourteen states faced with the same statutory language as Arkansas have adopted the specific-conduct rule. Only the state supreme courts of Rhode Island and Georgia, plus a Nebraska federal district court, chose the general-activity rule even though their safe-harbor provision suggested

application of the specific-conduct rule instead. The overwhelming majority of states choose to apply the specific-conduct rule when confronted with statutory language similar to that of the Arkansas statute. That is, other states hold that regulated industries do not enjoy a categorical exemption from DTPAs, regardless of whether the claim arises under the DTPA itself or under another area of substantive law.

As applied in a handful of cases, Arkansas's state and federal trial courts have split over how to interpret the ADTPA's safe-harbor provision. No court in Arkansas has explicitly compared and contrasted the safe-harbor provisions across the country to determine which rule to apply. The difference of opinion among the states, and even among the state and federal trial courts in Arkansas, means that the outcome of litigation in Arkansas is uncertain absent a decision on the issue by the Arkansas Supreme Court. The Arkansas Supreme Court needs to resolve this issue by explicitly interpreting the safe-harbor provision in the ADTPA consistently with the specific-conduct rule applied around the country.