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Analogies to Federal Law in the State Regulatory Context

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As the federal government pursues a deregulatory agenda, state regulators are increasing their enforcement activities to fill perceived gaps in oversight. They pursue their own regulatory agendas under state regulatory regimes that are often less developed than similar federal laws. This lack of existing state-level precedent opens the door for states to employ novel and aggressive legal theories that increase risk and uncertainty for private actors. Businesses should respond by evaluating opportunities to leverage the more comprehensive body of federal law as persuasive authority for previously unresolved questions of state law.

Analogies between state and federal law are at their strongest when they have express legislative approval. For example, the Massachusetts prohibition on unfair and deceptive acts or practices (UDAP statute) directs that construction of the UDAP statute should be "guided by the interpretation given by the Federal Trade Commission and the federal courts to the federal UDAP statute." G. L. c. 93A, Section 2. Thus, the court in *Ciardi v. F. Hoffman La Roche,* 762 N.E.2d 303, 309 (Mass. 2002), determined that price-fixing allegations "clearly stated a violation" of the Massachusetts UDAP statute—even though the issue had never been litigated as a matter of state law—because it was well established that price-fixing violated the federal UDAP statute. The same reasoning suggests that conduct that complies with the federal UDAP statute does *not* violate its Massachusetts counterpart. Although state regulators retain flexibility to take aggressive positions on questions of first impression, Massachusetts's incorporation by reference of federal law effectively narrows the number of unresolved questions under the state UDAP statute.

Identical language in parallel statutory schemes also provides grounds for a strong analogy between state and federal law. For example, the court in *Rosenberg v. JPMorgan Chase & Co.* applied federal law to determine the scope of the public disclosure bar in the Massachusetts False Claims Act (FCA). This provision bars private actors from filing qui tam lawsuits on behalf of the state that mirror allegations already disclosed in "news media." See 169 N.E.3d 445, 455 (Mass. 2021). The federal FCA also bars qui tam lawsuits that mirror allegations in "news media," reflecting the same policy "to balance the promotion of qui tam actions while also discouraging parasitic suits." Thus, broad interpretations of "news media" in the federal statute served as persuasive authority that "news media" in the state law includes "publicly available websites."

Depending on the circumstances, courts may also resolve textual ambiguities in a state law by looking to a parallel federal regime even where the text of the federal statute is not identical. For example, in *Story v. Wyoming State Board of Medical Examiners*, 721 P.2d 1013, 1018-19 (Wyo. 1986), the court looked to cases interpreting the

federal Administrative Procedure Act (APA) as persuasive in determining the extent to which private parties may rely on hearsay in agency proceedings under Wyoming's APA. The Wyoming APA does not expressly bar hearsay but calls somewhat ambiguously for consideration of "the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs." The court observed that the federal APA is "very similar" and has been construed to allow fair use of hearsay that is "probative" and bears "satisfactory indicia of reliability," supporting its conclusion to allow hearsay evidence that is "probative, trustworthy and credible."

Courts employ analogies to the federal APA not only to resolve ambiguities in a state APA, but also to help fill in statutory gaps. For example, the court in *Physicians for Social Responsibility v. Hogan*, 2019 WL 6002122, at *6 (Md. Ct. Spec. App. Nov. 13, 2019), noted that Maryland's APA was "silent on the authority of the governor, or an executive branch agency, to withdraw a regulation adopted by that agency by withdrawing the notice of adoption after the notice has been submitted" for publication but before publication actually occurs. The federal APA was similarly silent, but courts had interpreted it to allow a rule's withdrawal at any time before its publication to allow agencies to correct mistakes and because a regulation is not binding before publication. Maryland's APA was based on the Model State APA, which embodied the same "values of transparency, procedural regularity, and judicial review" as the federal APA and was similar in all relevant respects. Thus, federal precedent was persuasive support for interpreting Maryland's APA to allow last-minute withdrawal of unpublished rules.

Businesses cannot, however, assume that courts will always look to federal law for guidance, even when interpreting statutes based on the Model State APA. Textual variations sometimes require differing interpretations of state and federal law. For example, in *Arkansas Beverage Retailers Association v. Moore*, 256 S.W.3d 488, 495 (Ark. 2007), the court rejected a state agency's effort to import the federal "zone of interests" requirement for APA standing, holding it had no textual basis in the Arkansas APA. Federal authority was irrelevant, the court held, because the state legislature was "very clear" in granting standing to "any person … who considers himself or herself injured in his or her person, business, or property by final agency action." Despite relying on federal precedent in other cases interpreting the state APA, the court declined to do so and cautioned that it had never "demonstrated any intention … to rely upon the federal APA guidelines in all instances."

Similarly, in *State ex rel. Bartlett v. Miller,* 197 Cal. Rptr. 3d 673, 680 (Ct. App. 2016), the court found federal law unpersuasive in interpreting the California FCA's bar on qui tam lawsuits based on matters publicly disclosed in a "report … conducted by or at the request of" various state and local government entities. The court acknowledged that California's FCA was "patterned after the federal" statute and that "federal authorities interpreting the federal act are often looked to for guidance 'to the extent the language of the two acts is similar.'" The state and federal statutes, however, employed "markedly different" language on the issue before the court, reflecting that they were "designed to protect against similar but distinct harms." The federal statute, the court held, protects against harm to the federal fisc by encouraging private parties to come forward with information not already publicly disclosed to federal officials through federal administrative reports. The parallel state statute, by contrast, protects state and local governments and recognizes that "state officials may be unaware of information disclosed solely to or by the federal government." Thus, California's public disclosure bar requires a "report … conducted by or at the request of" a state or local government entity. A federal report that may trigger the federal statute's public disclosure bar is insufficient.

As these cases illustrate, the relationship between state and federal law can be nuanced, and analogies to federal law require case-specific evaluation. For attorneys who are experienced in state regulatory practice, such

analogies are already a familiar tool for resisting novel and aggressive interpretations of state law. This tool deserves renewed attention as federal deregulation spurs increased state enforcement.

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