Case Nos. 33,011 and 33,013

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

ANDREA J. FELTS,
on behalf of herself and all others similarly situated,

Plaintiff-Respondent,

v.

CLK MANAGEMENT, INC. f/k/a/ BAT SERVICES, INC.;
and CASH ADVANCE NETWORK, INC.,

Defendants-Appellants.

AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER ADVOCATE'S BRIEF IN SUIPPORT OF PLAINTIFF-RESPONDENT ANDREA J. FELTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and by serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal and state consumer protection laws in general and state unfair and deceptive practices acts in particular is a continuing concern of NACA.

NACA, through counsel for Plaintiff, provided all Parties to this appeal timely notice of the intent to file this brief.

SUMMARY OF BRIEF

Adoption of Defendants' position would be the death knell of virtually all meaningful enforcement of the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -22. The UPA's class action mechanism is the only practical choice that New Mexico citizens have to both deter and redress unfair and deceptive practices that occur other than on an isolated basis. Unscrupulous businesses know this reality all too well, and Defendants' attempt to eliminate the class action option is

consistent with the business models of predatory lenders and others whose abusive business practices are premeditated, persistent, and indiscriminate. Defendants' attempt to impose their putative ban on class actions speaks volumes for itself.

Enforcement of Defendants' ban on class actions would still allow individual actions, whose impact, however, would be comparatively minimal. The record here shows that Plaintiff presented unrebutted evidence that no attorney would prosecute this claim as an individual action. No doubt especially egregious examples of anti-consumer fraud and other overreaching causing substantial injury would continue to be enforced to recover an individual consumer's losses. However, the experience of amicus and its members confirms that in most instances the far more profitable, effective, and prevalent forms of anti-consumer and anti-competitive practices are those where, as here, the relative costs of litigation eliminate individual claims as a meaningful remedy and an effective deterrent.

Defendants' attempt to evade consequential legal oversight and scrutiny with regard to the UPA is particularly telling. The UPA is the single most important tool that New Mexico consumers have to combat the predatory practices that are alleged to have occurred here. Common law and other available remedies are ill-suited to tackle the systemic abuse of the market and its participants presented in this case. The Legislature adopted the UPA well aware of these limitations and

included the class action and private attorney general provisions with specific intent to curtail the types of abuses that Defendants apparently wish to be free to employ. Amicus opposes their strategy and urges this Court to reject it.

ARGUMENT OF LAW

A. The UPA Is the Single Essential Provision of New Mexico Law Available to Curb and Deter Predatory Business Practices

The UPA is the primary means available to citizens of New Mexico to protect and enforce their basic consumer rights. The Legislature drafted the UPA expansively to prohibit "any representation of any kind" "that may, tends to or does deceive or mislead any person" "knowingly made in connection with" a broad range of specified financial and mercantile enterprises. §§ 57-12-2(D) and -3; *see Ashlock v. Sunwest Bank of Roswell*, 107 N.M. 100, 102, 753 P.2d 346, 348 (1988) ("By recognizing that the Act applies to all misleading or deceptive statements, whether intentionally or unintentionally made, we ensure that the Unfair Practices Act lends the protection of its broad application to innocent consumers."); *Jaramillo v. Gonzales*, 2002–NMCA-072, ¶ 31, 132 N.M. 459, 50 P.3d 554 (failure to acknowledge the consumer's legal rights was a false and misleading representation that violated the UPA); *Smoot v. Physicians Life Insurance Company*, 2004–NMCA-027, ¶ 15, 135 N.M. 265, 87 P.3d 545 ("The

UPA...imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading").

New Mexico does not stand alone in having enacted the UPA. Rather, the UPA is part of a comprehensive, nationwide statutory scheme of uniform and similar laws designed to enhance and defend consumer rights. *See* Annotation following § 57-12-1 ("**Uniform Deceptive Trade Practices Act.** – The Unfair Practices Act is modeled after the Uniform Deceptive Trade Practices Act; however, numerous variations, omissions, and additions occurred in adoption and amendment"). Beginning about half a century ago, state legislatures initiated efforts to enact consumer protection statutes – referred to generically as "unfair and deceptive acts and practices" laws ("UDAPs") or Little FTC Acts – to address the unequal bargaining power and resulting abuses that often inhered in consumer transactions. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act As Rule Model* (hereinafter "Sovern"), 52 Ohio St. L.J. 437, 446 (1991).

New Mexico's UPA was enacted in 1967, a time when many states adopted their UDAP statutes. In the 1960's the Federal Trade Commission (FTC) began a collaborative effort with states aimed at providing local enforcement mechanisms to vindicate consumer rights. William A. Lovett, *State Deceptive Trade Practices Legislation* (hereinafter "Lovett"), 46 Tul. L. Rev. 724, 730 (1972). The impetus

for such a movement is evident: the power of the FTC to enforce the Federal Trade Commission Act as a means to protect consumers against unfair and deceptive trade practices was restricted by the FTC's limited resources and informed by political concerns. Sovern at 440-43. And because the FTC Act has no private enforcement mechanism, *see e.g., American Airlines v. Christensen*, 967 F.2d 410, 414 (10th Cir. 1992); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-89 (D.C. Cir.1973), the overwhelming majority of consumer abuses went unchecked.

The FTC's caucus with state officials spawned a model UDAP, intended to serve as a prototype for states to employ.[1] Lovett at 730. As noted by Prof. Lovett, this model UDAP "is actually much broader and more effective in its remedial provisions [than the FTC Act], and, unlike the Federal FTC Act, it provides for private enforcement and private remedies as well as administrative enforcement." *Id.* Additionally, the model UDAP specifically provided for class actions. Council of State Governments, 1970 Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law—Revision, *reprinted in* Clearinghouse No. 31, 035B, at pp. 4 and 9.[2] Thus, the gap left by the FTC Act –

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[1] The initial draft of the model UDAP was released in 1967 and was revised slightly over the next few years. The features referenced in this brief have all been in the model UDAP since at least 1970.

[2] In accordance with this Court's instruction [NMRA, Rule 12-213(F)(4)], amicus is not attaching here a copy of this original model act, which is however attached to the copy of this brief posted on amicus' website that is publicly available at http://www.naca.net/about-naca/amicusbrief/felts-amicus-brief.

no available private consumer enforcement vehicle – was filled by the model UDAP in three salient ways: a private right of action ensured that prosecution of consumer law violations was not restricted to governmental actors and by their limited resources; the people injured by wrongful conduct were given the means and ability to act on their own behalf to redress their injuries; and a class action mechanism facilitated combating systemic abuse and instituting programmatic change, an otherwise unlikely result when remedies are confined to individual small-value consumer claims.

By 1972, 36 states, including New Mexico, had enacted legislation consistent with the model UDAP. Lovett at 730; *see also* Sovern at 447-48 n.60. The trend continued through the decade, and by 1981 every state had enacted some form of consumer protection statute. Sovern at 446; *see also* Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 Tul. L. Rev. 427, 427 (Dec. 1984). Today, all fifty states and the District of Columbia have UDAP statutes, and each (save Iowa) contains the essential provision that permits a private cause of action for a statutory violation.[3]

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[3] Ala. Code § 8-19-10(a); Alaska Stat. § 45.50.531(a); *Sellinger v. Freeway Mobil Home Sales, Inc.*, 521 P.2d 1119 (Ariz. 1974) (recognizing implied private right of action for violations of Arizona Consumer Fraud Act, Ariz. Rev. Stat. § 44-1522 *et seq.*); Ark. Code Ann. 4-88-113(f); Cal. Bus. & Prof. Code § 17070, Cal. Bus. & Prof. Code § 17203, Cal. Civ. Code § 1708(a); Colo. Rev. Stat. § 6-1-113(1);

As in other jurisdictions, the UPA includes features designed to ensure robust protection and private enforcement of consumer rights. One such feature is the absence of any requirement that New Mexico consumers prove a defendant's culpable intent or even show their own reliance on the deceptive or false representation. *Ashlock*, 107 N.M. at 101, 753 P.2d at 347 ("Had the legislature wished intent to deceive to be an essential element of the [UPA] offense, it would have so specified."); *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100,

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Conn. Gen. Stat. § 42-110g; *Young v. Joyce*, 351 A.2d 857 (Del. 1975) (recognizing availability of private right of action under Delaware Consumer Fraud Act, Del. Code Ann. tit. 6, § 2511 *et seq.*); D.C. Code § 28-3905(k)(1); Fla. Stat. Ann. § 501.211; Ga. Code Ann. §§ 10-1-373(a), 10-1-399(a); Haw. Rev. Stat. Ann. §§ 481A-3(a), 480-2(c), 480-13; Idaho Code Ann. §§ 48-619, 48-608; 815 Ill. Comp. Stat. §§ 510/3, 505/10(a); Ind. Code Ann. § 24-5-.05-4(a); Kan. Stat. Ann. § 50-634; Ky. Rev. Stat. Ann. § 367.220(1); La. Rev. Stat. Ann. § 51:1409(A); Me. Rev. Stat. Ann. Tit. 5, § 213, Me. Rev. Stat. Ann. Tit. 10, § 1213; Md. Code Ann., Com. Law § 13-408(a); Mass. Gen. Laws Ann. ch. 93A § 9; Mich. Comp. Laws Ann. § 445.911; Minn. Stat. Ann. § 8.31 (granting private right of action for violations of Unlawful Trade Practices Act, Minn. Stat. Ann. § 325D.09 *et seq.* and Prevention of Consumer Fraud Act, Minn. Stat. Ann. §325F.68-.70), limited by *Ly v Nystrom*, 615 N.W.2d 302 (Minn. 2000) (recognizing private UDAP right of action for matters brought for public benefit); Miss. Code Ann. § 75-24-15; Mo. Ann. Stat. § 407.025(1); Mont. Code Ann. § 30-14-133(1); Neb. Rev. Stat. §§ 59-1609, 87-303.10-11; Nev. Rev. Stat. Ann. §§ 41.600, 598.0977, 598.0993; N.H. Rev. Stat. Ann. § 358-A:10; N.J. Stat. Ann. §§ 56:8-2.12, 56:8-19; NMSA 1978, § 57-12-10(B); N.Y. Gen. Bus. Law § 349(h); N.C. Gen. Stat. Ann. § 75-16; N.D. Cent. Code § 51-15-09; Ohio Rev. Code Ann. §§ 1345.09, 4165.03; Okla. Stat. Ann. tit. 15 § 761.1; Or. Rev. Stat. Ann. § 646.638; 73 Pa. Cons. Stat. § 201-9.2(a); R.I. Gen. Laws § 6-13.1-5.2(a); S.C. Code Ann. § 39-5-140(a); S.D. Codified Laws § 37-24-31; Tenn. Code Ann. § 47-18-109; Tex. Bus. & Com. Code Ann. § 17.50(a); Utah Code Ann. § 13-11-19; Vt. Stat. Ann. tit. 9, § 2461(b); Va. Code Ann. §§ 59.1-68.3, 59.1-204(A); Wash. Rev. Code Ann. § 19.86.090; W. Va. Code Ann. § 46-6-106; Wis. Stat. Ann. § 426.110; Wyo. Stat. Ann. § 40-12-108(a).

¶ 35, 142 N.M. 437, 166 P.3d 1091 (to prosecute a successful UPA claim, "a claimant need not prove reliance upon a defendant's deceptive conduct"). To establish liability under the UPA, a plaintiff is not required to show that the defendant had actual knowledge of the falsity of the misrepresentation but need only show that the defendant would have known that the representation was misleading in the exercise of reasonable diligence. *Stevenson v. Louis Dreyfus Corporation*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991) ("The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading."); *Pedroza v. Lomas Auto Mall, Inc.*, 600 F. Supp. 2d 1200, 1208 (D. N.M. 2009) ("a good-faith, but mistaken, legal conclusion does not prevent a statement from being knowingly false" under the UPA).

Proof of actual loss is also not required. *Page & Wirtz Construction Company v. Solomon*, 110 N.M. 206, 212, 794 P.2d 349, 355 (1990); *Lohman*, 2007-NMCA-100 at ¶ 44, 142 N.M. 437, 166 P.3d 1091 (the case law "clearly establish[es] that the UPA does not require proof of actual monetary or property loss"); *Jones v. General Motors Corporation*, 1998 NMCA 20, ¶¶ 23-25, 124 N.M. 606, 953 P.2d 1104. The New Mexico Legislature included minimum statutory damages and a mandatory fee shifting provision to ensure that the UPA would be

enforced by common citizens acting as private attorneys general.[4] §§ 57-12-10(B) and (C); *see generally San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 12, 257 P.3d 884, 150 N.M. 44 ("By giving enforcement power to any person whose written request has been denied, IPRA's provisions create 'private attorneys general' for more effective and efficient enforcement of IPRA than would be possible if only the attorney general or district attorney could

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[4] Although the term "private attorneys general" is not used in the text of the UPA nor in any of the New Mexico opinions that discuss the fee shifting provision of the UPA, it is well recognized that state consumer protection statutes like the UPA use mandatory fee shifting to encourage private enforcement, termed a "private attorneys general" scheme. *See Gilkey v. Central Clearing Company*, 202 F.R.D. 515 (E.D. Mich. 2001) (in class action against payday lender, certification granted in part because "[c]utting off the rights of consumers to vindicate their rights is contrary to the intent of the TILA and [the Michigan Consumer Protection Act] to encourage private attorneys general"); *Alexander v. Certified Master Builders Corporation*, 1 P.3d 899, 907 (Kan. 2000) ("the [Kansas Consumer Protection Act] provides a private remedy to consumers in the hope that they will enforce the KCPA as 'private attorneys general'"); *Aral v. Earthlink, Inc.*, 36 Cal. Rptr.3d 229, 241 (Cal. Ct. App. 2005) (in striking down class ban, noting "consumers with small monetary claims are ill served by a consumer protection scheme that prohibits private attorney general actions"); *Adkinson v. Harpeth Ford-Mercury, Inc.*, 1991 WL 17177, * 9 (Tenn. Ct. App. Feb. 15, 1991) ("Plaintiffs under the Tennessee Consumer Protection Act also act as private attorneys general"); *Hernandez v. Monterey Village Associates Limited Partnership*, 553 A.2d 617, 619 (Conn. Ct. App. 1989) ("The policy behind [the Connecticut Unfair Trade Practices Act] is to encourage litigants to act as private attorneys general and to bring actions for unfair or deceptive trade practices"); *Nalen v. Jenkins*, 741 P.2d 366, 369 (Idaho Ct. App. 1987) ("the [Idaho] Consumer Protection Act['s] function is to provide private attorney general actions to redress unfair and deceptive practices"); *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984) ("It is widely recognized that a dual purpose underlies private attorney general statutes: The award should eliminate financial barriers to the vindication of a plaintiff's rights and the award should provide incentive for counsel to act as private attorney general") (citations omitted).

enforce the statute") (internal quotation and citation omitted). Consistent with the UPA's statutory charge, New Mexico courts have emphasized that the Act should be broadly interpreted to protect consumers. *Ashlock*, 107 N.M. at 102, 753 P.2d at 348 (N.M. 1988) (UPA should be interpreted to ensure "the protection of its broad application to innocent consumers"); *Lohman*, 2007-NMCA-100 at 25, 142 N.M. 437, 166 P.3d 1091 ("The remedial purpose of the [UPA], as a consumer protection measure, is also consistent with the broadest possible application."); *State ex rel Stratton v. Gurley Motor Company*, 105 N.M. 803, 808, 737 P.2d 1180, 1185 (Ct. App. 1987) ("Because the Unfair Practices Act constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent").

These core remedial provisions of the UPA demonstrate that the UPA was intended to correct the inadequacies that existed with consumer protection remedies provided by the common law. Thirty years ago the North Carolina Supreme Court reviewed, summarized, and confirmed these principles in its seminal opinion construing its version of the model act:

> Between the 1960's and the present, North Carolina was one of forty-nine states to adopt consumer protection legislation designed to parallel and supplement the FTC Act. Leaffer and Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521 (1980). The statute enacted in North Carolina in fact had its genesis in the first of several alternative forms suggested to the states by the Federal Trade Commission and the Committee on Suggested State Legislation of the Council of State

> Governments. Council of State Governments, Suggested State Legislation (Vol. XXIX 1970); Lovett, State Deceptive Trade Practices Legislation, 46 Tulane L. Rev. 724, 732 (1972). The Commission encouraged state-level legislation because it recognized that enforcement of the FTC Act's broad Section 5 proscription against "unfair or deceptive acts or practices" could not possibly be accomplished without extra-agency assistance. L. Richie & H. I. Saferstein, Private Actions for Consumer Injury Under State Law The Role of the Federal Trade Commission, in FTC Trade Regulation Advertising, Rulemaking and New Consumer Protection 415 (PLI 1979). In enacting G.S. 75-16 and G.S. 75-16.1, our Legislature intended to establish an effective private cause of action for aggrieved consumers in this State.
>
> Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of "puffing." Comment, Maryland's Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Trade Practices, 38 Md. L. Rev. 733, 734 (1979). Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974). Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof. See Langer & Ormstedt, The Connecticut Unfair Trade Practices Act, 54 Conn.B.J. 388 (1980). A contract action for rescission or restitution might be impeded by the parol evidence rule where a form contract disclaimed oral misrepresentations made in the course of a sale. Use of a product after discovery of a defect or misrepresentation might constitute an affirmance of the contract. Any delay in notifying a seller of an intention to rescind might foreclose an action for rescission. Richie and Saferstein, supra at 416-17. Against this background, and with the federal act as guidance, North Carolina and all but one of her sister states have adopted unfair and deceptive trade practices statutes. Richie & Saferstein, supra at 441.

Marshall v. Miller, 276 S.E.2d 397, 400 (N.C. 1981).

B. Effective Consumer Enforcement of the UPA Also Protects the Interests of Honest Businesses as Well as the Free Market Itself

Significantly, the UPA does more than protect consumers; it also protects honest businesses. Consumer protection laws in a free market economy by

definition protect the market itself and all of its participants, since unscrupulous businesses that are allowed to profit from unfair and deceptive trade practices naturally and inevitably gain competitive advantages over honest businesses. *See E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F.2d 886, 888 (2d Cir. 1935) ("Selling by the use of false or misleading statements necessarily injures or tends to injure [an unscrupulous business's] competitors."); *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047, 1053 (Alaska 2004) ("[The Uniform Deceptive Trade Practices Act] makes it clear that the act was also intended to protect businesses from deceptive trade practices by other businesses"). *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 667 (Colo. 1972) ("the deceptive trade practices which are the subject matter of the statute under attack in this case injuriously affect both honest business men and consumers"); *compare Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, ___U.S. ___, ___, 130 S.Ct. 1605, 1608 (April 21, 2010) ("Congress enacted the FDCPA [Fair Debt Collection Practices Act] to eliminate abusive debt collection practices [and] to ensure that debt collectors who abstain from such practices are not competitively disadvantaged").

Thus, statutes such as the UPA that impose a standard of truthfulness, including full disclosure of all material facts [§ 57-12-2(C)(14)], are crucial to support a marketplace that is dependent on consumers making informed and

knowledgeable decisions that are undermined by misrepresentation and deception. For example, "Congress enacted the Truth in Lending Act in part because it believed consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping." *Till v. SCS Credit Corp.*, 541 U.S. 465, 482 (2004) (footnote, internal quotation, and citation omitted). The Supreme Court stated the guiding principle of this philosophy nearly 40 years ago: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 364 (1973).

The UPA acts as a check on an unregulated market to eliminate the additional costs to honest businesses in the absence of effective enforcement of consumer protections. Accordingly, this Court has expressly stated that in addition to "a consumer of goods or services," a UPA claim may be prosecuted by "the commercial competitor of an enterprise engaged in deceptive trade practices" who "could suffer loss of market share and profits because the public might be deceived." *Page & Wirtz Construction Company*, 110 N.M. at 211, 794 P.2d at 354.

C. Defendants' Ban on Class Actions Will Eliminate the Only Effective Method Available to Rein In Unfair and Deceptive Predatory Business Practices

The Legislature's decision to ensure effective consumer protections for all New Mexicans is demonstrated by the UPA provision authorizing class actions that Defendants seek to eviscerate. New Mexico is not unique in this regard. Fifteen jurisdictions have joined New Mexico in codifying the availability of a class action mechanism in their respective UDAPs.[5] Of the remaining thirty-five states, a handful explicitly prohibit private-litigant consumer protection class actions, *see e.g.* Ga. Code Ann. § 10-1-399(a); Mont. Code Ann. § 30-14-133(1), while the remainder determine their availability under each state's general rules governing class matters. *See e.g. Neese v. Lithia Chrysler Jeep of Anchorage* , 210 P.3d 1213, 1224-25 (Alaska 2009) (recognizing validity of class claims under Alaska Unfair Practices and Consumer Protection Act); *London v. Green Acres Trust*, 765 P.2d 538, 542-45 (Ariz. Ct. App. 1988) (finding no error in certification of private consumer fraud class action); *LaBerenz v. American Family Mut. Ins. Co.*, 181 P.3d 328 (Colo. Ct. App. 2007) (conducting Rule 23 analysis of Colorado

[5] Cal. Civ. Code § 1781; Conn. Gen. Stat. Ann. §§ 42-110g(b), 42-110h; D.C. Code Ann. § 28-3905(k)(1)(E); Idaho Code Ann. § 48-608(1); Ind. Code Ann. § 24-5-0.5-4(b); Kan. Stat. Ann. § 50-634(d); Mass. Gen. Laws Ann. ch. 93A, § 9(2); Mich. Comp. Laws Ann. § 445.911(3); Mo. Ann. Stat. § 407.025(2) & (3); N.H. Rev. Stat. Ann. § 358-A:10-a; NMSA § 57-12-10(E); Ohio Rev. Code Ann. § 1345.09(B); R.I. Gen. Laws § 6-13.1-5.2(b); Utah Code Ann. §§ 13-11-19, 13-11-20; Wis. Stat. Ann. § 426.110(1); Wyo. Stat. Ann. § 40-12-108(b).

Consumer Protection Act claims); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 702-05 (Fla. Ct. App. 2000) (certifying class under Florida Deceptive and Unfair Trade Practices Act); *Chultem v. Ticor Title Ins. Co.* 927 N.E.2d 289 (Ill. Ct. App. 2010) (reversing denial of class certification for claims which included violations of Illinois Consumer Fraud and Deceptive Business Practices Act); *Dowd v. Alliance Mortgage Co.*, 74 N.Y.S. 2d 104 (N.Y. Ct. App. 2010) (affirming certification of class claiming wrongful imposition of mortgage fees under N.Y. Gen. Bus. Law § 349); *Weigand v. Walser Automotive Group*, 683 N.W.2d 807, 808-09 (Minn. 2004) (reinstating class action brought under the Minnesota Consumer Fraud Act).

Just three years ago, this Court highlighted the essential purpose served by UPA consumer class actions when it declared that the "opportunity for class relief and its importance to consumer rights is enshrined in the fundamental public policy of New Mexico." *Fiser v. Dell Computer Corporation*, 2008-NMSC-46, ¶ 13, 144 N.M. 464, 188 P.3d 1215. This Court explained in *Fiser* that the UPA's class action provision is a primary enforcement tool to vindicate consumer rights. *Id.* While *Fiser* recognized that the policy favoring consumer class actions was one fundamental to New Mexico, its rationale was drawn from the United States Supreme Court:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

2008-NMSC-46 at ¶ 14, 144 N.M. 464, 188 P.3d 1215 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

Consumer class actions allow redress where victims may not even know they are being harmed, as is often the case with violations of UDAP statutes that protect against abuses that are intended by their perpetrators to be deceptive and misleading. As the United States Supreme Court has recognized, the class action is integrally tied to effective enforcement by private attorneys general schemes like the UPA:

> The financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights.

Deposit Guaranty National Bank of Jackson, Mississippi v. Roper, 445 U.S. 326, 338 (1980); *see also Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974) ("class actions might very well be superior to individual suits, because...[of] the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually"); *McKee v. AT&T Corporation*, 191 P.3d 845, 857 (Wash. 2008) ("without class action suits, the public's ability to act as 'private attorneys

general' as intended in the [Washington] Consumer Protection Act, was eviscerated") (citation omitted).

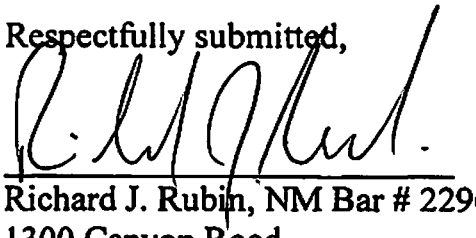
Not surprisingly, the record in this case contains uncontroverted evidence that no New Mexico attorneys would be available to prosecute this claim as an individual action. This conclusion comports with the legislative intent in adopting the UPA class action provision and the public policy basis for this Court's statement in *Fiser* quoted above. This conclusion also confirms the intention of Defendants when they foisted their putative class action ban on Plaintiff and other consumers in their boilerplate contract provisions. After all, "a person is presumed to intend the natural consequences of his own acts." *United States v. Lawrence*, 405 F.3d 888, 900 (10th Cir. 2005); accord *Woodson v. Lee*, 73 N.M. 425, 430, 389 P.2d 196, 200 (1963). And here, the natural consequence of Defendants' legal position is to free themselves from effective redress or remedy and to allow their predatory lending practices to persist unabated.

CONCLUSION

Amicus has no interest in the ultimate resolution of this matter. However, amicus has an abiding interest in the faithful enforcement of laws such as the UPA that are essential to the protection of the rights of all consumers and the wellbeing of the consumer marketplace. For the foregoing reasons, amicus asks that this

Court's resolution of this case not eviscerate the efficacy of the UPA and instead maintain the availability of its class action mechanism.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was mailed to the following counsel of record, on September 30, 2011, addressed as follows:

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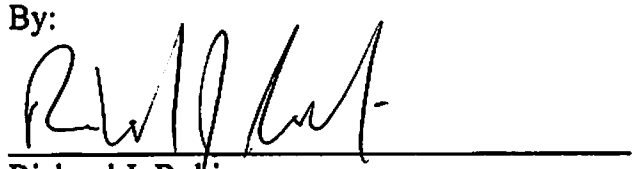

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1970 SUGGESTED STATE LEGISLATION

VOLUME XXIX

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW-REVISION

Developed by
The Committee on Suggested State Legislation

The Council of State Governments
Iron Works Pike
Lexington, Kentucky 40505

72-31-00 Unfair Trade Practices and Consumer Protection Law -- Revision

This suggested legislation, developed by the Federal Trade Commission, is a revision of the Unfair Trade Practices and Consumer Protection Act initially published in *Suggested State Legislation for 1967*. This draft incorporates the changes which were published in *Suggested State Legislation for 1969*, and additional changes discussed below.

The 1967 proposal has been adopted by the following ten states: Arizona, Kansas, Maryland, Massachusetts, Missouri, New Mexico, Pennsylvania, Rhode Island, Texas, and Vermont.

To meet differing requirements in the several States, slightly different language is suggested for Section 2 which declares what acts and practices are unlawful. Three alternative forms of language have evolved for this section. Alternative Form No. 1 prohibits use of those "unfair methods of competition and unfair or deceptive acts or practices" which, if used in interstate commerce, are prohibited by Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)). This form has been adopted in Washington, Hawaii, Vermont, and Massachusetts, and is the form preferred by the Federal Trade Commission. It enables the enforcement official to reach not only deceptive practices which prey upon consumers, but also unfair methods which injure competition. This form will reach price-fixing arrangements, boycotts by suppliers, coercion of retailers, and other trade restraints which tend to creat monopoly and enhance prices. However, in some States such anti-competitive practices are already covered by other legislation. For those States, Alternative Form No. 2 is suggested.

Alternative Form No. 2 enables the enforcement official to enjoin all types of deceptive trade practice. This alternative declares unlawful "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce" and is acceptable to, and recommended by, the Federal Trade Commission. Similar language is used in the laws of Arizona, Delaware, Illinois, Iowa, Kansas, Maryland, Missouri, New Jersey, and North Dakota.

Alternative Form No. 3, like the 1967 draft, prohibits the twelve specific types of deceptive practice enumerated in the Uniform Deceptive Trade Practices Act as promulgated by the National Conference of Commissioners on Uniform Laws in 1964. The latter Act provides a remedy only for a private person injured by a deceptive practice. In the draft set forth below, there has been added a subsection (13) to prohibit "any other act or practice which is unfair or deceptive to the consumer." This language was incorporated in *Suggested State Legislation for 1969*, and is acceptable to the Federal Trade Commission. It is somewhat narrower in scope than the language of either Alternative No. 1 or Alternative No. 2.

The common feature of these laws is that they enable an enforcement official, usually the attorney general, to investigate alleged or suspected deceptive and unfair trade practices,

and to obtain court injunction when violation exists. The enforcement official is given power to accept an assurance of voluntary compliance, when he considers that method of disposition appropriate. This, along with the authority to proceed when "in the public interest", protects him from contentious complainants and from the necessity of pursuing every matter, regardless of its relative importance, to formal litigation.

The provision in Section 3(a) that the administering official shall give due consideration and great weight to interpretations rendered by the Federal Trade Commission and the courts, in their administration of similar language of the Federal Trade Commission Act, was adopted by the Council of State Governments in *Suggested State Legislation for 1969.* This language is from the Rhode Island Consumer Protection Law.

The provision in Section 3(b) for the administering official to issue rules and regulations interpreting the Act is taken from the law of Massachusetts. This provision will reduce costs of administration by allowing the administering official to carry on an educational program among businessmen and consumers, to acquaint them with the requirements and protections of the act, and will encourage self-regulatory effort among the businessmen to attain a high level of compliance at minimum cost.

Section 4(a) continues the exemption for acts done pursuant to other laws of the State or the United States, as in the 1967 draft.

To this draft has been added, in Section 4(b), an exemption for acts done by newspaper and magazine publishers and radio and television broadcasters, and their agents and employees, in the publication or dissemination of advertising, when they do not have knowledge of the false, misleading or deceptive character of the advertisement. The language used is similar to that found in the New York False Advertising Law, and the Consumer Protection Laws of Delaware, Illinois, Iowa, Kansas, Maryland, Missouri, New Jersey, Pennsylvania, Vermont, and Washington. It is also similar to Section 145 of the Consumer Credit Protection Act (the Federal Truth-in-Lending Law) (P.L. 90-321) which provides there is no liability under the chapter relating to credit advertising on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated. However, in this draft publishers and broadcasters would be held responsible if they prepared the advertisement, or had a financial interest in the sale or distribution of the product being advertised. Thus, the exemption extends only to acts done in their capacity as publishers and broadcasters on behalf of other advertisers, and does not permit them to misrepresent their own goods or services, or goods or services in which they have a direct financial interest, or to prepare false advertisements for others.

Section 5 is amended by adding the words "has used" in the phrase which authorizes the attorney general to proceed when he has reason to believe that any person "is using, has used, or is about to use" any method, etc., which is unlawful. This corrects an oversight which occurred in drafting the 1967 model. Addition of these words will obviate the

problem which might occur if a defendant contends that he discontinued the alleged practice some days before trial, and that the prosecutor has failed to show continuance of the unlawful practice up to and through the day of trial.

Sections 6 and 7 provide additional relief, by authorizing the court to decree restitution of money or property to anyone who suffered damage from the unlawful acts or practices, and to appoint a receiver or revoke a license or certificate for doing business. This is similar to the laws of Arizona, Delaware, Illinois, Iowa, and several other States.

Section 8 provides for private and class actions, and for payment of attorney's fees and costs, so that the private bar may be brought into the consumer protection field. Ordinarily, the amount involved in a consumer transaction is not sufficient to interest a private practitioner, with the result that thousands of consumers suffer small losses, without remedy or relief being available. This section incorporates language and ideas suggested by David A. Rice, Assistant Professor of Law, Boston University, in an article entitled "Consumer Transaction Problems" (*Boston Univ. Law Review*, Fall 1968, p. 560).

Section 9 limiting the holder-in-due-course doctrine in the case of consumer paper is proposed on the basis of information and experience as reflected in *F.T.C. Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers* (March 1968), the *F.T.C. Report on District of Columbia Consumer Protection Program* (June 1968), and the *Record of F.T.C. National Consumer Protection Hearing* (November-December 1968). It is important and desirable to provide for the negotiability of commercial paper to the fullest extent practicable. But very often the finance company which purchases consumer paper knows, or should reasonably have known, of the existing defenses, such as non-performance of the seller or defect in the merchandise, and it places an unreasonable burden on the consumer to prove that the finance company had knowledge. It is suggested the consumer should be given the benefit of the doubt in such cases, by enabling him to assert all defenses against the finance company that he could have asserted against the original vendor or lessor of the goods or services.

This provision will help eliminate consumer deception, and the hardships which consumers suffer as a result of high-pressure selling methods. A main feature of the proposal is the built-in self-regulatory process by which finance companies will be encouraged to investigate more carefully the business practices of retailers with whom they deal. It should eliminate sources of financing which enable spurious operators to take advantage of aged, low-income and other unsuspecting consumers.

In selecting the language of Section 9, consideration was given "Alternative A" and "Alternative B" in Section 2.404 of the *Uniform Consumer Credit Code* promulgated in August 1968 by the National Conference of Commissioners on Uniform State Laws.[1]

[1]These provisions are found on pp. 74-75 of the *Uniform Consumer Credit Code*, 1969 Revised Final Draft.

Alternative A is considered less acceptable than the language of Section 9 recommended herein because Alternative A provides that rights of the buyer or lessee (the consumer) can only be asserted as a matter of defense to or set-off against a claim by the assignee (holder of the paper). Thus, unless the consumer is sued by the holder, he has no rights against the holder. This would allow continuation of threats to, and impairment of, a consumer's credit rating which result from harassing collection tactics sometimes used without any actual litigation being undertaken against the consumer. Alternative B which requires 90 days' notice to the holder by a debtor to preserve defenses is considered less acceptable, because it is unrealistic to expect low-income consumers or others not versed in the law to be apprised of their rights under the law and to defend themselves against the holder-in-due-course doctrine. Section 9 accordingly combines desirable features of Alternative A of the *Uniform Consumer Credit Code*, with the existing laws of Vermont and Massachusetts which abolish the holder-in-due-course doctrine for consumer paper (Section 2455 of the *Vermont Consumer Fraud Act*, approved April 17, 1967; and Section 12C, Chapter 255, *General Laws of Massachusetts*, approved May 31, 1961).

Section 10, providing for Assurances of Voluntary Compliance, is not changed from the 1967 version.

Sections 11 through 14 provide authority for the attorney general to require the filing of reports, to issue subpoenas, to interrogate persons under oath, to examine merchandise and to obtain relevant documentary material, in investigations to determine whether violation of the statute has occurred, similar to authority contained in the Consumer Protection Laws of Arizona, Delaware, Illinois, Iowa, and other States. Woven into these sections are pertinent provisions adapted from the Federal law applicable to issuance of civil investigative demands, similar to the 1967 draft.

Under Section 15, civil penalties of up to $2,000 per violation may be assessed by the court for initial violations of the Act when the violator acted willfully, that is, when he knew or should have known that his conduct violated the Act.

For violation of an injunction issued under the Act, civil penalties of up to $25,000 are provided, along with revocation of corporate charter, as in the 1967 draft.

Section 17 is new and authorizes participation in enforcement actions by County and City attorneys within the State, subject to approval of the attorney general. This is intended to promote the development of coordinated enforcement action at State, County and City level.

Additional information regarding this proposal, examples of existing consumer protection laws in the several States, and drafting assistance, may be obtained from: Assistant General Counsel for Federal-State Cooperation, Federal Trade Commission, Washington, D. C. 20580.

Suggested Legislation

(Title, enacting clause, etc.)

Section 1. Definitions

As used in this Act,

(1) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(2) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(3) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(4) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgement in respect of any such documentary material or copy thereof.

Section 2. Unlawful acts or practices

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 3:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

(1) passing off goods or services as those of another;

(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing likelihood of confusion or of misundertanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or

(13) engaging in any act or practice which is unfair or deceptive to the consumer.

Section 3. Interpretation

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45 (a) (1)), as from time to time amended; and

(b) The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C., 45(a) (1)), as from time to time amended.

Section 4. Exemptions

Nothing in this Act shall apply to:

(1) Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this State or the United States (or the state fair trade law).

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

Section 5. Restraining prohibited acts

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice, upon the giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 13 of this Act and at least three (3) days before the hearing of the action. The action may be brought in the (trial court of general jurisdiction of the county or judicial district) in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

Section 6. Additional public relief

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Section 7. Powers of receiver

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any unlawful practices and submits proof to the satisfaction of the

court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 8. Private and class actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200 whichever is greater. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a) of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section five of this Act shall be *prima facie* evidence in an action brought under Section eight of this Act that the respondent used or employed a method, act or practice declared unlawful by Section two of this Act.

Section 9. Non-negotiability of consumer paper[1]

(a) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the

[1]With reference to this section, States may wish to consider Section 2.404 of the *Uniform Consumer Credit Code*, 1969 Revised Draft, pp. 74-75, which treats this issue in a substantially different manner. See also the discussion in the explanatory statement prefacing this legislation.

execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument or evidence of indebtedness shall have printed on the face thereof the words "consumer paper," and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code—Commercial Paper.

(b) Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this Section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall subject the seller or other responsible person to appropriate civil and criminal sanctions as provided in this Act.

Section 10. Assurances of voluntary compliance

In the administration of this Act, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of (trial court of general jurisdiction of the county or judicial district) in which the alleged violator resides or has his principal place of business, or the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to Section 5.

Section 11. Investigation

(a) When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to

produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the (trial court of general jurisdiction of the county of judicial district) where the person served with the demand resides or has his principal place of business or in the (trial court of general jurisdiction of the county or judicial district) where the State Capitol is located.

Section 12. Subpoenas, hearings, rules and regulations

To accomplish the objectives and to carry out the duties prescribed by this Act, the attorney general, in addition to other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the attorney general or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 13. Service of notice, demand or subpoena

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(1) Personal service thereof without this State; or

(2) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(3) As to any person other than a natural person, in the manner provided in the (rules of civil procedure) as if a (complaint or other pleading which institutes a civil proceeding) had been filed; or

(4) Such service as a (trial court of general jurisdiction of the county or judicial district) may direct in lieu of personal service within this State.

Section 14. Enforcement of investigative demands

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a (trial court of general jurisdiction of the county or judicial district) and, after hearing thereon, request an order:

(1) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(2) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(3) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 15. Civil and criminal penalties

(a) Any person who violates the terms of an injunction issued under Section 5 of this Act shall forfeit and pay to the State a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the (trial court of general jurisdiction of a county or judicial district) issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the State may petition for recovery of civil penalties.

(b) In any action brought under Section 5 of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 2 of this Act, the attorney general, upon petition to the court, may recover, on behalf of the State, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation.

(c) For purposes of this Section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 2 of this Act.

Section 16. Forfeiture of corporate franchise

Upon petition by the attorney general, the (trial court of general jurisdiction of a county or judicial district) may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under Section 5 of this Act.

Section 17. Duties of County and City attorneys

It shall be the duty of the County and City attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions pursuant to this Act, or, the County or City attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general; provided that if an action is prosecuted by a County or City attorney alone, he shall make a full report thereon to the attorney general, including the final disposition of the matter.