



D I S T R I C T O F C O L U M B I A B A R
Antitrust and Consumer Law Section

Report with Recommendations, Prepared for Submission as Testimony
By the Antitrust and Consumer Law Section of the D.C. Bar
For the Hearing Scheduled For October 11, 2012

COMMITTEE ON PUBLIC SERVICES AND CONSUMER AFFAIRS
PUBLIC HEARING on Bill 19-0581,
The “Consumer Protection Amendment Act of 2011”
<http://dcclims1.dccouncil.us/images/00001/20111116102513.pdf>

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The views expressed herein represent only those of the Antitrust and Consumer Law Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.¹

Introduction

As explained in the Notice of Hearing, the stated purpose of Bill 19-0581 is [1] to prohibit the willful use of falsehood, innuendo, or ambiguity; to prohibit representing that a transaction confers rights that it does not; and to prohibit unfair business practices; [2] to explicitly authorize non-profit organizations to bring suit under the District’s consumer protection statute; to create a right of action for non-profit organizations whose public interest activities have been perceptibly impaired; and [3] to create a unit pricing requirement for consumer commodities.

The Section offers comments on all three parts of the proposed legislation.

Standing for Nonprofit Organizations

We support the proposal to explicitly authorize non-profit organizations to bring suit under the District’s consumer protection statute and to create a right of action for non-profit organizations. We agree that it is important to solidify the ability of non-profits to bring

¹ The Section’s steering committee was presented with a copy of the legislation and this proposed public statement. A vote was subsequently taken September 24, 2012. The statement was adopted without dissent, on a vote six-to-zero, with three abstentions.

representative actions under the Consumer Protection Procedures Act. Non-profits bring unique perspective and insights to consumer protection through their representation of the populations that they serve. They generally seek to advance the public welfare and may be able to bring actions on sensitive issues when it is politically difficult for an Attorney General to do so. Since they are not motivated by profit, they also have the ability to bring actions that may address a substantial harm, but that would not necessarily bring sufficient monetary return to individual plaintiffs or their attorneys to make private suit practical or realistic.

The D.C. Consumer Protection Act of 2000 included an amendment to the CPPA to allow non-profit public interest organizations and the private bar to bring litigation in the public interest. The District of Columbia Court of Appeals in *Grayson v. AT&T Corp.*² imposed the prudential requirement on the *individual* plaintiffs in that case that they must suffer an injury-in-fact to have standing to bring a claim. While the *Grayson* decision did not discuss litigation brought by non-profit public interest organizations, the decision has had a chilling impact on litigation by non-profits.

The proposed bill more clearly defines the statutory authorization for suits to be brought by non-profit organizations acting as private attorneys general. Pursuant to the legislation, such suits may proceed in D.C. Superior Court. Section 3901(a)(14) defines “non-profit organization” in relation to federal non-profit law under 26 U.S.C. § 501(c).

Relevant language of the proposed legislation includes the following:

(B) A non-profit may bring an action under this chapter on behalf of its members or the general public if it can demonstrate that a particular member of the non-profit or of the general public would have had standing, regardless of whether or not the organization itself has suffered or would suffer an injury in fact.

(C) A non-profit may bring an action under this chapter on its own behalf if it can establish that its public interest activities have been perceptibly impaired. The term “perceptibly impaired” shall include diversion of resources and interference with institutional efforts.

We understand that the two provisions are disjunctive and not conjunctive, meaning that they provide a nonprofit two separate, independent avenues for a private right of action for non-profit organizations under the statute.

While the local D.C. courts are not Constitutional courts, they do have authority to determine prudential standing requirements with regard to non-profit organizations.

We do not think that imposition by the D.C. Courts of prudential standing limits on suits by individuals is a reason to oppose the legislation. We view the legislation as avoiding what we regard as inappropriate application of standing requirements articulated in *Grayson*. As such, we expect that non-profits can draw complaints that serve the

² 15 A.3d 319 (D.C. 2011) (en banc).

public interest and where possible, include legally sufficient standing allegations. But the overarching point, and our reason for supporting the proposed legislation, is that in light of the case law with regard to standing and remedies, we think the proposed Act will appropriately facilitate enforcement actions by non-profits that will be of significant benefit to the public.

In summary, we anticipate that the proposed D.C. legislation that permits and encourages non-profits to bring cases in the public interest will confer a substantial public benefit in the form of useful consumer protection and other litigation. The need for non-profits to act as private attorneys general is great in D.C., where administrative enforcement of the consumer laws by D.C. government has been eliminated, and consumer enforcement by the Attorney General's office has been curtailed.

Unit pricing requirement for consumer commodities.

Unit pricing provides the price of goods based on cost per unit of measure, making it easier for consumers to compare prices. It is calculated by dividing the price of the product by an accepted unit of measurement depending on the type of product (e.g., grams, liters). The proposed language is based on a model act created by the National Conference of Weights and Measures and is supported by the Department of Commerce's National Institute of Standards and Technology.³ It should be noted that many industry trade associations worked with NIST to create the model act.

We understand that as of August 2011, there are nineteen states and two territories that have adopted unit pricing,⁴ including Maryland.⁵ We have spoken with an official in the Division of Consumer Protection of Maryland's Office of the Attorney General, who informed us that there have been no enforcement actions within the state since its enactment of a similar law. This suggests that unit pricing laws are easily implemented, that compliance is easy to maintain, and that the law will not materially impact resources at the District of Columbia's Office of the Attorney General.

Unit pricing allows customers to compare value between different brands, different sized packages, different package types, and different products. It allows consumers to identify the best value and use one consistent measure to sort through various package sizes, brands, and substitute products. It also provides a better indicator of the price premium being charged for a brand—a premium that may be perceived by consumers as an indicator of higher quality. Unit pricing places the focus on the pricing

³ National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 135-40 (2012), *available at* <http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf>.

⁴ National Institute of Standards and Technology, NIST Handbook 130: Uniform Law and Regulations in the Areas of Legal Metrology and Engine Fuel Quality as Adopted by the 96th National Conference on Weights and Measures 2011, at 10-13 (2012), *available at* <http://www.nist.gov/pml/wmd/pubs/upload/2012-h130-final2.pdf>.

⁵ Md. Code Ann., Com. Law § 14-101 to -107.

of the product rather than the brand name. It also helps reduce any incentive among sellers to use excessive packaging as a means of making quantity appear larger than it is.

Unit pricing also benefits retailers by promoting sales and private label products, and reducing pricing errors. With a uniform unit pricing system, consumers can also compare prices of the same product between stores. This will benefit businesses by providing a way to showcase that they have the lowest prices and best value. Unit pricing is consistent with the premise of the federal Fair Packaging and Labeling Act, that informed consumers are a crucial component of the market.⁶ Unit pricing enables consumers to make a more educated purchase decision and promotes healthy competition among businesses.

Creating a uniform system for unit pricing eliminates inconsistencies that arise through voluntary use. Many stores voluntarily provide unit pricing, but this is done in an inconsistent manner, including using different units of measurement for similar products, or selectively providing unit pricing, for only certain brands in a product category. This can mislead consumers when they compare products, or compare prices between stores. Instituting a uniform unit pricing system will eliminate this confusion by mandating consistent and accurate labels for all products and stores.

Legislative provisions prohibiting unfair business practices

The amendment also proposes additions of specific language to the D.C. CPPA to harmonize it with consumer statutes in the federal system and in other states. For example, the amendment clarifies the definition of “consumer” when used as an adjective and brings it in line with the definition under the Magnuson-Moss Warranty Act.⁷ Additionally, there are several proposed additions to section 3904 that are designed to provide improved protections for consumers:

- 3904(f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead

Proposed new section 3904(f-1) borrows language from the Kansas Consumer Protection Act and is similar to language found in the Hawaii Uniform Deceptive Trade Practices Act. This prevents businesses from mischaracterizing their goods or services and preying on consumers who are expecting to receive something different. Kansas courts clarify that the intent needed is the intent to engage in the act, not the intent to violate the statute.⁸

- 3904(r)(6) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law

⁶ 15 U.S.C. § 1451 (2006).

⁷ 15 U.S.C. § 2301(1) (2006).

⁸ *York v. InTrust Bank, N.A.*, 962 P.2d 405, 421 (Kan. 1998).

Proposed new section 3904(r)(6) adds an additional factor for courts to consider in determining whether a term or provision is unconscionable. This language is similar to language found in the consumer protection statutes of Alaska, California, Tennessee, Texas, and Guam. The proposed addition strengthens consumers' ability to receive the benefit of the bargain, and disincentivizes merchants from attempting to trick consumers into believing they are going to receive something different than what is actually being provided. It also prevents merchants from including terms that cannot come into effect because they are prohibited by law. This subsection allows courts to evaluate transactions to determine whether the merchant represented that the deal contained terms that will not take effect.

- 3904(ii) Engage in any unfair business act or practice, which occurs when the practice: (1) Offends established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and the practice is not outweighed by countervailing benefits to consumers; or (2) Threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Proposed new section 3904(ii) seeks to prohibit merchants from engaging in unfair acts or practices, which are defined as occurring in two circumstances. Paragraph (1) prohibits acts that offend established public policy, or are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. This language originates with an FTC rule prohibiting certain advertisements that neither violate laws nor are deceptive but nonetheless are unfair.⁹ The language has been adopted by courts in analyzing consumer statutes in Hawaii,¹⁰ Louisiana,¹¹ Massachusetts,¹² and North Carolina¹³ as a way to define an unfair trade practices. Oklahoma uses the phrase to statutorily define an unfair trade practice.¹⁴ The proposed bill also contains a provision that these prohibited practices must not be outweighed by countervailing benefits to consumers. This produces a balancing effect in which only those practices that have an ultimate negative impact on consumers are prohibited.¹⁵

Paragraph (2) prohibits unfair competition amongst merchants, in light of the negative impact anticompetitive conduct has on consumers. The prohibition applies not only to antitrust violations, but also to practices that otherwise significantly harm or threaten to harm competition. These practices harm consumers by undermining competitive markets. This language originated in California case law that interpreted the state's Unfair Competition Law.¹⁶

⁹ 29 Fed. Reg. 8324, 8355 (July 2, 1964); see *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (U.S. 1972).

¹⁰ *Balthazar v. Verizon Haw., Inc.*, 123 P.3d 194, 202 (Haw. 2005).

¹¹ *Monroe Med. Clinic, Inc. v. Hosp. Corp. of Am.*, 622 So.2d 760, 781 (La. Ct. App. 1993).

¹² *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 532 N.E.2d 660, 664 (Mass. 1989).

¹³ *John v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980).

¹⁴ Okla. Stat. tit. 15, § 752(14).

¹⁵ *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 779 (Ct. App. 2006).

¹⁶ *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).

Conclusion

The Antitrust and Consumer Law Section of the District of Columbia Bar encourages the passing of this bill *in toto*.