COMMENTS OF THE COMMITTEE ON CONSUMER AFFAIRS OF DIVISION 2, ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS, DISTRICT OF COLUMBIA BAR, ON PROPOSED CHANGES IN THE DISTRICT OF COLUMBIA UNFAIR AND DECEPTIVE INSURANCE PRACTICES ACT

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The views expressed herein represent only those of Division 2, Antitrust, Trade Regulation and Consumer Affairs of the D.C. Bar and not those of the D.C. Bar or of the Board of Governors.

In the enclosed comments, the Consumer Affairs Committee of the Antitrust, Trade Regulation, and Consumer Protection Division, proposes changes in the District of Columbia Unfair and Deceptive Insurance Practices Act, a bill that is currently under preparation by the District of Columbia Law Revision Committee. The Consumer Affairs Committee recommends that the D.C. Department of Consumer & Regulatory Affiars be given authority to promulgate rules for the insurance business, that the bill permit federal regulation of insurance in D.C., that private remedies be included, and that the department be given more discretion to impose monetary penalties and consumer redress.

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Mr. James. C. McKay, Jr.
Director, District of Columbia
Law Revision Commission
1341 G Street, NW, Suite 510
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ATTN: Bruce Brennan, Esq.

Dear Mr. McKay:

The Consumer Affairs Committee of Division 2 of the District of Columbia Bar would like to take this opportunity to submit these comments on the proposed Unfair and Deceptive Insurance Practices Act (our copy is dated July 11, 1983) ("proposed act"). We appreciate the special consideration extended by Bruce Brennan, Esq., of your staff, allowing us to submit these comments after the August 26, 1983, deadline, since our committee does not meet in August.

McCarran-Ferguson Act. Section 101 of the proposed act makes specific reference to the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq. This reference is undesirable because it might be interpreted to deny District of Columbia consumers the protections of future federal regulation in the insurance area. Instead, it would be preferable to include in Section 101 language declaring the intention of the Council to be that District of Columbia consumers should receive the benefit of all federal regulations in the insurance area.

Rulemaking. The rulemaking authority granted the Director of the Department of Consumer and Regulatory Affairs under Section 306(a) of the proposed act is inadequate, because it prohibits rulemaking to define and prohibit unfair or deceptive acts or practices in addition to those covered by Sections 202 to 213. Traditionally, legislation creating administrative agencies charged with supervising business conduct has included provisions enabling the agency to define, through rulemaking, practices to be prohibited under a broad legislative proscription. This has been done for very practical reasons:

(1) The variety of unfair or deceptive practices possible in an area is often limited only by the imaginations of very imaginative people, making it virtually impossible to anticipate and define every possible type of unfair or deceptive practice. In addition, competitive factors, commercial circumstances, consumer needs, and other elements will undoubtedly develop and change in ways not now imagined -- witness the change in financial services markets in just the past two years. The Director must have broad power to deal with these and to take them into account.

(2) The legislative process is much slower than the administrative rulemaking process in responding to the development of unanticipated consumer problems. Indeed, the initiation of rulemaking proceedings will often stimulate industry self-regulatory activities that obviate the need for the rule, and leave the agency free to pursue the few industry members who refuse to cooperate.

(3) It is an unwise use of the legislature's limited time to try to deal with such problems through special legislation, especially when the administrative agency can handle the job. Legislative oversight is always available to the legislature that wishes to review the agency's actions, which can always be overruled by legislation.

The efficiency and effectiveness of administrative rulemaking under broad statutory guidelines is such that it has become the dominant method used by Congress to exercise its power to regulate business. Tine and again in economic regulation over the past few decades, Congress has elected to send an agency out to identify and solve problems under a

broad legislative mandate, the detail and minutiae to be worked out through notice-and-comment rulemaking. 1/

Earlier statutes did not so plainly contemplate legislative rulemaking, yet the courts have found congressional intent for agency law-making in broad legislative prohibitions combined with general power to make rules and regulations 2/ Thus the courts, as well as Congress, have made plain their judgment that broad agency rulemaking authority is essential for effective operation of important regulatory systems.

1/ Recent and familiar examples include the National Highway Traffic Safety Administration's powers under the Federal Traffic and Motor Vehicle Safety Act of 1966; see 15 U.S.C. §§1391(1) and (2) and 1392. Federal safety regulation of federally-funded highways has taken the same form, with highway safety design standard rulemaking authority in the Federal Highway Administration; see 23 U.S.C. §109(a). For typical examples of safety rules promulgated under these authorities, see 23 C.F.R. 265.

Two other agencies with similar rulemaking authority are the Occupational Safety and Health Administration and the Consumer Product Safety Commission. See 29 U.S.C. §§ 654-55 and 15 U.S.C. §§ 2056 and 2058, respectively.

2/ This is the case for both the Federal Trade Commission and the Food and Drug Administration. See National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974), construing 15 U.S.C. §§ 45(a)(1) and 46(g); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir.), cert. denied, 423 U.S. 827 (1975), construing 21 U.S.C. §371.

The FTC operates under a single broad proscription of unfair methods of competition and unfair or deceptive acts or practices, as contemplated in part under our recommendations for the proposed act here. The FDA operates under a series of extensive (but not exhaustive) specific proscriptions, see 21 U.S.C. §§331, 342, 343, 348, 351, 352, 361, and 362, not unlike the definitions of prohibited practices set out in Sections 202-213 of the proposed act. The decisions of the Second and D.C. Circuits, noted in the previous paragraph, would thus strongly support the wisdom of the approach set out in this letter.

Accordingly, we recommend that the proposed act follow the pattern established by these many examples. Section 201 should be changed to expressly prohibit all unfair methods of competition and unfair or deceptive practices in the business of insurance, making it clear that the listed prohibited practices is not exclusive, and Section 306(a) should be changed to give the Director explicit authority to make rules further defining and prohibiting unfair methods of competition and unfair or deceptive acts or practices. Section 201 should set out the broad legislative standard which the Director is to follow by prohibiting all unfair methods of competition and all unfair or deceptive acts or practices in the business of insurance. Those terms -- unfair methods and unfair or deceptive acts or practices -- would would be defined as the listed practices as well as all matters determined to be such either by the Director under Section 306(a) or by a court making determinations on a full record after appropriate proceedings.

Scope of protection. Whether or not formal rulemaking authority is added, the duty of all agent, broker and company licensees not to engage in unfair or deceptive acts or practices should be expressed clearly. Even if the changes suggested above are incorporated into the proposed act, it still may be interpreted to preclude (through the operation of McCarran-Ferguson) all Federal Trade Commission regulation of insurance practices in the District of Columbia. Accordingly, irrespective of the final decision on rulemaking powers, Section 201 of the proposed act should be changed to match the scope of the protection it might remove: Section 201 of the proposed act, like Section 5 of the FTC Act (5 U.S.C. § 45(a)), should prohibit all unfair methods of competition and all unfair or deceptive acts or practices and make it clear that the list of practices prohibited in Sections 202 through 213 is not exclusive.

Concomitant with this change, the Director should be required to provide notice to all licensees, at least through the *D.C. Register*, and possibly through first class mail notice, of all determinations made under Section 302. (A new subsection 303(e) or Section 309 (renumbering the present 309 as 310)would be among the appropriate places to put such a provision. The effect of such notice would be to advise all licensees of the scope of the act, so that they could undertake voluntary compliance, and at the same time strengthening the position of the Director and consumers against those few licensees who may choose recalcitrance over compliance.

Private remedies. The proposed act makes no provision for private remedies for violations, giving consumers the right to go to court on their own to enforce the law. Consumer protection legislation has often included private rights of action, and the District Council has given District of Columbia consumers the benefit of such provisions. E. g., D.C. Code §§ 28-3905(k)(1) (Consumer Protection Procedures Act), 28-3813 (consumer protections in Chapter 38 of Title 28 of D.C. Code), and 28-3304 (action to recover usury paid).

There are many advantages to private remedies. Private remedies provide consumer protection at no expense to the government. The existence of private remedies tends to make the merchant more responsive to the efforts of government agencies and others to arrange a voluntary settlement of the dispute satisfactory to both parties. Often attorney's fees [see §§28-3813(e) & 3905(k)(1)(B)], punitive damages [see §§28-3813(a) & 3905(k)(1)(C)], treble damages [see §28-3905(k)(1)(A)] or special damages [see §§28-3813(a) & (d)(1)] are permitted in the Court's discretion, serving as additional enforcement mechanisms, for without those remedies the merchant who pays only compensatory damages is no worse off than if he dealt honestly and fairly in the first instance. The absence of those remedies would encourage the unscrupulous merchant to refuse to correct the wrong, and to gain the undue benefit from every consumer who gave up the fight.

With this change, Section 201 should also encompass within its recognition of unfair or deceptive trade practices those found by a court to be violations of the act. As with Director determinations of violations, court determinations should be a guide to the industry of what is and is not permitted under the act. The Director should regularly provide all licensees with notice of judicial decisions to assure the broadest possible voluntary compliance.

Public remedies. Section 303 of the proposed act permits the Director to impose a monetary penalty and issue a cease and desist order. These are good provisions, but should be augmented.

First, we question the wisdom of a rigid maximum fine where the profit from a violation may be many times greater than the statutory amounts. We suggest that the Director be given the discretion to impose fines up to the amounts given, or up to three times the revenue received in transactions affected by the violation, whichever is greater.

Second, the Director's implicit power to impose conditions on license suspension or revocation orders should expressly include the power to require full restitution to all consumers injured in connection with a violation. Moreover, it is possible that a licensee -- for example, an insurance agent -- might commit the violation but be bankrupt, while another person -- for example, an unlicensed out-of-state insurer -- profited from the violation and was solvent. To deal with that situation, the Director should have the express power to require restitution form anyone who benefits from a violation.

Particularly in statutes such as this, designed to protect the consuming public, remedies should focus on correcting real, experienced wrongs, as well as preventing their recurrence or the doing of new wrongs. Restitution is the efficient and fair way to achieve that basic goal.

Yours truly,

David A. Koplow
Chairman
Consumer Affairs Committee
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