New York Insurance Association

MEMORANDUM IN OPPOSITION

S795 (Comrie) A7138 (Weinstein)

AN ACT to amend the general business law, in relation to enacting the "Consumer and Small business Protection Act"

The New York Insurance Association (NYIA), the state trade association that has represented the property and casualty insurance industry in New York for more than 140 years, is **STRONGLY OPPOSED** to the above-captioned legislation.

This bill would specifically amend section 349 of the general business law, to recharacterize and make unlawful, certain "Prohibited Acts and Practices", in the conduct of any business, trade or commerce. In so doing, it uses extremely vague and amorphous definitions, to define such acts and practices, as follows:

- "Unfair" when it causes, or is likely to cause, substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by countervailing benefits;

- "Deceptive" when it misleads, or is likely to mislead, a person, and the person's interpretation is reasonable under the circumstances; and

- "Abusive" when it materially interferes with the ability of a person to understand a term or condition of a product or service, or takes unreasonable advantage of a person's lack of understanding of the material risks, costs, or conditions of the product or service, a person's inability to protect his or her interests in selecting or using a product or service, or a person's reasonable reliance on a person covered by the General Business Law or to act in his or her interests.

These definitions, in addition to being extremely vague and amorphous, are all defined through the perceptions of the consumer, rather than through an unbiased perspective of an unbiased, neutral party.

Under this bill, whenever the attorney general, and her 1000 attorney department of law, shall believe that any person, firm, corporation or association or agent or employee thereof, has engaged in or is about to engage in any such now unlawful practice, she may bring an action in the name of the state to enjoin such unlawful acts or practices and to obtain restitution. Such actions may be brought regardless of whether or not the underlying violation is directed at individuals or businesses, is consumer-oriented, or involves the offering of goods, services, or property for personal, family or household purposes.

Worse still, this bill also empowers a virtually limitless private right of action, not just by the Attorney General, but by any consumer feeling they have been injured, or any consumer group on behalf of consumers, regardless of whether such group has actually sustained any injury itself (i.e. removing the traditional requirement of privity).

As a result, this bill would lead to an explosion of litigation in New York, as the provisions that would trigger the bill's protections are enormously too vague and amorphous. Such would thereby actually result in significant harm to consumers, by means of having a serious chilling effect on nearly all commerce in our state.

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By conflating these new unreasonable definitions, with the past clear standard of unlawfulness, this bill actually undermines and minimizes what actually is an unfair, deceptive or abusive trade or practice, replacing it instead with an undeterminable, unknowable standard, anchored solely within the mind of the consumer, and that can only be seen through the eyes of a litigant and their trial lawyer.

In a state as unique and diverse as New York, this vagueness alone carries the potential for a massive increase in litigation. This is especially true when superimposed upon the contractual doctrine of unconscionability which would already provide a contractual redress for the traditional concept of unfairness. To now superimpose the serious additional penalties that this bill would provide, would simply be both "unfair" and would implant an enormous disincentive to do business in New York.

This bill establishes standards that are now light years from any other federal, state, or local laws, or regulations, and totally ignores whether the targeted acts or practices are within the commonly accepted business practices of the community. This would essentially allow the psychological idiosyncrasies of individual consumers to control the atmosphere of commerce in New York, and thereby invite chaos into business practices, for the sole purpose of overly expanding the abilities of trial lawyers to bring meritless lawsuits.

Currently, section 349 of the general business law already grants individuals a private right action, and the right to recover their actual damages, and statutory damages in the amount of fifty dollars, or at the discretion of the court, damages up to $1,000, if the court determines there were aggravating factors in the defendant's practices. Additionally, under any action brought under section 349, the court, in its discretion, may also currently grant the plaintiff reasonable attorney's fees.

This means that the current law, unlike this proposed bill, focuses on an individual consumer's complaint, when considering their actual damages. This bill, however, would expand and incentivize unnecessary litigation, by dramatically increasing the statutory damages from $50.00 to $100.00, and by granting mandatory attorney's fees to the plaintiff.

In combination, the vague and subjective standards of this bill, coupled with the significant increase in statutory damages and mandatory attorney's fees, this bill would have the unwanted effect of flooding the courts with unnecessary, meritless, frivolous litigation, that would have a chilling effect on business in New York.

It is lastly important to note, that this bill, mischaracterized in its title as the Small Business Protection Act, is understandably opposed by nearly every small business entity in the state, and would actually bring havoc and harm to small business and the commerce they seek to engage in.

For all the foregoing reasons, **NYIA STRONGLY URGES the Legislature to NOT enact this measure.**