CONSUMER PROTECTION

COMMERCE COMMITTEE

PUBLIC HEARING: SB 188, CSSB 352 AMENDED, HB 411, HB 444, HB 446

FEBRUARY 25, 1970

The following is an excerpt from this hearing, testimony from Mr. Randolph Aires, of Sear, Roebuck, and Co.

MR. AIRES: We do believe that the honest and legitimate merchants in your communities have a lot to gain from good and reasonable consumer legislation, and thus we do support and will continue to support good, reasonable consumer protection legislation. So, we are not fighting the consumer protections, persay. And you know, we are all consumers, I'm still young enough to remember painfully, an experiance I had as a young, newly married person, before I went to law school by the way, and a door-to-door salesman came around and very glibbly with a lot of pressure, sold us something I later didn't want. The next morning I got up and I really regretted having signed that contract and I wish at that time for example we would have had this door-to-door solicitation bill that you have before you. That's a separate matter, I'm not talking on that bill now, but I might that as an example what I think is good legislation. It would protect a lot of young married people who find themselves in that position with door-to-door salesman coming around. So, we're all consumers, and I think this is great and we should support good legislation and just another example, your door-to-door solicitation law is just one of twenty major parts of consumer protection features in the Uniform Consumer Critic Code which is before your Legislature at the present time. I understand it is not going anywhere this session, but we hope that there will be a study committee after the session is over and we get into this bill because we feel it is a good bill, it makes sense, we support it, and we hope it will really be studied seriously. Now let's get down to these three consumer protection acts, these are dealing with deceptive trade practices.

Deceptive trade practices, we're not getting into things like Federal Truth and Lending and so forth. And there are twelve enumerated deceptive trade practices in SB 352, the other two bills add a couple, and we don't agree with several of them. But the twelve that we ha ve in SB 352, we feel are practices that should be rightly attacked, with proper legislation. You'll note, the federal level, the FTC, is doing a pretty adequate job, considering. We believe that a customer who feels he's been defrauded and who cannot obtain satisfaction through the normal complaint procedure is entitled to a remedy. President Nixon's special assistant for consumer affairs, Mrs. Virginia Knauer who is receiving all sorts of publicity, has pointed out that the remedy in her words, should be, "Convenient, expeditous, and effective". Convenient, expeditous, and effective...and we submit that the consumer class action provision contained in SB 352 as amended, and HB 446, the Governor's bill, would not provide that type of remedy to the consumer. We think that indiscriminate class action legislation like this will create more evils than it will remedy. Class actions do not result in speedy and efficient determinations of claims, ask any lawyer who has ever been involved with one, he'll tell you. On the contrary, notice requirements on pre-trial procedures, required when there are numerous litigants, protracted trials, difficult damages determinations, and a heavy burden of management which is placed on the court system, all lead to excessively long and complex proceedings before benefiting and they really only benefit the lawyers when you come right down to it. These things go on for years...three, four, five years and the ones that have come up in the traditional class action arena. Up to now, the courts all over the country are reluctant to permit the traditional class actions and these come under the existing restrictive rules of civil procedure and the court rules which we have in all the states. And these allow class actions, and they are restrictive because these actions

are likely to benefit practically nobody other than the lawyers who bring them, and they create lawsuits without merit where none would have previously existed.

MR. SWEET: Mr. Chairman, he has used the word class action a couple of times could we have that defined before we go on?

MR. BRONSON: We'll pause for a moment, I think it would be a good idea, would you define class action?

MR. AIRES: Class action as I was using it, they have traditionally grown not by statute, but through our rules of civil proceedure in our court action, and it's been largely handled by the courts, by the judges making decisions by case law what the various restrictions will be in bringing a class action and the basic idea is one person can sue on behalf of a whole class of people in a somewhat similar situation. And here's where the rub comes, traditionally, the courts have been very restrictive in saying, how do you fit in this class? In other words, you must be in an almost identical position as your brethren over there in a similar situation. So that is you're, for an example, subject to one of these deceptive trade practices which are listed here, your treatment by this defendant, this given store let's say, must have been given under the same circumstances, the same type of refridgerator was sold for example, in the same store etc. etc.. I can give you an example of how some states approach this, normally the courts use very vague, broad legal terminolgy on these restrictions, just to quote you some of the traditional approaches, and then they get down to specific cases, but here is one example, they list four requirements. The class is so numerous that it is impracticable to bring all members of the class before the court, this is one condition that must exist. Well, that's not too hard to meet because you can say there are many people involved, what's many? Maybe fifteen, twenty people. Number two, another restriction would be, that the questions of law in fact come

into the class are substantially similiar and predominate over the questions effecting the individual members. There are cases upon cases on what this means, what are common questions of law in fact? And you just go on a case by case method but generally speaking, the courts have been very restrictive. They want to really be sure that Mr. A here and Mr. B really fall in the same type situations. The third requirement under this typical line of cases, would be that the claims or defenses of the representative plaintiffs are typical, another one of these broad, legal terms, are typical of the claims or defenses of th e class and fourth, the representative plaintiffs will fairly and adequately protect th e interests of the class. This is one of the chief concerns of the court, they feel somebody is going to start a lawsuit of behalf of everybody else, namely the world maybe, that by golly, they ought to be adequately representing all these other people out there, because what if he just decides in the middle of the lawsuit, "Well, I don't think we have a good case, we'll just drop it now," maybe somebody over there does have a good valid claim and he's left out hanging. The courts are very concerned with that factor, that they don't want to allow this class to get so big that somebody will be left out in the cold because the guy who brought the suit just didn't do a good job in promoting the lawsuit, and really getting adequate representation. It's a nebulous thing, what's a class action? You have a class against one defendant or in some cases if you can get defendants who are interlocked in some way maybe two companies that have interlocking boards of directors or something you could bring two defendants together, but the class is the group of plaintiffs, in other words. Traditionally, as I say, this is not by the statutes which we are now getting into, it's by the rules of civil proceedure that have been developed by the courts over the years.

MR. ORBECK: Take the pipeline for instance, it's going through quite a bit of Alaska, could people all along that pipeline, if one person

decides that this pipeline ruins his view or does damage to his property because this unsightly pipeline goes by, could VISTA or somebody file a suit for everybody along that pipeline?

MR. AIRES: I think under the traditional class action provisions we have they would have difficulty in joining together. I think for example that the clerk would say, "Well, your property is quite different from your neighbor's property, it may go through at a different angle, there's a different circumstance, you've got a mountain and he doesn't have a mountain there, lots of different things are involved." So I think in this example for example, you wouldn't have a very successful class action. I think the court would say, no...we're not going to allow that; now, that is under the traditional approach. When we get under these consumer class actions, it's a whole other ball game, and that's what I'm going to get into here. All of a sudden by statute we just say if everybody's similiarly situated, whatever that means, go at it boys! You're all together in one big class, that's what it amounts to, it's an entirely new ball game. This is a new animal which has appeared on the scene, this is a so called consumer class action. It's not just a regular class action, it' a consumer class action. It first came on the scene last year in the federal Congress with people such as Senator Tidings championing it and now this year we are seeing it at the state legislature level for the first time. We've had bills similiar to this in the past, dea ling with deceptive trade practices and they have been passed in some states. This is the first time we have had this consumer class actio" bill stuck into it; and it's not just in Alaska, it's all over. To my knowledge no state legislature has passed it yet, this year but it is difficult to keep up with this from day to day I cover nine states and it is certainly not in any of ours. But it's being

considered. One of the dangers as we see them, with the consumer class actions, this statutory creature that you are considering here, well, it's relatively simple for an enterprising lawyer, and there are many of them, to marshall an expansive list of plantiffs, through the class action notice provision you can develop hundreds of thousands of unknown clients just like that, you get your brother-in-law, o.k., you're going to bring a class action, now we're going to sue for everybody. Get the phone book out. You could check and make sure that they were customers at that store though, I think that would be a good precaution. The potential high legal fees, and this is my real concern , the potential high legal fees will cause many lawyers to bring unwerranted class actions relating to technical violations of law and against in many cases, innocent businessmen. The class actions could be brought against businessmen who would be willing to resolve on an informal basis a valid claim with a consumer. Maybe one guy would have a valid claim, and maybe it's ten dollars or twenty dollars, it could all be taken care of, the businessman would be glad to take care of this situation, but if he is faced with a situation where this one guy who has a valid claim and nine-hundred and ninety-nine who don't they were just brought in as a class without any merit, and he is dealing with a lawyer who is covering the whole class he is not going to be in the position to ever settle, or even attempt to settle with the one guy who has the valid claim, it just doesn't work. So, this is another aspect of it, when you add to that, to the fact that in your bills before you and I think we covered this in your question a while ago, that each of these so called injured persons recover at least two hundred dollars that's the floor. That's for certain on the individual actions, as I mentioned this question of interpretation as to whether that would apply in the class action part of this, but I think that would have to be cleared up, course we are against that whole feature anyway.

Even though for example, some guy may only have actual damages of say, two dollars, some very trivial thing and there are many very trivial things that come up. in our field, as you can understand. And yet this person would have two hundred dollars just like that. It doesn't take much of an imagination to see the potential for a severe harrassment in our judgement against the legitimate retailer under these conditions, you're talking about lawsuits in one millions of dollars particularly in the larger states, if you get into something like this, where they could be taken care of in a very sensible way. In class actions it's the lawyer that becomes less counsel and more the participating litigant and the real party in interest because the financial interest of the attorney as you can see, for the class may be for more substantial than the interest of any member of the class. We feel class actions could impose grave economic consequences for the defendant. A class action even if completely unwarranted necessitates substantial time and expense in the preparation of the defense, take a company like ours, we could be put to an awful lot of expense in defending one of these types of suits, whether it was warranted or not. This type of harrassment could drive some completely honest small businessman right out of business, it really could. The cost of doing business on these conditions would make it awfully difficult for any business, large or small, to keep from increasing prices of its' goods or services. It would be an added factor in the cost of doing business. Also the astute lawyer will obviously search for defendants who can be subjected to large damage recoveries rather than the judgement proof fly-by-night operator who preys upon the unsophisticated. And that, in my estimation is the tradegy of this whole approach, it's a misguided concept of this consumer class action. It's supposed to hit the guy who is abusing the consumer but he's the fly-by-night operator that the plaintiffs lawyer isn't even going to try to attack

because he knows his judgement if he'll attach the legitimate large operator for some trivial matter. There's been, in our judgement, no demonstrative need for donsumer class actions, especiaaly here in Alaska, as distinquished from your other forms of remedies presently available. And before dropping into this type of legislation we feel that at lease some experimentation in pilot programs involving other methods could be pursued. You have the small claims court here in Alaska and you can sue up to $500 in damages. The individual can go into the court without the expense and need of an attorney. One of the arguments the proponnents have always given us, well, the poor little guy...he can't go to an attorney because the attorney will say to him, well I can't take your case it's not worth it, but he can go to small claims court by himself and if he has anything on the ball he can say his case to the judge, the judges are very understanding in the small claims courts, so you have that remedy available right now. Also in this bill, CSSB 352, Section 45.50.511, which gives the Attorney General his basic powers, it provides that the court may make any order or judgement necessary to restore to the individual money or property acquired because of the deceptive trade practices. In other words, the provision is right there, for the court to take care of the individual by giving him whatever damages he is out. Now the Federal Trade Commission in the Attorney General's office should be available to the consumer who has been defrauded and there is increased emphasis being placed in this direction. The State of Washington for example, they have a consumer protection division in the Attorney General's office where they have three or four attorneys who are actively engaged only in consumer protection affairs and I know they are quite active and they do a good job, I've seen them work. We approve of this kind of strict enforcement, I think this is the proper place, the Attorney General should be serving the public interest in helping the consumer.

That's why we have no objection to the Attorney General having adequate funds and doing a proper job in this area. The whole point of this is this, we feel that much more study must be made of this whole area of how to give the consumer a fast and judicious remedy to take of his small greivances and we feel that it would be quite unwise to jump into this area right now it has just come on to the scene and from what I have indicated consumer class action is just not the fast, judicious way to go. It would hurt the consumer, it really would. We respectfully submit that if the Alaska State Legislature is prepared and determined to deal with this complex subject at this time and you are going to go ahead anyway, we feel that the best approach then would be to at least follow the Nixon Administration approach at the federal level, and that approach at the state level would be this; your Attorney General and his staff would effectively prosecute the violators of these deceptive trade practices. If he is successful then, give the individual his right, his private right under this kind of a condition. That way you at least get rid of the harrassment aspect. You won't have the plaintiffs lawyer just bringing a class actions without any merit at all. At least then you know if the Attorney General went through a case and he successfully prosecuted this guy, there it is laid right out for the individual he can go in and practically use that case and he has a legitimate reason to be there fighting the defendant. We would be willing to go along that as a compromise provision, however as I say, I don't think it is even needed, particularly here in Alaska. We have given you a suggested amendment to this effect and Dean has of course alluded to this, if this is the way you have to go in this area we feel this is a compromised version at least which we could live with. That is not our suggestion, it is just a last ditch alternative. If the Legislature felt that this was really the way to go we feel we could live with it. The

approach we submit would prevent the harrassment and at the same time the consumer would take care of his valid greivances. This is my whole emphasis with this class action thing I have six things ready to talk about but that's the big one and the rest I'll be very short about. The second thing which Dean gave to you as this matter of the proposed amendment which deals with the rule making powers of the Attorney General under a law such as this CSSB 352. Our concern in this area is that we don't feel the merchants should be subject to separate and possibly conflicting interpretations and rulings on what constitutes deceptive trade practices in any related matters. The deceptive trade practives listed in your bills, particularly CSSB 352 are keyed into the Federal Trade Commission Act dealing with deceptive trade practices. We propose that it should be made clear that it is the intent of the Alaska Legislature, if you're going with this type of legislation that the construction of your act will depend in good part upon the interpretations of the FTC and federal courts who have operated in this area for many years. Further we think it should be an absolute defense to an action brought under this act, if it can be shown conclusively that the conduct complained of was authorized by the FTC or any rules, regulations or decisions interpretating the FTC Act, this is only fair. In other words, we don't want to be subjected to going with entirely different rule making decisions on the very same area of law. There might be the very same deceptive trade practice involved and yet the Attorney General in state A will come up with an entirely different rule or interpretation of what this law is about, as opposed to the FTC and how could a businessman operate with this kind of dual regulation? So that is our concern. Four other little ones; to start with you have these twelve enumerated deceptive trade practices in CSSB 352, seven of those defined deceptive trade practices have a requirement for intent or knowledge on the part of the person or

company peretrating the practice. Just seven of the twelve, the other five don't for some reason. It's difficult to know this distinction is made, we feel that all twelve defined practices should have this knowledge or intent requirement. What if somebody innocently does something? We feel that in any good legal case you always have to show what we call the scienter, in legal terms, the intent that the guy really intented to do this. That he had a knowledge of what he was doing, I feel that is important in all twelve and it is only in seven of the twelve. Some of those definitions by the way, are so open in interpretation that you really have to have a requirement like this, to show some intent. We would suggest as another possible amendment if your legislature goes for this type of legislation, we suggest that the exception provided in Section 45.50.491 paragraph 2 of CSSB 352 as amended, should be extended to any person who merely uses some advertising matter supplied to him by his supplier That exception goes just to the newspaper, radio and television people, we feel it should apply to anyone else in the same situation. If material is supplied to him and he had nothing to do with it he should be treated the same way, it looks like it's just kind of a vested interest thing for the communications people. We feel it should be any person instead of the communication people, also as Dean has already mentioned, we feel that in fairness in this type of law there should be some statutory limitations and there are different ways you can go into this, you could say you could have a certain given time after the perpetration of the deceptive trade practices, or you can say give a certain time after the discovery of it. We feel in fairness to the consumer it should be after the discovery, in other words, what if that consumer doesn't know what happened to him until after a year and a half later. He should have should have some time and after he discovers what happened, to sue. Our suggesttion is one year after the discovery, we feel that is

plenty of time for a consumer to act. After one year his records get stale and it can become very difficult for a defendant to have to answer and get involved with a lawsuit of that nature. We feel that is a lot fairer than just the one year after it happened. We would suggest that as an amendment, one year statue of limitation after the discovery. And the last thing I would like to respectively submit as an amendment would be this liability for actions for employees under Section 45.50.550 of the CSSB 352. This is very broad, I can see the intent, this was an amendment by the way, that was slipped in at the last minute in the Senate side, it wasn't in the original bill, somebody put it in at the very end. It's on the liability for actions of employees, what I am suggesting is that we add a clause like this: after the word deceptive trade practices, in the course of; in the scope of employment with said person. The way this reads now your employee could go out and on his own in a moonlighting situation for example, or in his own business if he wanted, and maybe do something along this line the way this reads, the employer would be subject to liability. Maybe when he wasn't working for his employer or maybe he did something without the authority of his employer, he was doing something completely outside the scope of his duties for his employer intentionally wanting to screw up the operation. We feel if you put in this: in the course of; in the scope of employment, which is good law, then it would cover the situation. Corporations should be responsible for what their employees do but in the course of; in the scope of their employment, that's the point. WEll, I think I've said enough, maybe too much but this is a general summary we think with these six amendments particularly the two major ones which we have given to you we could support CSSB 352, with some modifications we could support HB 444 we think that probably the original version is the best of the three in our judgement. HB 446, the Governor's bill, would

have to be drastically changed before we could support it. And you are considering two other bills tonight and I would just like to throw that in that we are in favor of HB 411 and SB 188, one sets up the consumer protection division in the Governor's office and again we are in favor of supporting the consumer and helping him out. This door-to-door solicitation bill I think is a good piece of legislation, we are not fighting good consumer legislation, that's our story. But we think it should be reasonable and that it should not harrass the reasonable businessman.

February 3, 1970

The Honorable Lester Bronson
Chairman, House Commerce Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Bronson:

It has come to the attention of this office that several clerical errors appear in HB 446, the governor's bill relating to consumer protection. These errors should be corrected to avoid confusion in reading the bill.

Page 1, line 21; "of" should be "or"

In several places throughout the bill section 10 and section 30 appear and have no apparent cross reference in the bill. These section numbers were used in an earlier draft of the proposal and were inadvertently retained in a number of places. Section 10 corresponds to section 470 in the bill and section 30 refers to the present section 500. Thus on

Page 3, line 11; "sec. 10" should be "sec. 470"
Page 4, line 5; "sec. 30" should be "sec. 500"
Page 4, line 10; "sec. 10" should be "sec. 470"
Page 5, line 9; "sec. 10" should be "sec. 470"
Page 6, line 3; "sec. 30" should be "sec. 500"
Page 6, line 5; "sec. 10" should be "sec. 470"
Page 7 line 8; "sec. 10" should be "sec. 470"

Please accept the apologies of this office for this oversight. It is hoped that its correction will not cause undue inconvenience.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 9, 1970

The Honorable Tom Fink, Chairman
Subcommittee on Consumer Fraud
House Commerce Committee
Sixth State Legislature
Juneau, Alaska 99801

Dear Representative Fink:

This is in response to your request for a comparison of HB 444, the proposed consumer fraud bill of the Legislative Council, and HB 446, the Governor's bill on the same subject.

For your information, also included in the analysis is SB 352, the only other comprehensive consumer fraud bill now pending before the legislature, and which was introduced by Senator Terry Miller.

For convenience, the bills have been broken down into several particular areas so that the parallel features of the bills may be scrutinized separately.

I. Prohibited Acts.

(HB 446, pages 1 and 2 to line 22, page 6, lines 7-26)
(HB 444, pages 1, 2 and 3 to line 19)
(SB 352, pages 1 and 2 to line 28)

All of the bills in question are quite similar in their coverage of consumer fraud down to the ninth and tenth subsections, though there are a few minor changes. Subsection (1) of HB 446 contains language which was felt to be more specific than the term "pass off" used in the other bills, though all the subsections (1) contain language which specifically outlaws the age-old fraud of passing off consumer goods. Subsection (3) of the Governor's bill is essentially a combination of subsections (2) and (3) of the other two bills. [Note: The "of" in line 21 is a typographical error and should have been "or". This subsection must be amended accordingly in order to make sense.] Subsections 2, 4, 5, 6, 7, 8,

9 and 10 of HB 446 are all included in HB 444 and SB 352. The latter two bills contain a subsection (11) which is not included in the Governor's bill. This section sets out a specific fraud which, though not covered specifically in HB 446 would be actionable under its subsections (11) and (12).

Subsections (11) and (12) of HB 446 are not included in either of the other bills nor are there similar provisions in the other proposals. Subsection (11) requires that one be damaged by the fraud but does not require intent while subsection (12) states that the deception would be actionable "whether or not" damage has occurred but requires intent. Combined with the power to make regulations (see below) these sections are potentially very valuable and would enable the enforcement official (the Attorney General in all bills) to reach all forms of practice which are unfair or deceptive consumers. As such, it is felt these subsections provide more complete and comprehensive protection to the public against all of the various trade practices which unfairly injure or are calculated to injure consumers.

An important difference between the prohibitions in the Governor's bill and those in the other bills is the lack in most sections, of an intent, or knowledge requirement to constitute a violation. It would appear that a few of the prohibitive acts in the other two bills do not require the element of intent either. For an instance, subsection of both HB 444 and SB 352 does not refer to intent or knowledge. Likewise, subsection (12) of both bills appears not to require the element of scienter. The position that the element of intent not be required to constitute a violation in the Governor's bill is similar to that taken by several states (for instance Texas) and recognizes the essential nature of the activity sought to be prohibited as a fact accomplished, i.e. that someone has been damaged. This is especially true in a civil action where intent or knowledge has no part in such litigation for the salient point here is whether or not a person has been damaged. It is the position of this office therefore, that the element of intent should not be included in the prohibited acts but if it is so included in the final bill intent should not be required in any civil action and that in a criminal action there should be an evidentiary presumption, rebuttable by the defendant, that the act was done with intent.

HB 444 contains several subsections which are not in either the Governor's bill or the Senate bill. To-wit, subsections (13), (14) and (15) are unique to the council proposal. In inverse order, (15) would appear to be covered at least by (6) of the same section, (6) of SB 352 and (5), (11) and (12) of the Governor's bill. Likewise, the prohibition against 'bait and switch' advertising in (14) of HB 444 would probably be covered by (9) of the same section, (9) of the Senate bill and (8), (11) and (12) of the Governor's bill. This section includes the advantage of clear, specific prohibitions but may prove to contain loopholes or allow their creation by the imaginative and ever alert mind of the swindler. Subsection (13) of HB 444 again sets out a specific prohibition which is not included in either of the other bills. It is not precisely clear on the face of the subsection as to what transactions it might cover but may prove to be a useful addition to the prohibited acts section.

Both HB 444 and SB 352 contain identical subsections (b) and (c) which are not included in HB 446. It is not apparent what the specific purpose of subsection (b) is. It is probable that this subsection is aimed at giving an evidentiary advantage where there has been consumer fraud, to one either prosecuting or seeking damages in an anti-trust action, as it refers to injuring competition and competitors. Since, at the time the bill was drafted Alaska had no anti-trust provisions or proposed bills, it was not included in HB 446. However, the intent of the subsection may have been to aid in litigation begun under the several federal anti-trust laws, and may have value as such in the final bill. Subsection (c) was not considered necessary in HB 446 in light of AS 01.10.010 which makes the common law applicable in Alaska where it is not contrary to the State or Federal Constitutions.

A major provision which appears in the Governor's bill, but which does not appear in either of the other proposed bills, is the section on the non-negotiability of certain consumer paper found on page 6, line 7 of HB 446. A similar provision is still pending before the legislature in HB 362, though the technical statutory approach is somewhat different because that bill actually amends the Uniform Commercial Code. The Uniform Commercial Code presently permits a waiver of defense clauses in commercial transactions and the execution of a negotiable instrument is made equivalent thereto, but, in

effect, cedes to each state the power to set its own policies with respect to their use. Thus, in AS 45.05.726(a) the code permits the waiver of defenses "Subject to a statute or decision. . . . " The section of HB 446 presently under discussion would constitute the statute to which this section would refer. This section is intended to reach only paper which is described as negotiable for the purposes of AS 45.05.726(a) for it is this section that automatically forces a waiver of defenses agreement on a buyer signing a negotiable instrument. Thus, it is clear that many types of paper transactions in the consumer market would not be covered by this provision.

Present Alaskan law works a genuine hardship and great injustice on consumers in the state when it permits the transferee of consumer paper to cut off the consumer's defenses. When one buys goods it is his reasonable expectation that if the vendor does not live up to his end of the bargain, he, the consumer, may refuse to pay. In actual fact, however, he very often finds that the note has been assigned away to a third party with whom he has not dealt and of whom he may have never heard, and he is left only with a cause of action against the seller which, assuming the presence and solvency of the seller, means an expensive and time consuming law suit.

There is a considerable and increasing use of the holder of the due-course-doctrine in Alaska for fraudulent purposes. Very often a group moves in, makes a fantastic offer to consumers which is never intended to be fulfilled, takes a note for the products or services, negotiates it, and skips the jurisdiction before anyone even realizes they have been taken. As a practical matter, the consumer has no recourse, least of all against the holder of his note to whom he is legally liable. Very often it is impossible for law enforcement officers to stop the dishonest or sharp dealer before the damage is done. However, an essential part of any such scheme is the sale of the paper taken. If the institutions who close their eyes to the people with whom they are dealing realize that it is they, not the consumer, who will be left holding the bag, the incidence of consumer fraud of this nature will decrease markedly.

It may be noted that the Uniform Consumer Credit Code (U3C) also takes a dim view of negotiable consumer paper, and offers the legislature another alternative in accomplishing the objective sought in the present section, as the U3C has been introduced as SB 211. One of the stated aims of the

U3C in deciding what credit or practices to prohibit or limit, was to insure that there were very real and corresponding benefits to the consumer because of the recognition that restrictions on rights of creditors could lead to higher credit costs and interest rates (see N. Butler, Summary of the Uniform Consumer Credit Code 3, 1968). One of the very first practices outlawed by the U3C was the use of negotiable promissory notes and consumer sales (see 4.850 UCC4, in SB 211, page 46, line 29). The code also contains two alternative proposals as to the question of defenses and their waiver by the buyer as to an assignee of a consumer contract.

Obviously, the thrust of all these proposals is to curtail the abuse of the holder-in-due-course doctrine presently provided under the UCC, as noted above. The purpose of this doctrine is, of course, to insure, as far as it can, the free flow of commercial paper and to encourage investment. The supposition of the typical holder-in-due-course incident is that there are two innocent parties: the obligor who has been wronged by the obligee, and the assignee who took the note from the obligee without notice of the defense. The law, by favoring the holder of the note, seeks to keep the paper moving and relieve the anxieties of prospective transferors. However, the code, as noted, recognizes the difference between consumer paper and other loans, though it allows the local law to determine what the consequences of the distinction, if any, shall be. (It is interesting to note that the UCC originally sought to deny third party freedom from defenses in the case of consumer goods [Uniform Commercial Code § 9-2061 (1952 version)] which version was originally adopted in Pennsylvania.)

One question to be asked and answered, therefore, is whether the holder-in-due-course doctrine, as applied to consumer paper, is really having this classic effect on the money market. It is submitted that it does not. Consumer paper passes from dealer to financer as readily in states that subject the assignee to defenses as in states that do not. The possibility of consumer defenses is merely one of several risks taken by the assignee and the price he pays for the paper and the recourse or reserve arrangement he makes with the dealer are considered at the time the paper is negotiated. Consumer paper is not typically sold between financial institutions (saving perhaps some bulk transfers in which the

second assignee is probably indifferent to the defenses of individual consumers) but if bought directly from the dealers, and it is here that the crux of the situation may be seen most clearly.

Without question the financial institution who is in the consistent practice of buying paper from particular dealers is in the best position to police his retail activities; presently, however, he has no reason to do so. By making the financial institution subject to the defenses of buyers, however, the effect will be to make those institutions put pressure on retailers to improve shoddy or dishonest dealings and force them to examine more carefully the paper sought to be sold by fly-by-night businesses. Moreover, what is the social or economic policy of allowing a financial institution to deal with a disreputable dealer and then stand free of liability while the consumer bears the loss?

There is the possibility that the increased protection afforded by requiring buyers of paper to be a bit more selective in their purchases and by making them subject to the defenses of consumer notes will result in some increased credit costs. However, the small increase, if any, is justified by the amount of lost consumer dollars in personal financial difficulties that may be avoided by this legislation. Moreover, there are aspects of this section which may actually decrease the cost of credit which cannot be ignored; notably the reduction in personal bankruptcies and increased percentages of collections from satisfied customers.

II. Exemptions and Exceptions.

(HB 446, page 2, line 24 to page 3, line 5)
(HB 444, page 3, line 20 to page 4, line 6)
(SB 352, page 2, line 29 to page 3, line 12)

All three bills contain common exceptions and exemptions in subsections (1) and (2), HB 446 and SB 352 being almost identical. These two exceptions are almost always provided in the similar state laws regarding consumer fraud and are considered necessary to protect the parties concerned. It must be noted that HB 444 does not repeal, as do the other two bills, the present sections on false or misleading advertising which contain a provision (AS 45.50.490(b)) similar to all the subsections (2). The retention of this exception in HB 444 presumably is to insure that it will apply to both the civil actions it provides and the criminal actions in the present law.

HB 444 also contains a third exception dealing with a pending action and appeals, and a fourth dealing with trademarks and tradenames used prior to the effective date of the statute.

III. Investigatory, Regulatory, and Subpoena Powers of the Attorney General.

(HB 446, page 3, lines 6 and 7)
(HB 444, page 4, lines 7 to page 5, line 24)
(SB 352, page 3, line 13 to page 5, line 1)

One of the most marked differences between the Governor's bill and the other bills is the inclusion in the latter of very broad powers of investigation centering in the office of the Attorney General. Most of the states enacting this type of legislation have included these powers and they have apparently proven to be a useful enforcement aid primarily in states where court calendars are very crowded and immediate judicial action is difficult or impossible to obtain. It was felt, at the time 446 was drafted, that these extraordinary powers were not necessary to the enforcement of the act for several reasons. At this time, court calendars are not generally so overcrowded in Alaska as to make it difficult to hear motions for restraining orders or injunctions nor are the offices of the Attorney General so far distant from the court rooms that it would be impossible or inconvenient to act quickly in the necessary case. In addition, the relative isolation of the state combined with the relatively small population tends to discourage the fly-by-night or fast moving operator for whom most of these extraordinary powers are required from using Alaskans as his 'dupes'.

It must be noted that the powers granted by these two bills are both exceptional and substantial. The Attorney General, if these provisions are understood correctly, may upon his belief that some deceptive practice is or has taken place, (1) make the person in question file a detailed report in writing and under oath, (2) examine and cross-examine the person, (3) examine the property, records, books, and documents, (4) make copies of any of the above. The only investigation over which a court has any authority apparently is where the Attorney General wants to impound a sample of the property. In addition to these powers the Attorney General may issue subpoenas on his own power. These powers are reinforced by remedies against those refusing to cooperate in the investigation.

Should the legislature decide to include these powers in the final bill, the following general comments are offered for your consideration. SB 352 has identical powers to HB 444. However, it does not contain the safeguards against their abuse as does the latter bill (see HB 444, page 7, lines 5 to line 28). HB 444 recognizes the constitutional problems of self-incrimination which would be inherent in using material directly or indirectly uncovered as a result of an investigation conducted with these powers in any criminal action. (Though it must be noted that HB 444 provides for no criminal sanction.) The powers would, of course, be invaluable in opening up a violator to civil damages or injunction but their aid in convicting a person of a crime is doubtful. This distinction should be made where the broad investigatory powers are provided.

Likewise, HB 444 recognizes the possible abuse of the powers in question by requiring discovered material to be kept confidential. This protection will prevent persons from being pilloried in newspapers, stigmatized, or otherwise attacked unless the Attorney General, in his investigation has found evidence substantial enough to justify litigation. In this line of thought, some consideration might be given to the protection of trade secrets, secret trade information, or other privileged matter. Some states (Massachusetts notably) require that the demand for information shall not contain any requirements which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court. Further court control could be obtained by providing for a motion by the person of whom the information is requested to extend the period of time or even satisfy the demand for good cause. In addition, some consideration should be given to the time and place that such information could be demanded (regular business hours, regular place of business, etc.).

It should be noted here that all three bills allow for regulatory power in the office of the Attorney General. This provision will enable the Attorney General to pinpoint specific schemes and rackets by regulation so that there can be no mistake as to what acts are prohibited. It is an important and useful tool in insuring that comprehensive and effective protection is afforded the public in consumer matters and the provision which will allow in the long run greater fairness to the business man by outlining prescribed conduct with precision.

IV. Restraining Orders, Injunctions, Voluntary Compliance.

(HB 446, page 3, line 8 to page 5, line 3)
(HB 444, page 5, line 25 to page 7, line 28)
(SB 352, page 5, line 2 to page 6, line 12)

Any law seeking to regulate such a sensitive area as consumer fraud requires that a broad spectrum of ways to deal with violators, whose activities may range from borderline to flagrant, be available to the authority charged with enforcement. Though the development of a body of effective regulations as to what specific acts are prohibited will go a long way toward putting the business man on notice as to what activity is prohibited, the use of assurances of discontinuance or voluntary compliances are particularly useful in cases where an honest business man unwittingly may have used a practice that could be considered deceptive. As a practical matter, long standing usages by businesses or industry which would be illegal under a new law may continue unnoticed and such cases should not necessarily be brought into court though something beyond a specific warning may be needed. Also, the use of this device will aid the enforcement officers and courts by giving an alternative to actual litigation for every use of deception. The provisions for voluntary compliance in HB 444 and SB 352 are substantially the same except that the latter adds a subsection (c) (page 6, line 8) which would seek to make a violation of the assurance prima facie (rebuttable) evidence of the violation of the law in civil actions by the Attorney General. This provision attempts to overcome the shortcoming of the voluntary assurance that if it is violated the Attorney General must proceed as if it had never been made.

The Governor's bill does not include it, as do the other bills, the provision for the voluntary payment by the alleged violator of investigative costs or damages on a stipulation to the assurance. This section does not appear to add a great deal to the bill because unless such an agreement were specifically prohibited by statute it could always be entered into regardless of its mention in the consumer fraud bill. Moreover, the Governor's bill does contain substantial provisions for private recourse, and in no way would prohibit this payment which is stated to be voluntary.

The power of the Attorney General to seek injunctions, whether permanent or temporary is common to all three bills and

is a valuable and traditional tool of enforcement and one which we believe is essential to effective enforcement of a deceptive trade practice act.

V. Penalties.

(HB 446, page 6, line 27 to page 7, line 20)
(HB 444, page 7, line 29 to page 8, line 13)
(SB 352, page 6, line 13 to page 7, line 9)

SB 352 and the Governor's bill both provide for criminal sanctions for a violation of the act. HB 444 in marked contrast does not provide for any criminal sanctions. It is submitted that criminal sanctions are often the only way to deal with the purveyors of consumer fraud and that any bill without them would be of little help in actually curbing the incidents of consumer fraud in Alaska. A bill providing only civil penalties seems to assume that the victims of fraud are intelligent middle class individuals who are all aware of their rights, are familiar with and at ease in the courts, and are willing to bring actions to enforce their rights. Many times the persons hardest hit by these frauds are the poor, the illiterate, the feeble, the old, immigrants, the unaware, the unintelligent, and others who need to be protected from the unscrupulous. We are rarely concerned in these laws with the brilliant confidence artist who executes a multi-million dollar stock swindle against the financial wizards of Wall Street; we are talking here about individuals who take advantage of people who are already disadvantaged and prey upon the weakest members of our society. This is criminal activity and should be treated as such.

It is the apparent theory of HB 444 that the present criminal law is sufficient to protect the general public. The only additional public protection afforded by this proposal is the ability of the Attorney General to seek an injunction, which, if broken, could result in a civil penalty of up to $10,000. In other words, the purveyor of fraud has nothing to lose by engaging in fraudulent acts. Even if the Attorney General identifies him, seeks and obtains an injunction, (or assurance of discontinuance) the defrauder has lost nothing. He is free then to find another racket in which to engage so long as the court's order is not violated. The only fear under HB 444 would be from civil suits of those who are aware of the fraud, can prove damage, and are willing to prosecute

their cases. However, as noted below, these civil claimants are given no evidentiary advantage and no specific provision for punitive or treble damages. Moreover, it is difficult to imagine a defrauder entering into an assurance of discontinuance with the Attorney General if the most than can be done is to get an injunction against him. The lack of criminal sanctions negates the use of this manpower saving tool. In short, the bill contains no real deterrent to fraudulent practices and next to no way to punish those who do engage in fraud. HB 444, despite its extensive and carefully drawn provisions prohibiting acts, providing for investigations, etc., will, in fact, change very little the present law which is inadequate to deal with the mounting incidence of consumer fraud in Alaska.

In comparing HB 446 and SB 352, it is notable that upper limit of the fine in the latter is $1,000, while in the former it is $10,000. Both provide for one year imprisonment. It is submitted that the fine will be used much more extensively by the courts than the jail sentence and that a $1,000 fine is an insufficient deterrent to the crimes set out in these bills. Consumer fraud is big business and $1,000 to many of these organizations would be a mere slap on the wrist, and easily written off as a 'business expense'. In addition the civil penalty limit for violation of a court order in SB 352 is only $10,000 as compared with $25,000 in the Governor's bill. Obviously these upper limits are not aimed at small operators but at the large, nation-wide organizations who may be well heeled and may retain 'house counsel' or other advantages.

All of the bills provide for private civil actions but again HB 444 is considerably less helpful than the other two bills. It provides only for actual damages where, in the proper case, the other bills would allow punitive damages (SB 352) or treble damages (HB 446). It does not specifically provide for class actions; nor does it give the evidentiary edge (prima facie) to private litigants where there has been a permanent injunction or final judgment as does the Governor's bill in subsection (e) of 45.50.540 (page 6, line 2). This point is not a minor one for in consumer fraud cases the main difficulty in getting a judgment is the investigation and accumulation of evidence which can be prohibitively expensive. Neither HB 444 or SB 352 provide for this feature. The deletion of this evidentiary advantage is particularly damaging to HB 444 which relies only on the Attorney General's ability to get an injunction and the possibility of private civil recovery for sanctions.

Allowing for private civil actions in a consumer fraud law is extremely helpful to the enforcement agent because it has the effect of making the law 'self-enforcing' to a degree, and especially with regard to the smaller or occasional claims. As a general rule, every such case which is brought by a private party means one less that must be prosecuted by the state. The enforcement officer is thus freer to investigate the professional or organized operations which are of important public concern and which may be prevented before they begin. In addition, it must be noted that the civil action gives the injured party a chance to recover his damages.

In our opinion the Governor's bill and, to the extent applicable, SB 352 are more sensitive than HB 444 to the need for a wide range of alternatives for enforcement. It includes higher limits for violation of orders or injunctions; it provides for a civil action by the state and class actions by injured groups; it provides for revocation of a corporate franchise as a proper case; it provides for a receivership where the court deems such extreme action necessary; and it recognizes the ability of private actions to aid in enforcement.

VI. Definitions.

(HB 446, page 7, line 21 to end)
(HB 444, page 8, line 15 to end)
(SB 352, page 7, line 10 to end)

In HB 444 "person" seems unnecessary in light of AS 01.10.060(7). ✓

I hope these observations have been of help to you in your study of this important legislation. If you have questions concerning it, please do not hesitate to contact this office.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 17, 1970

The Honorable Tom Fink
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Fink:

On February 9, 1970 you were sent a letter in which the three consumer fraud bills now pending before the legislature were compared in some detail. Since that time one of the bills, SB 352, has been altered in several important points and this letter is to insure that you understand that the previous letter from this office was concerned with the original bill and not the substitute CSSB 352.

Though the substitute bill incorporates some of the features of the governor's bill (HB 446) it now appears to bear more relation to the Legislative Council proposal (HB 444) than to the former bill. Like HB 446, the substantial investigatory powers of the Attorney General are deleted. However, CSSB 352 goes even further in that it also has removed the power of the Attorney General to make regulations. The importance of this feature was expressed in our previous letter and its absence in a final law would be detrimental to the enforcement branch and the legitimate businessman as well.

The signal change in the substitute bill is the removal of any criminal sanctions from the bill which places it in the same category with HB 444 and leaves the governor's proposal the only bill providing for criminal actions. It is felt that the effectiveness of a consumer fraud law not containing provisions for criminal proceedings would be drastically reduced and would be far out of line with other state provisions and practices. In addition to removal of criminal penalties, it must be noted that the substitute reduces the civil sanctions and no longer provides for punitive damages. In short the substituted bill has had its teeth almost entirely drawn.

CSSB 352, you will note, has added the sections with which your subcommittee was most interested, dealing with consumer paper. This addition, identical to the governor's bill, seems to be a recognition of the importance of taking consumer paper out of the holder-in-due-course doctrine presently provided by the UCC.

Thank you for your patience in this matter. I hope that these supplemental comments will be of help to you.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 10, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Representative Jackson:

This is in response to the request of the Vice-Chairman of your committee, Mr. Fink, for clarification of certain issues raised with regard to the sections of HB 446 and CSSB 352 which would have the effect of suspending the holder-in-due-course doctrine, now provided for in the Uniform Commercial Code, where consumer paper is sought to be negotiated.

Section 45.50.550 of proposed House Bill 446 makes any instrument entered into between a retail buyer and seller a non-negotiable instrument within the meaning of the UCC (AS 45.05). Paragraph (b) provides that an assignee of the seller is subject to all claims and defenses of the buyer and the buyer may not agree to limit his rights.

This section is intended to modify AS 45.05.726 which provides:

> Subject to a statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee a claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith, and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under §§ 246 - 402 of this chapter. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

Under the current practice, when a negotiable instrument and a security agreement are executed by a retail buyer, under the provisions of AS 45.05.726, the buyer by executing the negotiable instrument agrees not to assert any defenses against an assignee of the paper except defenses which could be asserted against a holder in due course. In effect, the assignee becomes a holder in due course and the buyer may not assert against the assignee defenses which he would have available in an action by the seller. Proposed AS 45.50.550 removes the holder in due course protection of the assignee thus allowing the buyer to assert any defenses against an assignee which he could assert against the seller of the merchandise.

Under trade practices an assignee among others could consist of finance companies, small loan companies and state and national banks. There is no statutory conflict under state law which proposed AS 45.50.550 would affect as to any of the various types of assignees. Nor is there any statutory conflict under Federal Law, which would adversely affect national banks in the event proposed House Bill 446 was adopted.

National banks are authorized to purchase installment consumer paper. 12 U.S.C.A. § 84 sets forth the limits of liability of any person to a national bank. Paragraph 13 provides that as to full recourse negotiable or non-negotiable installment consumer paper the bank is subject to a limitation of 25% of its capital and surplus. However, this section goes on to provide if the bank certifies it has evaluated the responsibility of the purchaser of merchandise and is relying primarily on him for payment the 25% limitation is transferred from the seller of the paper to the maker.

For example, if a bank were purchasing negotiable or non-negotiable recourse consumer paper from an automobile dealer it would be limited in the amount that it could purchase to 25% of its capital and surplus. However, if the bank evaluates the responsibility of the buyer of the automobile and certifies that it is relying primarily upon him for payment that paper is not considered in the 25% limitation applicable to the dealer.

The section refers to both negotiable and non-negotiable consumer paper. The provision for certification is not limited to negotiable paper but also includes non-negotiable paper. Therefore, a statute which made all such paper non-negotiable would not change the authorization or the practice which national banks have been following.

It does, of course, because it removes a bank from the protection of a holder in due course, requires it to be a little more circumspect in purchasing paper because of the requirement of evaluating the responsibility of the buyer and certifying that the bank is relying primarily on him for payment. Or in the words of the comptroller of national banks: "What is required essentially is the responsible exercise of prudent banking judgment supported by a reasonably adequate record." (Comptroller's Manual for National Banks, May 1968, Sec. 1620(e).

Several states including California and Massachusetts have adopted legislation such as HB 446 without any noticeable effect on banks. Congress in 1959 when considering 12 U.S.C.A. § 84(13) acknowledged the necessity of including non-negotiable paper in paragraph (13) because various state laws had been enacted limiting the negotiability of consumer paper. Thus it was stated in Senate Report (No. 731) on the amendment:

> Furthermore, there has been a trend in recent years for the varous States to protect consumers by adopting retail installment sales acts which specify the form which obligations covering consumer installment purchases shall take. The form prescribed is almost always nonnegotiable, and in at least some of these States the law prevents the seller of goods from taking a negotiable note in addition to the form of obligation prescribed by statute. In these States banks engaged in this type of financing must take nonnegotiable paper. (U.S. Code Congressional and Administrative News, Vol. 2, 86 Congress, First Session, page 2305.)

For the foregoing reasons, it is the opinion of this office that enactment of the sections on non-negotiability of consumer paper will not have any noticeable effect upon legitimate and good faith commercial transactions. On the other hand, passage of the measure will accomplish a substantial benefit to Alaska's consumers as was explained in our previous memorandum, (See letter to Hon. Tom Fink, Feb. 9, 1970 pp. 3-6) by requiring the purchasers of consumer paper to be more selective in choosing businesses from whom they purchase paper and in policing the activities of the businesses with whom they do choose to deal.

It may be appropriate here to discuss one further point concerning the various approaches to the provision in question. The language of the provisions in HB 446 and CSSB 352 are quite similar to the draft developed by the Committee on State Legislation. (See Suggested State Legislation 1970, The Council of State Governments.) In drafting the provisions both alternatives of the UCCC (SB 211) on the subject were considered but found to be less acceptable than the language of the present bills. SB 211 chose alternative "A" of the UCCC which provides that the rights of the consumer can only be asserted as a matter of defense to or set-off against a claim by the holder of the paper. Under that provision then the consumer has no rights unless the holder sues the consumer. In the commentary on the language here it was stated:

> 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. (p. 5 of Reprint)

Thus it is felt that though the effect of either approach is aimed at the same problem the legislation under consideration here is superior to that of the UCCC.

I hope these remarks have been of help to you in your study of this provision.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By
Donald J. Beighle
Assistant Attorney General

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MEMORANDUM

February 20, 1970

1970 Alaska Legislation
S.B. 352, H.B. 444 and
H.B. 446

Each of these similar bills would prohibit numerous "deceptive" or "unfair" trade practices in the name of "consumer protection." In brief summary, they would seek to prevent various defined deceptive or unfair trade practices, principally by providing injunctive and damage sanctions. For reasons detailed below, legislation of this kind would be unsound in any state and is unnecessary in Alaska. S.B. 352[1] will be used for illustrative purposes, with appropriate references to variations in the other two bills.

Section 471.[2] This section forbids any trade practice "defined in this chapter as, or determined under this chapter to be, a deceptive trade practice." Section 461 then sets out twelve categories of deceptive trade practices varying in specificity from the relatively clear "(6) represents that a property is original or new if he knows or should know that it is deteriorated, altered, reconditioned, reclaimed, used or secondhand"; to such amorphous standards as "(8) disparages the property, services or business of another by false or misleading representation of fact," and "(12) makes false or misleading statements of fact concerning the price of property or services, or the reasons for, existence of,

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1. Considered herein is "CSSB 352 am." which is an amended version of original S.B. 352 and which was passed by the Senate on February 11, 1970 and thereupon assigned to the House ~~Consumer~~ COMMERCE and Judiciary committees.
2. The provisions of the bill would constitute Article 4 of Title 45, Chapter 50.

or the amounts of price reductions" (emphasis added).[3] It is then provided that the foregoing deceptive trade practices "are in addition to and do not limit the various types of unfair trade practices actionable at common law or under the laws of this state."[4] This last provision really subverts the ostensible purpose of this kind of legislation, i.e., to notify businessmen of definite wrongs, because in effect it says that if we have forgotten anything it nonetheless may be redressed under

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3. In addition to its generally similar definitions of "unlawful acts and practices" H.B. 446 prohibits engaging "in any other conduct creating a likelihood of confusion or misunderstanding and which misleads, deceives, or damages any person in connection with the sale or advertisement of any goods or services," and using or employing "any deception, fraud, false pretense, false promise, misrepresentation, or knowingly conceal, suppress or omit any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any goods or services whether or not any person has in fact been misled, deceived or damaged."

   H.B. 444's "deceptive trade practices" add to those of CSSB 352am certain restrictions on installment sales, "bait and switch" advertising and the sale of flood or water damaged goods.

4. H.B. 446 does not contain a comparable provision. H.B. 444 contains the same provision and also provides that "Evidence that a person has engaged in a deceptive trade practice is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." Apparently this provision is intended to help sellers prove that any loss of profits coincidently sustained by them resulted from the "deceptive" practice, which would be redressable in damages as provided in other provisions of the bill.

the common law or under other statutes.[5]

These categories of deceptive practices would seem to add nothing of importance to Alaska's existing legislation. Present section 45.50.40 forbids all "false, deceptive or misleading advertising with actual knowledge of the facts which make the advertising false, deceptive or misleading, for a business, trade or commercial purpose or for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase, consume, lease, dispose of, utilize or sell a property or service, or to enter into an obligation or transaction relating to a property or service." Related provisions authorize injunctive relief and make violations of the statute a misdemeanor punishable by ninety days imprisonment or a $5000 fine, or both (Alaska Statutes, Title 45, Ch. 50, §§ 470-510).[6]

Indeed, the superfluity of this bill is indicated by the speech of Mr. Gale P. Gotschall, FTC Counsel for Federal-State Cooperation, given on September 26, 1969 to an Arkansas legislative committee. On page 5 of the transcript of that speech Mr. Gotschall includes Alaska as one of 23 states now having laws "which achieve approximately the same results" for consumer protection as the Federal Trade Commission Act.

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5. Indeed, H.B. 444 provides that the Attorney General may "promulgate the rules necessary to administer the provisions of this chapter" (§ 45.90.040), and under H.B. 446 he may "make regulations interpreting" what is and what is not an unlawful act or practice under the statute (§ 45.50.090). Considering the breadth and vagueness of many of the descriptions in the bill, this power is legislative in nature. Such comparable legislation as the FTC may enact is limited to a case-by-case development and is based on the Commission's assumed expertise supported by an extensive staff of lawyers, accountants and economists able to make the detailed economic studies necessary for any intelligent regulation of interstate business. There is no basis for delegating like legislative powers to a state attorney general, and this effort to do so would raise a serious constitutional question.

6. CSSB 352am and H.B. 446 would repeal this legislation.

Section 501. Whenever the Attorney General has "cause" to believe that section 481 is being violated he may sue for temporary and permanent injunctive relief.[7] In contrast, the Federal Trade Commission's repeated requests for a preliminary injunctive remedy have always been denied by Congress, and soundly so. To the extent that the FTC may particularize the broad wording of section 5 of the Federal Trade Commission Act on a case-by-case basis, it is acting essentially like a legislature. To a significant degree the same would be true of courts entertaining cases under section 481 of this bill. No legislature has the power to obtain injunctions pending consideration of proposed laws, and neither the FTC nor a court should have it in similar circumstances.

This section also provides that the court may make any further order "necessary to restore to any other person money or property which may have been acquired by means of a deceptive trade practice." Apparently this contemplates broadening state injunctive proceedings to include damage claims in behalf of the general public. Wholly apart from the unnecessary administrative burdens this would impose on the Attorney General, a damage remedy is inappropriate to enforce a statute of such breadth that proceedings under it would often perforce be announcing new rules which would be applied ex post facto in awarding damages.[8] This point is noted further below.

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7. H.B. 444 adds provisions making the Attorney General a one-man grand jury with power to issue subpoenae and t require written reports and oral testimony under oath, as well as the production of documents. Disobedience may be redressed by court orders not only requiring compliance but restraining the "sale or advertisement of property by a person," which, so far as appears, could be done without notice to and an opportunity to be heard by the respondent (see §§ 45.90.030-45.90.050, incl.).

8. H.B. 444 and H.B. 446 have comparable provisions, those of the latter bill contemplating even the appointment of a receiver and the dissolution of the company and the forfeiture of its right to do business in the state. Such drastic relief is plainly disproportionate to the offenses involved, and even if it were not there are no criteria to guide the court in dispensing such punishment.

Section 511 contemplates the negotiation of "an assurance of discontinuance of a deceptive trade practice" in lieu of litigation. Such a stipulation may provide, among other things, for the payment of "any amount necessary to restore to a person the money or property which may have been acquired by the alleged violator by means of the deceptive trade practice." This provision also would create substantial administrative burden for the Attorney General and would in effect provide for a damage remedy to enforce a statute that, unless made far more specific, would be in many instances too vague to support such relief.[9]

Section 520. Anyone who violates a court order or injunction obtained under this bill is subject to a "penalty" of up to $10,000. This seems excessive in view of the $5000 maximum penalty imposed for violations of cease and desist orders issued by the Federal Trade Commission.[10]

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9. The other bills have comparable provisions. Section 530(d) of CSSB 352am states that a final judgment in state proceedings shall be "prima facie evidence that the person engaged in a deceptive trade practice" as defined in section 461, but there is nothing to indicate whether the subsequent action must involve the same conduct. H.B. 444 states that any violation of such an assurance is "prima facie evidence of a deceptive trade practice for the purposes of civil action or proceeding thereafter by the attorney general, whether a new action or a subsequent motion or petition in a pending action or proceeding" (45.90.000(b)). This sort of once-guilty-always-guilty approach is untenable and presumably unconstitutional since the first conduct may have no sufficient probative connection with the later conduct.

10. H.B. 446 would impose up to $25,000 for each violation of an injunction obtained under the bill (45.50.500).

    H.B. 446 would also impose a "civil penalty" of up to $5000 for each unlawful act or practice and a fine of up to $10,000 and imprisonment for up to one year for "a course of conduct declared unlawful" by the bill (ibid.). There are no civil or criminal penalties for violations of section 5 of the Federal Trade Commission Act, and presumably criminal sanctions could not lawfully be imposed for "crimes" so vaguely defined as many of these "unlawful" or "deceptive" practices.

Section 530. "Any person" may sue for himself and for "numerous persons similarly situated" to recover damages. An individual suing solely for himself may recover his actual damages or $200, whichever is greater. But apparently in class actions each member of the class may recover only his "actual" damages. In each type of action, however, the court in its discretion may award "additional" damages.[11]

There is no private right to damages for a violation of section 5 of the Federal Trade Commission Act, and there should be none for substantive state provisions of comparable vagueness. This is because prohibitions of acts described so vaguely as those that may "mislead" are so broad that it is inappropriate and unfair to impose damages, ex post facto, for a violation which would not be established with certainty until the end of a trial. "Additional damages" in such cases would be even more unfair, especially in the absence of any criteria to govern when they would be awarded. Moreover, the bill would improperly provide what in the usual case would be an unreasonable escalation of actual damages to a minimum of $200. Large and prosperous companies could possibly withstand the financial exposure created by this provision, which would typically result in punitive damages multiplied by the total number of consumers who sue or join in suits brought by others. But the statute is not so limited and it therefore threatens smaller companies with bankruptcy for relatively trivial offenses that may even be inadvertent. In sum, the damage provisions are unnecessary and repressive in the context of legislation this vague, especially when considered with the other remedies provided by the bill.

---

11. HB. 446 gives the court discretionary power to award up to threefold the actual damages sustained. H.B. 444 contemplates only actual damages, and does not provide for class actions. All three bills would permit the court to award costs and reasonable attorney's fees.

    Section 45.50.550 states that notes and evidence of indebtedness given for the purchase of consumer goods and services shall be nonnegotiable. This seems unnecessary and will serve to make it more difficult to obtain credit for such purchases. CSSB 352am has the same provisions.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

JACKSON & FENTON
ATTORNEYS AT LAW
527 4TH AVENUE
P. O. BOX 348
FAIRBANKS, ALASKA 99701
907 - 456-7791
452-2014

BARRY W. JACKSON
THOMAS E. FENTON

November 7, 1969

Mr. Arthur H. Peterson
Revisor of Statutes
Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99801

Re: Consumer Protection Act

Dear Art:

Enclosed is some material on Colorado's new consumer protection act. Senator Terry Miller and I are agreed on your reviewing this proposed legislation in light of our present statutes, and preparing an appropriate bill for prefiling in both houses. Can you go to work on this.

Sincerely,

Barry W. Jackson

BWJ:nb

Encl.

cc: Senator Terry Miller

The State of Colorado

DEPARTMENT OF LAW

DUKE W. DUNBAR
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
104 STATE CAPITOL BUILDING
DENVER, COLORADO 80203

JOHN P. MOORE
DEPUTY ATTORNEY GENERAL

August 26, 1969

JACKSON (1)
FENTON (2)
BROWN
HILARY
OTHER
FILE (3)

Mr. Millard F. Ingraham
Attorney at Law
Suite C, Nerland Building
Fairbanks, Alaska 99701

Mr. Ingraham:

Thank you for your inquiry about Colorado's new Consumer Protection Act.

I enclose a copy of the Act, which became effective July 1, 1969; a copy of a brochure explaining the Act's more important features; an overview of such state legislation in the form of a review by the FTC; and an FTC news release issued recently describing newer developments.

If we can be of further assistance, please call on us.

Cordially,

OFFICE OF CONSUMER AFFAIRS

C. Patrick Carrico

C. Patrick Carrico
Assistant Attorney General

CPC:pmb
Enclosures

(House Bill No. 1030. By Representatives Fuhr, Bain, Bastien, Mullen, Black, Grace, Koster, Cox, Dameron, Braden, Sack, Johnson, Arnold, Baer, Bryant, Burns, Byerly, Calabrese, Colorose, Cooper, DeMoulin, Dittemore, Edmonds, Fentress, Friedman, Grant, Grimshaw, Gustafson, Hamilton, Hinman, Horst, Jackson, Klein, Knox, Lamm, Massari, Ed McCormick, H. McCormick, Moore, Munson, Ed Newman, J. E. Newman, Quinlan, Rose, Safran, Sanchez, Schmidt, Schubert, Showalter, Singer, Sonnenberg, Strahle, and Woodard; also Senators Stockton, Strickland, MacManus, Kemp, Vollack, L. Fowler, Anderson, Cisneros, Decker, MacFarlane, and Taylor.)

CONCERNING CONSUMER PROTECTION; DEFINING DECEPTIVE TRADE PRACTICES; AND PROVIDING ENFORCEMENT BY THE ATTORNEY GENERAL.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Definitions.—(1) As used in this act, unless the context otherwise requires:

(2) "Article" means a product as distinguished from a trademark, label, or distinctive dress in packaging.

(3) "Certification mark" means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.

(4) "Collective mark" means a mark used by members of a cooperative, association, or other collective group or organization to identify goods or services and distinguish them from those of others, or to indicate membership in the collective group or organization.

(5) "Mark" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(7) "Service mark" means a mark used by a person to identify services and to distinguish them from the services of others.

(8) "Trademark" means a mark used by a person to identify goods and to distinguish them from the goods of others.

TRADE

(9) "Trade name" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation, and to distinguish it from the business, vocation, or occupation of others.

(10) "Advertisement" includes the attempt by publication, dissemination, solicitation, or circulation, visual, oral, or written, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any property.

(11) "Property" means any real or personal property, or both real and personal property, intangible property, or services.

(12) "Sale" means any sale, offer for sale, or attempt to sell any property for any consideration.

Section 2. Deceptive trade practices.—(1) (a) A person engages in a deceptive trade practice when in the course of his business, vocation, or occupation, he:

(b) Knowingly passes off goods or services as those of another;

(c) Knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods or services;

(d) Knowingly makes a false representation as to affiliation, connection, association with, or certification by another;

(e) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(f) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(g) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(h) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

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

(j) Advertises goods or services with intent not to sell them as advertised;

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

(l) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;

(m) Makes false or misleading statements of fact concerning the price of goods or services, or the reasons for, existence of, or amounts of price reductions;

(n) Fails to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting forth the

name and address of the seller and the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(n) (i) Employs "bait and switch" advertising, which consists of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell, which advertising is accompanied by one or more of the following practices:

(ii) Refusal to show the product advertised;

(iii) Disparagement in any respect of the advertised product or the terms of sale;

(iv) Requires tie-in sales or other undisclosed conditions to be met prior to selling the advertised product or service;

(v) Refusal to take orders for the product advertised for delivery within a reasonable time;

(vi) Showing or demonstrating a defective product which is unusable or impractical for the purposes set forth in the advertisement;

(vii) Accepting a deposit for the product and subsequently switching the purchase order to a higher priced item; or

(viii) Failure to make deliveries of the product within a reasonable time or to make a refund therefor.

(p) Knowingly fails to identify flood damaged or water damaged goods as to such damages.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

Section 3. Exclusions.—(1) (a) This act does not apply to:

(b) Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency;

(c) Publishers, including outdoor advertising media, advertising agencies, broadcasters, or printers engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast, or reproduce material without knowledge of its deceptive character; or

(d) Actions or appeals pending on the date that this act becomes effective.

(2) This act shall not be interpreted to apply to the use by a person of any service mark, trademark, certification mark, collective mark, trade name, or other trade identification which was used and not abandoned prior to the effective date of this act, if the use was in good faith and is otherwise lawful except for the provisions of this act.

Section 4. Powers of attorney general.—(1) (a) When the attorney general has cause to believe that any person has engaged in or is engaging in any deceptive trade practice listed in section 2 of this act, he may:

(b) Request such person to file a statement or report in writing under oath or otherwise, on such forms as shall be prescribed by him, as to all facts and circumstances concerning the sale or advertisement of property by such person, and such other data and information as he may deem necessary;

(c) Examine under oath any person in connection with the sale or advertisement of any property;

(d) Examine any property or sample thereof, record, book, document, account, or paper as he may deem necessary;

(e) Make true copies, at the expense of the attorney general, of any record, book, document, account, or paper examined pursuant to paragraph (d) of this subsection (1), which copies may be offered into evidence in lieu of the originals thereof in actions brought pursuant to sections 6 and 7 of this act; and

(f) Pursuant to any order of any district court, impound any sample of property which is material to such practice and retain the same in his possession until completion of all proceedings undertaken under this act. An order shall not be issued pursuant to this paragraph (f) without full opportunity given to the accused to be heard and unless the attorney general has proved by clear and convincing evidence that the business activities of the person or persons to whom such order will be directed will not be impaired thereby.

Section 5. Subpoenas—hearings—rules.—(1) The attorney general, in addition to other powers conferred upon him by this act, may issue subpoenas to require the attendance of witnesses or the production of documents, administer oaths, conduct hearings in aid of any investigation or inquiry, and prescribe such forms and promulgate such rules as may be necessary to administer the provisions of this act.

(2) Service of any notice or subpoena may be made in the manner prescribed by law or the Colorado rules of civil procedure.

Section 6. Remedies.—(1) (a) If any person shall fail to cooperate with any investigation pursuant to section 4 hereof or if any person shall fail to obey any subpoena pursuant to section 5 hereof, the attorney general may apply to any district court for an appropriate order to effect the purposes of this act. Such application shall state that there are reasonable grounds to believe that the order applied for is necessary to terminate or prevent a deceptive trade practice as defined in this act. If the court shall be satisfied of such reasonable grounds the court, in its order, may:

(b) Grant injunctive relief restraining the sale or advertisement of any property by such person;

(c) Require the attendance of or the production of documents by such person, or both;

(d) Grant such other or further relief as may be necessary to obtain compliance by such person.

Section 7. Restraining orders—injunctions—assurances of discontinuance.—(1) Whenever the attorney general has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 2 of this act, he may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such

person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any moneys, or real or personal property which may have been acquired by means of any such practice.

(2) Where the attorney general has authority to institute a civil action or other proceeding pursuant to the provisions of this act, in lieu thereof or as a part thereof, he may accept an assurance of discontinuance of any deceptive trade practice listed in section 2 of this act. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the costs of investigation and any such action or proceeding by the attorney general, and any amount or amounts necessary to restore to any person any money or property which may have been acquired by such alleged violator by means of any such practice. Any such assurance of discontinuance accepted by the attorney general and any such stipulation filed w i the court as a part of any such action or proceeding shall be confidential to the parties to such action or proceeding and to the court and its employees, but upon final judgment by the court that (a) a temporary restraining order or injunction obtained pursuant to subsection (1) of this section has been violated, or (b) an assurance of discontinuance accepted pursuant to this subsection has been violated, or (c) a person has engaged in the same deceptive trade practice as had theretofore been enjoined pursuant to a final permanent injunction obtained pursuant to subsection (1) of this section, or (d) a person has engaged in the same deceptive trade practice which he theretofore had agreed to discontinue by acceptance of an assurance of discontinuance under this subsection, said assurance of discontinuance or stipulation shall thereupon be deemed a public record and open to inspection by any person. Proof by a preponderance of evidence of a violation of such an assurance shall constitute prima facie evidence of a deceptive trade practice for the purposes of any civil action or proceeding brought thereafter by the attorney general, whether a new action or a subsequent motion or petition in any pending action or proceeding.

Section 8. Information and evidence confidential and non-admissible—when.—(1) The attorney general shall not release any information or evidence, obtained by him pursuant to the provisions of this act, to any district attorney or his investigator or to any law enforcement officer for use in any criminal prosecution. Any such information or evidence produced by the attorney general under this act shall not be admissible in evidence in any such prosecution. The provisions of this subsection (1) shall not be construed to prevent the attorney general from disclosing to any district attorney or law enforcement officer the fact of the commission of a crime by any person, nor shall the same be construed to prevent any district attorney or his investigator or any law enforcement officer from independently producing or obtaining the same or similar facts, information, or evidence for use in any criminal prosecution.

(2) Subject to the provisions of section 7 (2) of this act, the attorney general shall not make public the name of any person alleged to have committed a deceptive trade practice during any investigation conducted by him under this act, nor shall the records of investigations or intelligence information of the attorney general obtained under this act be deemed public records available for inspection by the general public; but this shall not be construed to prevent the attorney general from issuing public statements describing or warning of any course of conduct or any conspiracy which constitutes or will constitute a deceptive trade practice, whether on a local, state-wide, regional, or nation-wide basis.

Section 9. Civil penalties.—Any person who violates any court order or injunction issued pursuant to this act shall forfeit and pay to the general fund of this state a civil penalty of not more than ten thousand dollars. For the purposes of this section, the court issuing any such order or injunction shall retain jurisdiction and the cause shall be continued. In any such case of violation, the attorney general may petition the court for the recovery of such civil penalty. Such civil penalties shall be in addition to any other penalty or remedy available for the enforcement of the provisions of this act and of any such court order or injunction.

Section 10. District attorneys to receive and transmit complaints.—(1) The district attorneys of the several judicial districts of this state, their assistants and deputies, are hereby appointed agents of the attorney general, to serve without additional compensation, for the limited purposes described in subsection (2) of this section.

(2) (a) The agents appointed in subsection (1) of this section shall have the following duties:

(b) To receive, on forms provided by the attorney general, complaints from persons concerning deceptive trade practices listed in section 2 of this act; and

(c) To transmit such complaints to the attorney general.

Section 11. Enforcement.—In order to promote the uniform administration of this act in this state, the attorney general shall be responsible for its enforcement, but he may direct any district attorney in this state to enforce the provisions of this act, in which case the district attorney shall have the powers of the attorney general prescribed in this act.

Section 12. Damages.—The provisions of this act shall be available to any person in a civil action for any claim against any person who has acquired any moneys or real or personal property by means of any deceptive trade practice listed in section 2 of this act. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party.

Section 13. Citation.—This act may be cited as the "Colorado Consumer Protection Act".

Section 14. Severability clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 15. Effective date.—This act shall take effect July 1, 1969.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For RELEASE: IMMEDIATE, Wednesday, August 13, 1969

FTC URGES STATES TO ENACT "UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW"

The Federal Trade Commission has renewed its recommendation, originally made in 1966, that the states enact laws to protect the public from deceptive and unfair trade practices. The FTC-recommended legislation would enable the attorney general or other designated state official to investigate and obtain court injunctions with respect to "unfair methods of competition and unfair or deceptive acts or practices in trade or commerce." This is similar to language contained in Section 5 of the Federal Trade Commission Act (Title 15, Section 45, U. S. Code). The Commission also included in its draft alternative language which would prohibit practices which are misleading or deceptive to the public.

Chairman Paul Rand Dixon in discussing the current proposal stated that co-operation between the Commission and state and local agencies is needed if the public is to be afforded adequate protection against practices which cheat consumers and unfairly injure honest businessmen. Chairman Dixon said, "To the extent that the states correct such practices occurring locally, the Commission will be enabled to giv quicker and more effective attention to problems of national significance."

The FTC-recommended legislation is designated "Unfair Trade Practices and Consumer Protection Law." It embodies language not only from the Federal Trade Commission Act but from existing laws of several states, including Washington, Hawaii, North Carolina, Vermont and Massachusetts, as well as Arizona, California, Connecticut Delaware, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Texas and Wisconsin.

This year's draft contains a provision authorizing the court to decree restituti of money or property to anyone who suffers damage from unlawful acts or practices, to appoint a receiver, or revoke a license or certificate for doing business. Provision is also made for injured parties to initiate suits for the recovery of their own damages as well as losses sustained by others who have been similarly damaged, and for payment of attorney's fees and court costs. Ordinarily the amount involved in a consu transaction is not sufficient to warrant bringing private suit, with the result that thousands of consumers suffer small losses without any remedy being available, Chairma Dixon explained. Minimum relief of $200 is authorized, and the court may, in its discretion, award up to three times the actual damages.

Another new section added to the model law this year provides that a consumer's promissory note or other evidence of debt is different from ordinary commercial paper and, if it is transferred to a finance company or other third party, the consumer may assert all the defenses against the note holder that he could have asserted against

the original seller or lessor of the goods or services. Under the laws of most states, such transferees are treated as "holders-in-due-course" and are not subject to these defenses with the result that if the seller fails to perform the services or to deliver the merchandise as ordered, the buyer may nonetheless be required to pay his note. The Commission feels that eliminating the holder-in-due course doctrine for consumer installment transactions will help to eliminate consumer deception and the hardships which consumers suffer as a result of high-pressure selling methods. Retailers will no longer be able to secure what amounts to virtual immunity from their illegal practices by assigning the installment contracts to third parties. At the same time, more finance companies will be encouraged to investigate the business practices of concerns from whom they buy consumer paper, which may dry up the sources of financing of those fly-by-night operators which engage in deceptive and fraudulent sales practices.

Another new section of the model law recommended by the Commission would authorize assessment of civil penalties of up to $2,000 per violation for initial violations when the violator acted willfully, that is, when he knew or should have known that his conduct violated the law. Criminal penalties of up to $5,000 fine and one year's imprisonment are authorized to be imposed, in the discretion of the court, to deal with violations which entail fraudulent conduct. The Commission felt that these additions were necessary to eradicate the hard-core frauds and predators who victimize aged and low-income consumers, especially in the inner cities.

Participation in enforcement actions by county and city attorneys within the state, subject to approval of the state attorney general, is also authorized under the proposed law. This, it was felt, would promote the development of coordinated enforcement action at state, county and city levels.

In addition to the specific legislative proposal contained in the recommended "Unfair Trade Practices and Consumer Protection Law," the Commission urged that agencies of state and local government take action designed to stimulate competition in low-income areas of their inner cities. The Commission believes that the restoration of competition among merchants who serve these areas is an effective means of assuring that the customer has the opportunity to purchase quality goods and services at fair prices.

The proposals were unanimously adopted by the Commission except that Commissioner MacIntyre did not concur in the recommendation regarding limitation of the holder-in-due-course doctrine. He reserved judgment on this subject pending completion of his analysis and study of the National Consumer Protection Hearing held by the Commission in November-December 1968.

The Council of State Governments has endorsed the draft recommended by the Commission with three changes:

(1) in the prefatory explanation regarding the limitation of the holder-in-due-course doctrine, the Council added a footnote reminding state legislatures to consider this change in conjunction with the Uniform Consumer Credit Code;

(2) in the civil damage section, the Council changed treble damages to punitive damages; and

(3) the Council deleted the section which would have provided criminal penalties. This was done on the motion of a member who expressed the view that their inclusion would unduly complicate and delay investigation under the law, and that state criminal fraud laws are already more or less adequate, the great need being for a law which provides civil procedure and remedies.

The Commission's proposal regarding improvement of competition was consolidated for consideration with related proposals received from the Small Business Administration and the Department of Housing and Urban Development which the Council is also considering.

The official report of the Council's action will be published about September 1, 1969 in Suggested State Legislation for 1970.

The full text of the Commission's proposals may be obtained from Office of the General Counsel, Division of Legislation and Federal-State Corporation, Federal Trade Commission, Washington, D. C. 20580.

---oOo---

OK → 1) See Law Reviews cited in note #1, 2) then fill in blanks "proposed legislation"

Proposed Legislation

FROM
ASSISTANT GENERAL COUNSEL
FOR FEDERAL-STATE COOPERATION
FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

PAUL RAND DIXON
CHAIRMAN

April 23, 1969

RECEIVED
MAY 19 1969
OFFICE OF THE
ATTORNEY GENERAL

Honorable Phillip S. Hughes
Deputy Director
Bureau of the Budget
Executive Office of the President
Washington, D. C. 20503

Re: Proposals for State Legislation

Dear Mr. Hughes:

This is in response to your letter of December 20, 1968, conveying invitation from the Council of State Governments and the National Governors' Conference for submittal of legislative proposals to be considered by the Committee of State Officials on Suggested State Legislation.

The enclosed proposal No. 1 is a revision and bringing up to date of the model "Unfair Trade Practices and Consumer Protection Law" which was initially recommended by the Federal Trade Commission in 1966 and published by the Council of State Governments in Suggested State Legislation for 1967. This proposal incorporates changes which were published in Suggested State Legislation for 1969 and additional changes which are discussed in the prefatory statement.

The enclosed proposal No. 2 is designed to stimulate competition by encouraging new entry and improving efficiency of business concerns in low-income areas of America's inner cities, for the purpose of providing residents of those areas with better quality merchandise at lower prices.

The Commission is pleased to note that its proposal to license hearing aid fitters and dealers, as adopted by the Council of State Governments in Suggested State Legislation for 1967, has been followed in Indiana, Tennessee, Florida, Kansas, South Dakota, Louisiana, and Arkansas. They, along with Oregon and Michigan, which were first to act, now comprise nine States having such laws.

The Commission is still interested in seeing that model legislation be developed to provide for better regulation of correspondence and vocational schools and their salesmen, as mentioned in our proposals of 1966-68.

3.

The cooperation of the Council of State Governments and the National Governors' Conference in making this opportunity available to us is appreciated.

By direction of the Commission, with Commissioner MacIntyre reserving judgment as to the proposal involving holder-in-due-course doctrine. His separate statement in that regard is attached.

Paul R. Dixon

Paul Rand Dixon
Chairman

Enclosures

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (Revised for 1970)

This is a revision and bringing up to date of the model Unfair Trade Practices and Consumer Protection Act as 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 highly successful, in that ten States subsequently adopted such legislation. They are Arizona, Kansas, Maryland, Massachusetts, Missouri, New Mexico, Pennsylvania, Rhode Island, Texas, and Vermont.

To meet differing requirements in the several States, slightly different language has been adopted 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 create monopoly and enhance prices. However, in some States such anticompetitive 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. In this draft the language used is that proposed by Howard H. Bell, President of the American Advertising Federation, before the Federal Trade Commission at its National Consumer Protection Hearing on November 13, 1968. Mr. Bell suggested that the model act declare unlawful "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." This language 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 would, like the 1967 draft, prohibit 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 adopted by Council of State Governments 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.

Broad prohibition of unfair and deceptive practices is essential to cope with the novel practices and variations on old practices that sharp operators constantly are inventing to deceive the public and divert trade from honest competitors.

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 that 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. Such exemption is appropriate because media generally would not have the expertise or facilities needed to determine the truth or falsity of advertisements presented to them for publication. However, in this draft they 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 will extend only to acts done in their capacity as publishers and broadcasters on behalf of other advertisers, and will 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 has been 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. This deficiency in the model law was pointed out by Robert L. Meade, Assistant Attorney General of Massachusetts.

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.

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Section 8 provides for private and class actions, and for payment of attorney's fees and costs, in order that the private bar may be brought into the consumer protection picture. 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). The Commission is aware of the importance and desirability of providing 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. The Commission believes that the consumer should be given the benefit of 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, it is believed, go a long way toward eliminating consumer deception, and the hardships which consumers suffer as a result of high-pressure selling methods. A main advantage of the proposal is the built-in self-regulatory feature by which finance companies will be encouraged to investigate more carefully the business practices of retailers with whom they deal. It should dry up the sources of financing which enable fly-by-night operators to fleece aged, low-income and other unsuspecting consumers.

In selecting the language of Section 9, the Commission considered "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. 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 deemed clearly unacceptable, 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. The Commission accordingly has selected for inclusion in Section 9 what it considers to be the most desirable features of Alternative A of the Uniform Consumer Credit Code, coupled 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. Criminal penalties of up to $5,000 fine and one year's imprisonment are also provided for use in the discretion of the court to deal with violations which entail fraudulent conduct. These additions are needed to eradicate the hard-core frauds and predators who victimize aged and low-income consumers, especially in the inner cities.

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, to authorize participation in enforcement actions by County and City attorneys within the State, subject to approval of the attorney general. This should 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 should conform to state requirements. The following are some suggestions: "An Act to prohibit unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"; "Unfair Trade Practices and Consumer Protection Law"; or "Buyer Protection Act".)

(Be it enacted, etc.)

Section 1. Definitions.

As used in this Act,

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

(b) "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.

(c) "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.

(d) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment 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.

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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 misunderstanding 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:

(a) 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).

(b) 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 up to three times the actual damages sustained 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.

(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 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 or 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:

(a) Personal service thereof without this State; or

(b) 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

(c) 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

(d) 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:

(a) 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;

(b) 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

(c) 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) Any person who engages in a fraudulent course of conduct declared unlawful by Section 2 of this Act shall, upon conviction, be fined not more than five thousand dollars ($5,000.00), imprisoned for not more than one year, or both, in the discretion of the court; provided that nothing in this subsection shall limit any other provision of this Act.

(d) 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.

Section 18. Severability.

If any provision of this Act is declared unconstitutional, or the application thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

Section 19. Effective date.

(Insert effective date.)

Alaska Retail Association

Section 45.50.550 - PRIVATE AND CLASS ACTIONS

When any person in any action brought by the attorney general under section 45.50.520 of this title, has been enjoined from committing any act or practice, whether after final adjudication or by consent decree; any person claiming to have been adversely affected by the act or practice giving rise to such injunction may bring suit and recover actual damages, and the costs of suit, including reasonable attorneys' fees, and when appropriate additional damages, restitution, reformation, rescission and other equitable relief.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

ALASKA RETAIL ASSOCIATION, INC.

Testimony on

ALASKA CONSUMER PROTECTION ACT

The retail industry favors having a consumer protection bill which defines and prohibits deceptive trade practices. We know this helps the legitimate businessman, as well as the consumer. In fact, we have made this statement both before the Senate Judiciary Committee and, more recently, before the House Commerce Committee. Most of our previous testimony has been in regard to SB 352 which has passed the Senate and is being considered by you today, along with HB 444 and HB 446.

We have had only two major suggested amendments to the Senate Judiciary Committee substitute of SB 352; those were the elimination or modification of the "class action provisions" contained in Section 45.50.530 and an amendment to Section 45.50.501 which would bring this measure into line with existing Federal laws and regulations. Copies of those suggested amendments have been supplied to each member of this Committee.

I am certain that many of you wonder why our industry is so opposed to the "class action" method of enforcing this type of law. We have, we think, valid ground for our opposition.

First of all, let's define "class action." This is an action where one or more members of a class sue, either for themselves or for themselves and other members of a class. Any judgment entered for the plaintiffs in such an action would, of course, be conclusive for all members of the class represented. It is true that class actions are presently permitted under Alaskan Law; however, inclusion of a statutory provision in a law such as SB 352 would, in all probability, make entry of this type of suit much easier than is presently the case.

On the surface, it might seem that the inclusion of class action provisions in a consumer protection law might help to make it "self enforcing." However, if we explore the possibilities, we will see that the wide use, by consumer, of class action in cases of an alleged deceptive trade practice might create more problems than they would solve.

The possible amounts of recovery against a defendant under a class action are enormous and, on the surface, it would seem to be a fine way to rid ourselves of dishonest businessmen. It is an unfortunate fact, however, that attorneys initiating such an action would not be unduly interested in filing against the "fly-by-night" operator or against marginal businesses skirting the fringes of legality; these businesses would be judgment proof -- or unable to pay large amounts in damages. A class action lawyer and his multiple clients would, instead, be encouraged to bring actions against reputable, financially-sound enterprises who may have been trapped through an inadvertent violation.

A business could be nearly ruined in a situation where a responsible public official would only require an assurance of more care in the future, or, at most, a minor penalty.

Consumers, in cases where they have been victimized by a deceptive trade practice, are entitled to fast and equitable relief. The "class action" theory would not accomplish this purpose because of the intricate and complicated pre-trial procedures required in determining, first of all, the actual "make-up" of the class. There would also be the requirement of notices to all parties (or members of the class); complicated pre-trial procedures and extensive hearings. All of this would serve to cause delay to the consumer in receiving the relief he seeks. Another point to consider is the fact that, if class action suits become the usual method by which this law is enforced, it could place a fantastically heavy burden on our Court System which is already over-loaded.

The retail industry sincerely feels that the consumer, the State, and the businessman would not benefit under a class action suit. We feel that the inclusion of such provisions in a law of this nature would encourage the filing of frivolous actions by attorneys interested only in the large contingent fees possible or by persons solely interested in "harassment" of reputable businessmen.

We would suggest that the consumer, the State and the honest businessman would be much better served if, instead of class actions, a consumer protection law included provisions to give the

Attorney General's Office broad and realistic powers to enforce the Alaska Consumer Protection Act, along with providing for reasonable penalties. In this manner, the honest victim of a deceptive trade practice would be protected. Additionally, the legitimate businessman would not be subjected to unfair private actions that, even though unfounded, could still cost a lot of money to defend.

If this Committee and the legislature still feel that class actions would be a necessary part of this law, we would suggest the inclusion of language which would allow private and class actions after a vendor has been enjoined from committing any act or practice prohibited by this measure either through final adjudication or by consent decree, through an action brought by the Attorney General. A provision of this nature would help to discourage the filing of frivolous, harassment type actions. I have previously distributed copies of a suggested amendment that would accomplish this.

Our other principal suggested change is the inclusion of language in Section 45.50.501 which would bring this law in line with Federal laws and regulations presently in existence. This suggestion is only to preclude the possibility that a business might find itself in the position of having to comply with two separate laws on the same general subject. Copies of our suggested amendment have been made available.

We have several other suggested changes that are minor, copies of which have been also supplied to you. I'll review a few

of these briefly. Sec. 45.50.481 - Deceptive trade practices defined: We suggest that it should be made clear that a person must have knowingly engaged in a deceptive trade practice (INTENT); Section 45.50.491 - Exceptions to the prohibited trade practices - Language should be added to insure that when a person uses, for example, advertising furnished by a supplier which turns out to be false or misleading and he has no knowledge of its misleading character, he will not be penalized; Section 45.50.550 - Liability for actions of employee - The addition of language specifying that the employer shall be liable for an employee's action only in the course and scope of his employment; A new section establishing a statute of limitations, which we suggest, should be one year after the discovery of a deceptive trade practice.

We have mainly discussed SB 352 and have not touched greatly on the other two similar bills. However, I would like to make brief comments on two sections in HB 446 which contain provisions not covered in either HB 444 or SB 352, or in our suggested amendments. First of all, under Section 45.50.560 - Penalties - We feel that a penalty of $25,000 is excessive, particularly when a violation could be through inadvertence. Secondly - in Section 45.50.570 - Forfeiture of Corporate Franchise - This section is extremely harsh. The loss of one's business, which apparently is possible under this section for one violation, seems unduly drastic; we would suggest the complete elimination of this provision.

To sum up -- we favor the passage of SB 352 if our suggested amendments are included. We think a law along these liner would be beneficial to all concerned. HB 446 seems to be, in general, an extremely harsh measure, particularly in view of the fact that there appears to be no pressing problem in Alaska at this time in reference to deceptive trade practices. HB 444, in its original form appears to be the most fair and realistic law and could be supported by the retail industry, subject to a few very minor technical changes or classification of certain portions.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

ALASKA RETAIL ASSOCIATION, INC.

Testimony on SB 352

Alaska Consumer Protection Act

I am Dean Ehrich, Executive Director of the Alaska Retail Association. With me is Mr. Randolph Aires, an attorney from Sears Roebuck & Co. in Los Angeles, who will gladly answer any questions regarding the legal aspects of SB 352, which is being considered at this hearing.

We have examined the Committee Substitute for SB 352, relating to consumer protection in some detail and find that its intended purpose is substantially in accordance with our own views regarding the need to protect consumers and legitimate merchants from unfair and deceptive trade practices. There are, however, at least two major areas in the bill before us which need complete revision. First, and most important, we feel, is elimination of the class action provisions. Second, would be the addition of language in Section 45.50.501 to bring the measure in compliance with existing Federal laws. We also feel, incidently, that a reasonable statute of limitations should be included. We suggest that one year would be a reasonable length of time for a consumer to determine whether or not he had been a victim of a deceptive trade practice.

We would now like to relate our reasons for our suggested changes in more detail. CLASS ACTIONS: On the surface, the provisions in this measure allowing the right of private or class action suits in matters of deceptive trade practices might appear to be reasonable and justified. However, if we explore all the ramifications possible in this type of provision, we soon find that we have indeed opened up a "fine can of worms"; a can of worms that negatively affects not only the retail industry but also our

court system and the consumer its designed to protect.

Let's first define "Class Actions". This is an action in which one or more members of a class sue, either for themselves or for themselves and other members of a class. Where members of a class sue on behalf of other membems, judgement is conclusive for those memb rs of the class thus represented. As you will note, the class action provision in SB 352 would allow for a multiplicity of plaintiffs, all bringing action against a defendant. The possible amounts of recovery against a defendant under a class action are enormous and, on the surface, it would seem a fine way to rid ourselves of dishonest businessmen. However, it is an unfortunate fact that class action lawyers would not be unduly interested in filing an action against the "fly-by-night" operator or marginal businesses skirting the fringes of legality. Such businesses would generally be judgement proof or, at best, incapable of paying substantial damages. Accordingly, class action suits would be least effective in reference to the very type of business against whom they are allegedly designed to protect the consumer. The class action lawyer, with a view toward garnering large fees, would, quite naturally, initiate actions against reputable, financially sound enterprises who would be capable of paying large judgements. He would have little or no interest in "righting a wrong". We can see from this that a legitimate operator could easily become a victim, through honest ignorance or employee neglect, of an action that could quite possible ruin him. He could be ruined, under a class action suit, in circumstances that a responsible public official would only require an assurance from the businessman of greater care in the future or, at most, a minor penalty.

We feel that the consumer is entitled to fast, equitable redress in cases where he has been the victim, either through design or through inadvertance, of a deceptive trade practice. The class action provisions of SB 352 would not accomplish this worthwhile goal. In fact, because of the time consuming, cumbersome procedures involved in such an action, the consumer may never receive the relief deserved. Litigation in a class action would involve questions including the actual "make-up" of the class; would require intricate notices to all members of the class; and would require complicated pre-trial procedures and extensive hearings.

This leads us to our third point against the class action theory. Should this type of action become the usual vehicle for redress of consumer wrongs, a fantastically heavy burden will be placed on or already over-loaded Alaskan Court system. This is inefficient, both from the stand-point of the State and that of the consumer.

We believe that the proper, most efficient method to accomplish the purpose of rapid remedy of consumer abuses is to give the Attorney General's office broad and realistic powers to enforce the provisions of the Alaska Consumer Protection Act. Class actions would only serve to cause confusion and delay to the consumer, burden our courts and perform an injustice to the honest businessman. Class action would be more a form of mob rule rather than rule by law and justice.

If, after due consideration, the committee still feels that class action should be retained in this law, we would suggest the inclusion of a provision which would provide, in brief, that private and class actions would be allowed after a vendor or supplier has been enjoined from committing any act or practice prohibited by this measure, either through final

adjudication or by consent decree, through an action brought by the Attorney General. This would, to a large degree, help to prevent the filing of frivolous, harassment type actions.

Our second major suggested change would be the addition of language in Section 45.50.501 which would serve to bring this measure in line with existing Federal laws and regulations. To accomplish this, we suggest the following: "This act is to be construed uniformly with Federal law and regulations. In any action instituted under this act, it shall be an absolute defense to show that challanged parties are subject to and comply with statutes administered by the Federal Trade Commission, or any rules, regulations, or decisions interpreting such statutes." We feel the inclusion of such language would serve to prevent possible confusion and mis-interpretations from developing in the State's administration of this law.

Mr. Chairman, we wish to thank you and the members of your committee for hearing our views on SB 352. We would be happy to answer any questions you might have of Mr. Aires or myself at this time.

STATEMENT OF RANDOLF H. AIRES BEFORE
ALASKA HOUSE COMMERCE COMMITTEE
CONCERNING S.B. 352 AND RELATED BILLS

I am Randolf H. Aires, an attorney in the Pacific Coast Legal Department of Sears, Roebuck and Co. I appreciate the opportunity to appear before your Committee, both on behalf of my company and on behalf of the Alaska Retail Association, to express the retailing industry's concerns with all three consumer protection bills before your Committee and with CSSB 352 in particular.

The retail industry, which acts as the purchasing agent for the consumer, believes that the interests of its customers are paramount. The words "consumer protection" are magic words these days, and we believe that the honest and legitimate merchants in your communities have a lot to gain from good consumer legislation. Thus we support and will continue to support good and reasonable consumer legislation.

You know, we are all consumers, and I am still young enough to remember painfully how I was taken advantage of as a young newly married person, before going to law school, by a door-to-door salesman with a glib line and plenty of high pressure. The misrepresentations he made really hit me the morning after we signed the contract, and I wish that a law such as your door-to-door solicitation bill being considered here tonight would have been available to me then, so that I could have rescinded that sale.

Your proposed door-to-door solicitation law is just one of twenty significant consumer protection features contained in the Uniform Consumer Credit Code, presently before the Alaska Legislature. We support the UCCC and we hope that it will be studied seriously some time later in the year.

Now, in these three consumer protection acts before you, we're dealing with deceptive trade practices. The twelve enumerated practices in CSSB 352 are practices which we feel should be dealt with in proper legislation.

We believe that a customer who feels he has been defrauded, and who cannot obtain satisfaction through the normal complaint procedure is entitled to a remedy. President Nixon's Special Assistant for Consumer Affairs, Mrs. Virginia Knauer, who has received so much publicity recently, has pointed out that the remedy should be "convenient, expeditious, and effective."

We submit that the consumer class action provision contained in CSSB 352 and H.B. 446 would not provide that type of remedy to the consumer. We believe that indiscriminate class action legislation will create more evils than it will remedy.

Class actions do not result in a speedy and efficient determination of claims. Ask any attorney who has been involved with one. On the contrary, notice requirements, unwieldly pre-trial procedures required when there are numerous litigants, protracted trials, difficult damages determinations, and a heavy burden of management which is placed on the courts, all lead to excessively long and complex proceedings benefitting only the lawyers. I know that you are attempting to deal with the problem of overburdened courts in Alaska this year.

Up to now, courts all over the country have been reluctant to permit traditional class actions, under the existing restrictive rules of civil procedure and court rules allowing class actions, because these actions are likely to benefit practically nobody other than the lawyers who bring them and because they often create lawsuits without merit

where none would have previously existed.

Now we have this new approach which has appeared on the scene - the proposed statutory consumer class action. It first came on the scene last year in the Federal Congress with people such as Senator Tidings championing it. This year we are seeing it at the state legislative level. To my knowledge no state has passed a consumer class action law so far this session.

What are the dangers as we see them with the consumer class action? It is relatively simple for an enterprising attorney (there are many) to marshall an expansive list of plaintiffs through the class action notice provision. You can develop hundreds and thousands of unknown clients just like that. The potential of high legal fees will cause many attorneys to bring unwarranted class actions relating to technical violations of law and against innocent businessmen. The class action might be brought against a businessman who would be willing to resolve, on an informal basis, a valid claim of a consumer. But when maybe only one out of the hundreds or thousands who might be in the so called "class" has a valid claim and the others don't, how could you possibly settle with the lawyer representing the amorphous class?

Add to this the fact that in your bills before you, each so called "injured person" will recover at least two hundred dollars. There is no certainty concerning this provision, but there is the possible interpretation that the two hundred dollar minimum for each person applies to the consumer class action as well as to the private individual action. If this is true, even the people with valid claims may be damaged only in the amount of several dollars, and yet each person in the class would be asking for two hundred dollars or more, whether they have a valid claim or not. It doesn't

take much imagination to see the potential for severe harassment against the legitimate retailer under these conditions.

In class actions such as these, the lawyer becomes less counsel and more the participating litigant and real party in interest, because the financial interest of the attorney for the class may be far more substantial than the interest of any member of the class.

We believe that consumer class actions could impose great economic consequences for the defendant. A class action, even if completely unwarranted, necessitates substantial time and expense in the preparation of a defense. This type of harassment could drive some completely honest small businessmen right out of business.

The astute lawyer will obviously search for defendants who can be subjected to large damage recoveries rather than the judgment proof "fly-by-night" operators who prey upon the unsophisticated. Thats the tradgedy of this whole misguided concept of consumer class actions in bills such as are before you.

Here are some examples of technical violations which could be used against a legitimate enterprise in a consumer class action: an unintentional omission of an address in a guaranty form; a mistake in using the term "regular price" when an article was actually "originally" rather than "regularly" offered at such price; the designation of a product as "imported" but with the omission of the specific country of origin, even though such country produces goods of desirability to the consumers; the advertising of a television picture tube as "23 inch" without referring to it as a "diagonal measurement."

There has been no demonstrated need for a consumer class

action statute, especially here in Alaska, as distinguished from other forms of remedies presently available. Before jumping into this type of legislation, we believe that experimentation and pilot programs involving other methods could be pursued.

Section 45.50.511 of CSSB 352, which gives the Attorney General basic powers, provides that the court may make any order or judgment necessary to restore to the individual money or property acquired because of a deceptive trade practice. So the court would be equipped to take care of the individual without the necessity of the individual bringing his own lawsuit.

Furthermore, small claims courts are available in Alaska for amounts up to $500.00 in damages, where the individual can go into court without the expense and need of an attorney.

The Federal Trade Commission and the Attorney General's office should be available to a consumer who has been defrauded. There is increased emphasis being placed in this direction. In the State of Washington, there are presently three or four attorneys in the Consumer Protection Division of the Attorney General's office, doing their thing for the consumers, and they are quite active. We have no objection to this kind of strick enforcement at the governmental level.

The whole point of all of this is that much more study should be made of this whole area of how to give the consumer a fast and judicious remedy to take care of his small grievances, and it would be quite unwise, in our judgment, to pass this kind of legislation at this time.

We respectfully submit that if the Alaska Legislature is prepared and determined, however, to deal with this complex

subject at this time, the best approach is that being followed by the Nixon Administration at the Federal level. That approach, put into effect at the state level, would involve your Attorney General and his staff, who would effectively prosecute violators of these deceptive trade practices, and if successful, the individual could bring his lawsuit based on the violation and get all the relief necessary from the court. We have given you a suggested amendment to this effect. This approach, we submit, would prevent the harassment from unwarranted private and class actions, and at the same time give the consumer who has a valid grievance his day in court.

Another proposed amendment which we have given to you deals with the rule making powers of the Attorney General under such a law as CSSB 352. Our concern in this area is that we don't feel that merchants should be subject to separate and possibly conflicting interpretations and rulings on what constitutes a deceptive trade practice and on any related matters. Deceptive trade practices listed in your bills, particularly in CSSB 352, are keyed into the Federal Trade Commission Act dealing with deceptive trade practices. We propose that it should be made clear that it is the intent of the Alaska Legislature that the construction of your act will depend in large part upon the interpretation of the Federal Trade Commission and the federal courts who have operated in this area for many years.

Further, we think it should be an absolute defense to an action brought under this act if it can be shown conclusively that the conduct complained of was authorized by the Federal Trade Commission or any rules, regulations or decisions interpreting the Federal Trade Commission Act. This is only fair.

We suggest that four other amendments be considered for

CSSB 352.

Seven of the twelve defined deceptive trade practices have a requirement for intent or knowledge on the part of the person or company perpetrating the practice. It is difficult to know why this distinction has been made. We feel that all twelve defined practices should have this knowledge or intent requirement. The requirement is particularly necessary because some of those definitions are so broad and open to interpretation.

We suggest that the exception provided in Section 45.50.491 (2) should be extended to <u>any person</u> who merely uses some advertising matter which is supplied to him by his supplier, and not just to the newspaper, radio and television people.

We feel that it is only reasonable that a statute of limitations be placed in this bill or any other bill of this nature, granting a one year statute of limitations after the discovery of the unlawful conduct involved.

We recommend that Section 45.50.550 of CSSB 352, dealing with the liability for actions of employees, be clarified to state that the deceptive trade practice perpetrated by the employee would have to arise in the course of and in the scope of his employment with the employer. Otherwise, broadly read, this could apply to something the employee did when he wasn't working for his employer, such as on a moonlighting situation, or it could apply to something which the employee did without any authority, or in connection with some type of activity not in the scope of his assigned duties.

With the adoption of the amendments which we have recommended and given to you, we could support CSSB 352. If H.B. 444 and H.B. 446 are considered by the House, our comments concerning CSSB 352 will apply with equal force to

those bills. Further, we would want some other minor modifications to H.B. 444, and we feel that H.B. 446 would have to be drastically changed before we could support it. In particular, I refer to the sections in H.B. 446 dealing with the Attorney General's regulations, the powers of receivership, the forfeiture of the corporate franchise, and the civil and criminal penalties provided therein.

Since you are also considering tonight H.B. 411 and S.B. 188, I would like to state that we are in favor of both of these consumer bills.

Thank you. I will be glad to try to answer any questions you may have.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.