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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.

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