

**WRITTEN STATEMENT
OF**

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WASHINGTON, D.C.**

SUBMITTED TO THE

**ECONOMIC MATTERS COMMITTEE
MARYLAND HOUSE OF DELEGATES**

**REGARDING:
HOUSE BILL 797**

ON

MARCH 4, 2009

This statement is being submitted to the House Economic Matters Committee on behalf of the American Tort Reform Association (ATRA) in regards to the hearing being held on March 4, 2009, concerning House Bill 797.

ATRA is a Washington, D.C.-based membership association of more than 300 large and small businesses, physician groups, nonprofits, and trade and professional associations having as its mission the establishment of a predictable, fair, and efficient civil justice system through the enactment of legislation and public education.

ATRA strongly opposes House Bill 797.

The proposed law would create greater incentives to sue under the Consumer Protection Act (CPA) by providing for statutory damages and, in some cases, even treble damages, at a time of great economic uncertainty and turmoil. This bill is exactly the wrong prescription for Maryland's businesses, particularly small business, which far too often are victimized by predatory CPA lawsuits. We know from experience in other states and jurisdictions that providing the wrong incentives leads to disastrous results and, unfortunately, House Bill 797 would move Maryland in wrong direction.

There is no evidence that Maryland needs to provide additional incentives to bring lawsuits under the CPA. On the other hand, there are examples from across the country of frivolous lawsuits that are filed when statutory damages are available under consumer protection laws.

For example, one only has to look at our neighbors in the District of Columbia to see the consequences of a poorly conceived CPA. There, a much publicized multi-million dollar lawsuit was brought against Custom Cleaners, a Northeast

Washington dry cleaning establishment, over a lost pair of pants valued at \$150.¹ The plaintiff, D.C. Administrative Law Judge Roy Pearson Jr., sued Custom Cleaners, owned by the Chung family who are Korean immigrants, under the District of Columbia's consumer protection statute. Pearson continued to pursue litigation despite a generous offer by the Chung's to settle the claim for \$12,000² and widespread public condemnation and outrage.³ Although Mr. Pearson's pants were valued at \$150, he demanded \$65 million in his complaint. According to newspaper reports, Pearson believed the damages sought were justified because of signs posted in the dry cleaning establishment that promised "Satisfaction Guaranteed" and "Same Day Service" and the daily failure (in Mr. Pearson's mind) to provide such services constituted violations of the District's consumer protection law.⁴ Because D.C. offers statutory damages for CPA violations, Mr. Pearson demanded \$1,500 for each sign and every day that he did not have his pants.

Even though the Chungs won at trial and prevailed on the latest appeal brought by Pearson,⁵ the Chungs wracked up enormous legal expenses and ultimately closed down Custom Cleaners due to the toll the trial took on the family and their business. Only in a jurisdiction that offers statutory damages could a lawsuit over missing pants become a \$65 million case.

Unfortunately, the District is not the only place where small business has been victimized by consumer protection laws. Notably, in California, small businesses were easy prey for personal injury lawyers who used the plaintiff-friendly provisions of the state's Unfair Competition Law (UCL), section 17200 of the

¹ The lawsuit *Pearson v. Chung*, Civ. Action No. 4302-05 (D.C. Super.), has received extensive national and international media coverage. The initial story about the case appeared in a column by Marc Fisher. See Marc Fisher, *Lawyer's Price For Missing Pants: \$65 Million*, THE WASHINGTON POST, Apr. 26, 2007, at B1.

² *Id.*

³ See Editorial, *Kick in the Pants*, THE WASHINGTON POST, May 3, 2007, at A24.

⁴ See Marc Fisher, *Judge in \$65 Million Suit Might Keep Seat on Bench*, THE WASHINGTON POST, May 10, 2007, at B01.

⁵ See Keith Alexander, *District Briefing: Pants Hearing Rejected*, THE WASHINGTON POST, March 3, 2009, at B04.

Business and Profession code, to extort settlements from small businesses through fear of litigation. Until the UCL was reformed by ballot measure in 2004, plaintiffs' lawyers were able to bring claims without having to allege an injury or loss and, incredibly, without even having a client!

Small business owners who ran establishments, such as nail salons, auto-body shops, and restaurants, often were victims of shakedown UCL claims brought by personal injury lawyers for technical violations, such as running newspaper ads that printed "APR" instead of "annual percentage rate" and using the same container of nail polish on more than one client.⁶ Typically, personal injury lawyers would send a demand letter notifying the "offending" small business that a lawsuit was forthcoming but that litigation could be avoided by payment of a few thousand dollars directly to the lawyer.

This is exactly what happened when a Beverly Hills plaintiff's firm sent 2,200 claim letters to restaurants and auto repair shops on behalf of a front corporation located in Santa Ana.⁷ The claims were based on technical violations of the state's Automotive Repair Act, and the firm sent defendants settlement "offers" that demanded payment ranging from \$6,000 to \$26,000.⁸ After years of trying unsuccessfully to get the California legislators to make reasonable changes to the UCL, California's business community, led by small businesses, ran a ballot initiative known as Proposition 64, which was overwhelmingly approved by California voters. Thankfully for California's small business owners, shakedown lawsuits under section 17200 are a thing of the past.

The fundamental flaw with most state consumer protection statutes is that they do not require elements that are fundamental to bringing a private lawsuit:

⁶ Amanda Bronstad, *Nail Salons Sued Under Unfair Competition Law*, L.A. BUS. J., Dec. 16, 2002, at 12.

⁷ Monte Morin, *State Accuses Law Firm of Extortion*, L.A. TIMES, Feb. 27, 2003, at 5.

⁸ In early 2003, California Attorney General Bill Lockyer filed a Section 17200 lawsuit on behalf of the state against the law firm involved in suing restaurants and automobile repair shops for abusing Section 17200. *Id.* Ultimately, the lawyers involved surrendered their licenses, rather than face disciplinary proceedings. See Traci Jai Isaacs, *Litigious Attorneys Give Up Licenses*, DAILY BREEZE (Torrance, Cal.), July 12, 2003, at A3.

- The plaintiff experienced an injury – a loss of money or property – stemming from the purchase;
- The plaintiff saw or heard an advertisement or was the subject to allegedly unfair or deceptive conduct;
- The plaintiff was misled or deceived by a representation made; and
- The deception led the person to act in a way that he or she otherwise would not have, such as purchasing a product or service.

The potential for abuse of private claims was recognized long ago when the United State Congress considered the Federal Trade Commission Act. During the debate over an amendment that would have created a private right of action under the Act, Democratic Senator William J. Stone of Missouri observed, “[A] certain class of lawyers, especially in large communities, will arise to ply the vocation of hunting up and working such suits...The number of these suits, no man can estimate.”⁹ The Senate rejected the amendment, and the Act was passed without a private right of action. Ninety-five years later, the Act still does not provide for a private right of action.

House Bill 797 would do nothing to address some of the existing shortcomings of and inadequacies with Maryland’s CPA. In particular, our analysis reveals that while plaintiffs must show an actual injury or loss, they are not required to prove that they were actually misled or deceived. Rather than address this shortcoming, House Bill 797 seeks to make Maryland an even more attractive venue for CPA claims by providing for statutory damages ranging from \$500 to \$5,000. Hypothetically, judges in Baltimore City and Montgomery County could award \$500 and \$5,000, respectively, in cases arising out of the *very same behavior*. In addition, the upper limit of \$5,000 would move Maryland outside the mainstream of states that provide for statutory damages under state cpa’s. Only

⁹ 51 Cong. Rec. 13,113 (1914)

Kansas¹⁰ and the state of Washington¹¹ would provide for higher statutory awards. House Bill 797 virtually invites Maryland residents to bring low dollar claims in the hope of winning the litigation lottery. One can imagine a claimant who experienced a \$20 loss recovering \$5,000 in statutory damages; such an award is disproportional to the alleged harm and does not provide the equitable treatment that all participants in the civil justice system are entitled, including defendants.

The FTC Act, which was the first consumer protection law, was not written to provide for private recovery. Rather, it was designed to provide regulators sufficient means to curb fraud and unfair or deceptive trade practices. Private relief for fraudulent behavior was always, and continues to be, available through the common law. Maryland's CPA does contain a provide right of action, however, and we believe it is already contains sufficient remedies for those who suffer losses by providing for recovery of actual damages; courts also have the discretion to award attorney's fees and costs. As experience in the District of Columbia and California shows, abusive CPA claims harm the business environment and those who are least equipped to handle civil litigation --- small businesses.

Adoption of House Bill 797 will move Maryland toward a more hostile business climate that will not add one job to the economy but will burden Maryland's businesses that are already struggling to maintain viability in a challenging economic climate. House Bill 797 sends the wrong signal to Maryland's employers and will do nothing to attract additional investment to the state. Why would lawmakers want to risk turning Maryland into another California or Washington, DC? Lawmakers should reject House Bill 797 and consider improving our state's legal environment for business, rather than harming it.

¹⁰ The Kansas CPA provides for statutory damages equal to the greater of individual damages or \$10000. *See* K.S.A. §§ 50-634(b) and K.S.A. 50-636(a).

¹¹ Washington state provides statutory damages with an upper limit of \$10000. *See* RCW § 19.86.090.