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Position Paper: Unfair Trade Practices and Consumer Protection Law – HB 538 and 977

This position paper is written on behalf of Community Associations Institute's Pennsylvania Legislative Action Committee regarding PA House Bills 538 and 977, proposing to make the remedies contained in the Unfair Trade Practices and Consumer Protection Law (UTPCPL) applicable to enforcement of the Pennsylvania Uniform Condominium Act (UCA), Cooperative Act, and Uniform Planned Community Act (UPCA).

For the reasons set forth below, CAI strongly opposes the provisions of HB 538 and HB 977, which seek to specifically permit enforcement of the UCA or UPCA (together the "Acts") through the UTPCPL. Reference is initially made to Sections 3412 and 5412 of the Acts, already containing remedies for willful violations of their subparts, the declaration and bylaws. Likewise, the governing documents of most condominium and homeowners associations invariably address enforcement, often providing reimbursement of attorneys' fees to compensate the prevailing party. Furthermore, applicability of the UTPCPL will expose Associations to volumes of litigation, much of which is anticipated to be frivolous. The risk of having to defend such claims will not only have a chilling effect on board member participation by volunteer homeowners, it will also impact the availability and cost to Associations for insurance coverage.

By virtue even of its title, the **Unfair Trade Practices and Consumer Protection Law** is intended to protect and shield consumers from the predatory and fraudulent business practices of sellers of goods and services:

The purpose of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit. 73, §§ 201-1 to 209-6, is to protect the public from--and indeed to eradicate-- unfair or deceptive business practices. The statute's underlying foundation is fraud prevention, and **its strategy is to place the consumer and the seller of goods and services on more equal terms.** Agliori v. Metro. Life Ins. Co., 2005 PA Super 253; 879 A.2d 315; 2005 (emphasis added)

However, condominium and homeowners associations do not sell or advertise what could be deemed "goods and services", nor are homeowners considered "consumers". To the contrary, associations are corporate entities charged with management of its own affairs. The fiscal and administrative functions of associations are carried out by member-elected boards of directors. Sections 3303 and 5303 of the Acts not only specifically require board members to stand in a fiduciary relation to the association, but also mandate that they perform their duties in good faith, in a manner they reasonably believe to be in the best interest of the association. Similar provisions are also contained in the governing documents of associations. A person becomes a member by virtue of ownership of a unit within the association. The purchase transaction is governed by Chapters 34 and 54 of the Acts, which set forth statutory schemes intended to assure full disclosure of the finances and restrictions applicable to associations. Accordingly,



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members receive not only statutorily mandated disclosures, but are furthermore protected by a Board's obligation to act as fiduciaries. Homeowners and associations are thus clearly on equal terms. This relationship is quite different from that between a seller and purchaser of household goods, where statutory intervention to prevent consumer fraud may be appropriate. However, the remedies available for predatory trade or commercial practices clearly have no place in the context of a condominium or homeowners association.

Most if not all modern governing documents contain specific provisions addressing enforcement of their terms and conditions. These mechanisms are contractual in nature, and cannot unconstitutionally be disturbed by legislation. Even in the absence of a contractual procedure, Sections 3412/5412 of the Acts provide as follows:

If a declarant or any other person subject to this subpart violates any provision of this subpart or any provision of the declaration or bylaws, **any person or class of persons adversely affected by the violation has a claim for appropriate relief. Punitive damages may be awarded in the case of a willful violation of the subpart.** (emphasis added)

The addition of a potential UTPCPL claim against a condominium or homeowners association is thus unnecessary and duplicative. Similar remedies are already contained in the existing statutory scheme, specifically permitting an award of punitive damages in case of willful violations - not only of the Acts, but also of the governing documents (declaration and bylaws). It should also be noted that Sections 3412/5412 are specifically made retroactive to associations created prior to the effective date of the UCA and UPCA, thus protecting owners in older associations.

Although those outside of the industry seem to ignore this fact, condominium and homeowners associations are governed by volunteer board members. These individuals are not compensated for their services, and often devote all of their free time to the proper administration of a community. This commitment, coupled with the tremendous fiduciary responsibilities placed upon board members, has made it difficult for many associations to attract volunteers. While exposure to litigation has always been a factor in discouraging willing owners to serve on a board, the threat of a UTPCPL claim will undoubtedly constitute only one more reason not to volunteer.

Availability of UTPCPL remedies will surely encourage additional litigation, enabling anyone seeking to challenge the actions of an association to invoke its punitive remedies. Ordinary breach of contract or declaratory judgment actions will turn into fraud and misconduct cases. To the extent coverage to defend these claims is available, the cost to purchase directors / officers liability policies will increase. Obtaining coverage will also become more difficult. However, as these policies generally do not cover claims for fraud or willful misconduct (allegations of which are necessary to sustain a claim under the UTPCPL), defending such claims will be at the expense of the association; or even worse, at the expense of the individual board member.



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Thus, whether frivolous or not, associations and board members will be required to incur attorneys fees and court costs in defending UTPCPL claims.

As attorneys and professionals working in the community association industry, we believe that the UTPCPL should not be applicable to claims against condominium and homeowners associations. Remedies for violations of governing documents exist not only by contract, but also by virtue of an existing statutory scheme. HB 538 and HB 977 would thus not only unconstitutionally infringe upon contractual relationships, but also interfere with Sections 3412/5412 of the Acts. Moreover, applicability of the UTPCPL to violations of the Acts will discourage volunteerism, and thus hinder the proper administration of condominium and homeowners association. This is in addition to the increased costs of insurance coverage and litigation expenses.

For the foregoing reasons, CAI asks that any reference to the UTPCPL be eliminated from HB 538 and HB 977, and that enforcement of the Acts be left to existing contractual provisions and statutory schemes.

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