A.8427 (Lasher)

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BILL

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SUBJECT

"FAIR Business Practices Act"

DATE

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OPPOSE

The Business Council, representing more than 3,500 member companies from across New York State, **strongly opposes** adoption of the "Fostering Affordability and Integrity through Reasonable (FAIR) Business Practices Act," due to its overly broad application which will lead to a needless spike in the number of meritless lawsuits against businesses of all sizes in our already overly litigious state. While this bill claims to address affordability and protect consumers and small businesses, it will increase consumer costs, kill jobs and our economic health, and hold small businesses hostage to plaintiff's attorneys seeking a quick payout.

This proposal will lead to fewer jobs and higher costs of goods and services for all New Yorkers. The cost of litigation will lead to increased price of goods and services which leads to higher consumer prices, fewer jobs and increased insurance premiums. According to a report by the U.S. Chamber, New York households paid more than $7,000 annually in "hidden" tort costs through increased insurance and consumer prices -- $3,000 more than the national average – which can be directly attributed to New York's out of control litigation environment. This bill further opens the door for plaintiff's attorneys to pursue baseless and endless litigation, which will jeopardize the livelihood of many hard-working small businesses and result in uncontrollable costs for all New York businesses and consumers.

Below we highlight significant flaws in the proposed legislation:

- **Removes consumer-oriented standard**

In its expansion of General Business Law §349, currently known as "Consumer Protection from Deceptive Acts and Practices," this legislation intentionally removes "Consumer" from the title of the article. This is not a flaw, but a key component of the bill. The specific language of the bill removes the longstanding consumer-oriented standard from the heart of the statute, which goes against decades of jurisprudence and is in direct conflict with the integrity of UDAAP laws, federally and in other states. ("An unlawful act or practice is actionable under this section regardless of whether or not that act or practice is consumer-oriented…") The Business Council is unaware of any other state's UDAAP laws which are not consumer oriented in nature.

In removing the consumer-oriented standard, this legislation will open the door to lawsuits over one-off commercial transactions, employment relationships, and private or philosophical disagreements that have never fallen within the scope of consumer protection statutes.

- **Does not require actual harm or injury to bring an action**

Additionally, the bill intentionally removes the need for any complainant or plaintiff to show actual harm or injury to bring an action against a business. Without harm, any person could sue a business even if they did not purchase a good or service or interact with the business in any way. The Business Council is unaware of any other states' UDAAP laws which do not require actual harm or injury to bring actions.

Broadly subjective definitions of "unfair" and "abusive" are reliant on what someone's thinks might be unfair or abusive. The definition of "unfair" does say the act must "cause or likely to cause" "injury" or "substantial injury," but the bill then defines "injury" and "substantial injury" as "impairment of a person's interests." What is a "person's interests"? If a service is disconnected due to non-payment, does that constitute an impairment of a "person's interests"? Further, it goes on to state that injuries need not be "quantifiable, economic, or monetary in nature, including but not limited to loss of time, privacy, or security." Keeping in mind that the proposed statute is no longer consumer-oriented, if a consumer or a business partner or an employee must wait a certain amount of time (5 minutes, 20 minutes) to receive assistance or a response to a request or proposal, does that constitute a "loss of time?" What constitutes injury is a principle and question best left to courts to decide, not plaintiff's attorneys.

Further, the broad subjectiveness of "abusive," especially given that it does not require substantial injury or the likelihood of causing substantial injury, but merely an individual's interpretation of what may be abusive. Supporters of the expansion of GBL §349 purport that 42 states expressly prohibit unfair and abusive practices. But that is not entirely true. Only two states prohibit abusive practices and only recently amended their laws to do so: Maryland and Indiana. In the context of comparison, it is worth noting that both Maryland and Indiana enumerate specific acts as violations (which this proposed law does not) and have broad exemptions on their statute's applicability (does not apply to insurance, securities, for example). Also, these two states do not mandate the award of attorney's fees and costs to the prevailing plaintiff, but instead to the prevailing party, which could serve as a deterrent to a plaintiff (and their attorneys) from bringing frivolous and unfounded lawsuits.

- **Expanded private right of action incentivizes plaintiff's attorneys to pursue baseless claims**

This legislation expands the existing private right of action afforded under §349 to require $1,000 in statutory damages **and** actual damages, ***if any*** (again, no actual injury or damages are required to bring action). It removes court discretion in awarding attorney's fees and instead mandates the court to award "attorney's fees, including expert witness fees, and costs to a prevailing plaintiff." The bill also makes significant changes to the award of treble damages, replacing treble damages for "actual damages" with "damages" (inclusive of statutory damages) and again removes the court's discretion.

The legislation attempts to provide a "cure period" to businesses, however, the cure as written will incentivize plaintiff's attorneys to extort settlements from small businesses. The cure period provides a business with 30-days to comply with a "demand for relief."

Due to the significant changes in the private right of action, a “demand for relief” will likely be a monetary demand for relief, rather than a corrective demand for relief. This will be used by plaintiff’s attorneys to target small businesses with the threat of frivolous lawsuits, who often lack legal resources, with the hopes of extracting quick monetary settlements. Small businesses cannot afford long, expensive trials, and settlements are usually the only viable economic option. The structure of the cure period in this legislation does not allow a business to rectify an unintentional error but creates perverse incentives for a private attorney to hold a business hostage so they can receive a contingency fee with little or no effort.

Further, the bill requires the Attorney General to publish all settlements which could be used by plaintiff’s attorneys to target business. A settlement does not necessarily mean wrongdoing occurred. The Business Council understands the utilization tracking cases and settlements may have to the Attorney General’s Office but firmly believes it should not be published.

- **Liberally construed third-party and organizational standing to bring actions will create a cottage industry**

Liberally construed third-party and organizational standing goes far beyond what any state has in their UDAAP statutes. Allowing third-party standing with no harm required will create an opportunity for cottage industry (including attorney-affiliated organizations) to target any business for any reason. Coupled with the class-action allowed under the bill, this is a recipe for disaster. Under this bill, any business can be sued by another organization simply because they disagree with the business philosophically and seek to make an example of them. This could be utilized against entities across the philosophical spectrum and the Legislature should be cautious to open Pandora’s box in this way.

- **Changes under §349-c introduce amorphous characteristics of a person which would increase damages**

This proposed legislation seeks to amend GBL §349-c regarding additional civil penalties to apply not just to elderly persons (65 years of age or older), but additionally to anyone under the age of 18, or “a person who is on active duty in, or a veteran of, the United States Armed Forces, a person who has a physical or mental impairment that substantially limits one or more major life activities, or a person with limited English proficiency.” Whether an individual is active duty or veterans, has a physical or mental impairment or limited English proficiency are amorphous and subjective. How is a business to know if an individual has one of these characteristics? We must also consider that many transactions now happen online and in different mediums, making some of these characteristics almost impossible to discern. Not only is the introduction of those three attributes incredibly problematic, but sets a very high burden of proof for a defendant in that they must prove they “did not know *or have reason to know*” the act was perpetuated against a “vulnerable person.” The proposed language has no requirement that a plaintiff establish a nexus between one of these attributes and the alleged misconduct, yet requires the court to award an additional penalty of not less than $5,000 or more than $10,000. Mandating the court to award additional penalties in connection with these vague attributes without

putting any onus on the plaintiff to show a nexus between that attribute and the alleged conduct again only incentivizes plaintiff's attorneys and third-party organizations to seek out vulnerable plaintiffs to increase their fees.

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The Business Council recognizes and supports the protection of consumers from deceptive practices from bad actors. However, we firmly believe that the extreme broadness of this bill will ultimately harm New York residents and consumers. If enacted, this legislation will only create a massive incentive for over-eager plaintiff's attorneys to file frivolous and devious lawsuits against law-abiding businesses to recover excessive punitive damages for increased attorney's fees and court costs that will benefit their pockets – not consumers. And rather than protecting small businesses from frivolous lawsuits, this bill makes it easier for plaintiff's attorneys to prey on them even when no wrongdoing has occurred.

Any policy that trades litigation windfalls for the few for higher costs for the many is bad policy. For these reasons, The Business Council strongly opposes A.8427 (Lasher) and urges against its passage by the Legislature.