Model Legislation

Summary

State consumer protection statutes, frequently known as “unfair and deceptive trade practices acts,” vary widely from state to state. ALEC’s Model Act on Private Enforcement of Consumer Protection Statutes structures the private right of action under such laws to reflect sound public policy. Legislation based on the model act must be carefully drafted to fit within the state’s existing statutory scheme. Cross-references to the state’s existing definition of an unlawful act or practice, optional language, and language that may be altered to fit the preference of the sponsor or consistency with state law are presented in brackets.

Section 1. (Private Right of Action)

A.) A person who reasonably relies upon an act or practice declared unlawful by [SECTION] in entering into a transaction and thereby suffers an ascertainable loss of money or property may bring an action under this Act to enjoin further violations, or to recover as damages the out-of-pocket loss the person sustained as a result of such act or practice, or both. The “out-of-pocket loss” shall be no more than the difference between what the person paid for the product or service and what the product or service was actually worth in the absence of the unlawful act or practice.

B.) At least ten days prior to the commencement of any action brought under this section, any person intending to bring such an action shall notify the prospective defendant of the intended action, and give the prospective defendant an opportunity to confer with the person, the person’s counsel, or other representative as to the proposed action. Such notice shall be given to the prospective defendant by mail, postage prepaid, to the prospective defendant’s usual place of business, or if the prospective defendant has no usual place of business, to the prospective defendant’s last known address.

C.) If the [court OR trier of fact] finds by clear and convincing evidence that the use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public, the court may award up to three (3) times the actual damages sustained[, or $500 per person, whichever is greater].

D.) In determining whether to award enhanced damages under Subsection (b) and the amount of such penalty, the [court OR trier of fact] shall consider:

(1) if the amount of the actual damages awarded would have a deterrent effect upon the defendant;
(2) the seriousness of the violation, including the nature, circumstances, frequency, and gravity of any prohibited act or practice;
(3) the history of previous violations;
(4) the good faith of the person found to have violated the Act, including whether the person took prompt and appropriate remedial action upon learning of the alleged violation; and
(5) any other matter that justice may require.

E.) Any person who is entitled to bring an action under Subsection (a) on his or her own behalf or an alleged violator of this act for damages for an act or practice declared unlawful by [SECTION] may bring a class action against such person or on behalf of any class of persons of which he or she is a member and which has been damaged by such act or practice, subject to and pursuant to the [STATE] Rules of Civil Procedure governing class actions. [In any such class action, the court shall not award statutory damages, but recovery shall be limited to actual out-of-pocket loss suffered by the person or persons.]1

This paragraph is not intended to create or otherwise permit class action relief where not permitted by state law.2

F.) Punitive or exemplary damages are not permitted in an action maintained under this Section.
Section 2. (Attorneys Fees and Costs) The court may award reasonable attorneys’ fees and costs to:

A.) A prevailing plaintiff upon a finding (by the court OR trier of fact) that the defendant’s use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public.

B.) A prevailing defendant upon a finding by the court that the action was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment.

Section 3. (Limitation of Actions) No action may be brought more than one (1) year after the person bringing the action discovers or reasonably should have discovered a loss resulting from an act or practice declared unlawful by [SECTION], but in no event may any action be brought under this chapter more than [four (4)] years from the first instance of the act or practice giving rise to the cause of action.

Section 4. (Exemptions)

A.) Nothing in this Act shall apply to:

1. Acts or practices required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action;

2. Acts or practices by the publisher, owner, agent or employee of a newspaper, periodical, radio or television station or any other person without knowledge of the deceptive character of the advertisement in the publication or dissemination of an advertisement supplied by another; or

3. Acts or practices by a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the Act.

B.) Nothing in this Act is intended to create a claim or remedy for a violation of a state or federal law, rule or regulation where the legislature did not establish a private right of action.

Endnotes

1. This provision is needed only in states that opt to provide statutory damages, a minimum award to the plaintiff regardless of the actual injury. The model act does not provide for statutory damages, but fully compensates plaintiffs for any out-of-pocket loss.

2. Legislation in states that do not currently permit class action lawsuits under their consumer protection statute should not include paragraph (e).

3. This language is needed in states in which courts have permitted use of consumer protection statutes to effectively create private rights of action under other statutes or regulations where the legislature did not intend to allow private lawsuits.