

## Memorandum of Support for A.7138 and S.795

### *Proposed Legislation to Amend New York's Deceptive Practices Act (GBL § 349), to Prohibit Unfair and Illegal Conduct*

**STATEMENT OF SUPPORT:** Consumer Reports<sup>1</sup> strongly supports A.7138 and S.795, also known as the Consumer and Small Business Protection Act (CSPA), which would strengthen the New York's Deceptive Practices Act (GBL § 349), by specifically banning unfair and abusive practices that harm consumers; 2) eliminating the judicial requirement of demonstrating that a business engages in "consumer-oriented conduct," in order to bring a claim; and 3) increasing the amount of damages available for recovery, and making attorney's fees mandatory instead of discretionary.

The backbone of consumer protection in the states is generally contained in Unfair and Deceptive Acts and Practices (UDAP) laws, which prohibit unfair and deceptive practices in consumer transactions, including sales of cars and other goods, loans, home improvements, utility contracts, and mortgage transactions. UDAP laws are a main line of defense against predatory and unscrupulous business practices for billions of transactions every year. They give both state agencies and consumers the power to take legal action to challenge fraud and abuse, and seek remedies against unfair practices in the courts.<sup>2</sup>

While New York has been a leader in certain areas of consumer protection, New York's version of the UDAP law (GBL § 349) lags behind statutes in 42 other states, because it only bans "deceptive acts and practices" but not "unfair or unlawful acts and practices," as other states do. New York is one of only five states that does not include a broad prohibition of unfairness or unconscionability. New York's prohibitions against unconscionable and unlawful practices are found in a separate statute that is enforceable only by public officials, not by consumers. This sharply limits a New York consumer's right to challenge unfair business conduct and seek redress under GBL § 349.<sup>3</sup>

This glaring omission leaves New Yorkers unprotected against marketplace practices that may be abjectly wrong, but not necessarily deceptive. Practices such as harassment in debt collection, high-pressure sales tactics, and one-sided contract terms may be unfair to consumers and distort the marketplace, even if they are not deceptive. As another example, New Yorkers are experiencing an increasing threat of data breaches, when companies fail to protect sensitive personal, financial and medical data. If a company takes inadequate security precautions to protect private customer data, such practices may well be unfair, but they cannot be challenged under New York's consumer protection law because they are not deceptive. Similarly, debt collectors might garnish exempt disability income from low-income New Yorkers, which is illegal under the Exempt Income Protection Act. But an individual consumer could not challenge the

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<sup>1</sup> Founded in 1936, Consumer Reports (CR) is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR also advocates for laws and corporate practices that are beneficial for consumers. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities facing today's consumers, and provides ad-free content and tools to 6 million members across the United States.

<sup>2</sup> Carter, Carolyn. Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws, National Consumer Law Center, March, 2018, p. 9-17, available at: <http://www.nclc.org/images/pdf/udap/udapreport.pdf>

<sup>3</sup> Ibid., p. 12-17, p.60.

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practice under the consumer protection law, as they could do in other states, because it is not considered deceptive -- even though it is arguably unfair and unlawful.

To better protect New York consumers, A.7138 and S.795 add a broad prohibition against unfair, unlawful and abusive acts and practices, in addition to the law's current prohibition on deceptive acts and practices. This provision will bring New York's law into line with the UDAP protections currently in place in 42 other states, and help ensure that individual New York consumers can protect their rights on an equal footing with consumers in those states.

A.7138 and S.795 would also strengthen New York's consumer protection law (GBL § 349) by making other updates and changes that make it more effective and consistent with laws in other states. These include eliminating the judicial requirement of consumer-oriented conduct, to ensure consumers can bring cases of challenging anti-consumer practices that affected them personally. Currently New York is one of only seven states that prevent a consumer from obtaining any remedy for a deceptive practice unless they prove in court that the practice has a broader impact on consumers at large. New York courts have dismissed hundreds of consumer protection cases simply because the consumer alleged only that the business deceived or defrauded him or her. To have successfully brought a claim, the consumer would be forced to demonstrate that the business engaged in a *broader pattern of anti-consumer conduct*, a difficult and potentially expensive proposition. To promote consumer access to justice, New York should drop this onerous requirement.

Passing the Consumer and Small Business Protection Act will:

- Expand prohibited acts to include "unfair" and "abusive," defining these terms as well as the term "deceptive."
- Eliminate the judicial requirement of consumer-oriented conduct.
- Raise the penalty to \$1,000 and let courts set damages for willful or knowing violations.
- Make attorney's fees mandatory, not discretionary.
- Permit class actions for actual, statutory, and punitive damages.

A.7138 and S.795 are supported by New York Attorney General Letitia James, the National Association of Consumer Attorneys (NACA), and New Yorkers for Responsible Lending (NYRL), a statewide coalition of over 160 consumer, community, senior and legal services organizations.

**CONCLUSION: For all these reasons, Consumer Reports strongly urges you to please cosponsor and vote YES to approve A.7138 and S.795. As outlined above, this bill would bring New York's General Business Law in line with most other state consumer protection statutes, and provide a strong deterrent to dishonest and unethical practices that harm consumers in the marketplace.**

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