

PROPOSED RULEMAKING

OFFICE OF ATTORNEY GENERAL

[37 PA. CODE CHS. 301 AND 311]

Unfair Market Trade Practices; Automotive Industry Trade Practices; Advanced Notice of Proposed Rulemaking; Public Hearing

The Office of Attorney General (OAG) may promulgate regulations under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG, and section 506 of The Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority. The OAG intends to amend Chapter 301 (relating to automotive industry trade practices) and add Chapter 311 (relating to unfair market trade practices).

The OAG enforces and administers the act. The OAG has long taken the policy position that unfair market trade practices, inclusive of anticompetitive conduct, constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act. Federal jurisprudence interpreting section 5 of the Federal Trade Commission Act (FTCA) (15 U.S.C.A. § 45), on which the act is based, has also held that unfair methods of competition and unfair or deceptive acts or practices include anticompetitive conduct. The United States Supreme Court has held that section 5 of the FTCA protects consumers from unfair competitive practices. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). Rulings under the FTCA have held antitrust violations to constitute an unfair and deceptive practice. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986); *FTC v. National Lead Co.*, 352 U.S. 419, 428—30 (1957); *FTC v. Cement Inst.*, 333 U.S. 683, 688, 68 S. Ct. 793, 797, 92 L. Ed. 1010 (1948); and *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

During and following a public hearing on Senate Bill 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, members and bill opponents suggested that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices.

Under section 3.1 of the act, the OAG is scheduling a public hearing to receive comments on a proposed rulemaking under the act, so that comments may be considered as the OAG prepares the proposed rulemaking. The OAG will hold a public hearing for the purpose of accepting comments on the proposed rulemaking at 10 a.m. on September 11, 2018, in the Training Conference Room, 16th Floor, Strawberry Square, Harrisburg, PA 17120.

Individuals wishing to present testimony at the hearing shall, at least 1 week in advance of the hearing, notify Lisa Long, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, PA 17120, (717) 787-4530. Oral testimony will be limited to 10 minutes for each witness. Witnesses shall submit three written copies of testimony at the hearing. Each organization shall designate one witness to present testimony on its behalf. A draft proposed rulemaking follows. Hard copies of the draft proposed rulemaking are also available by contacting Lisa Long, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, PA 17120, (717) 787-4530.

Interested persons are also invited to submit written comments, objections or suggestions about this draft proposed rulemaking to the Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120 within 30 days after publication of this notice of hearing in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted.

Comments also may be submitted by e-mail to antitrust@attorneygeneral.gov. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

Persons with a disability who wish to attend the hearing and require an auxiliary aid, service or other accommodation to participate should contact Lisa Long at (717) 787-4530 to discuss how their needs may be accommodated.

JOSH SHAPIRO,
Attorney General

Title 37—Law Office of Attorney General 37 Pa. Code Chs. 301 and 311

The Office of Attorney General (OAG), through its Public Protection Division, proposes to amend 37 Pa. Code by amending Chapter 301 (relating to automotive industry trade practices) and by adding a new Chapter 311 (relating to unfair market trade practices) to read as set forth in Annex A.

A. *Effective Date*

This draft proposed rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information on the draft proposed rulemaking, the primary contact is Tracy W. Wertz, Chief Deputy Attorney General, Antitrust Section and the secondary contact is Joseph S. Betsko, Senior Deputy Attorney General, Antitrust Section, Pennsylvania Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120, (717) 787-4530. This draft proposed rulemaking is available on the OAG website at www.attorneygeneral.gov.

C. *Statutory Authority*

This draft rulemaking is proposed under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG, section 506 of The Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority.

D. *Purpose and Background*

The draft proposed rulemaking is designed to improve, enhance and update the OAG's unfair methods of competition and unfair or deceptive acts or practices regulations. The specific purpose of the draft proposed rulemaking is described in more detail under the summary of proposal.

E. *Summary of Draft Proposed Rulemaking*

1. *Introduction*

The OAG enforces and administers the act. The OAG has determined that it is necessary for the enforcement

and the administration of the act to amend the existing automotive industry trade practices regulations to provide adequate protections to consumers regarding the inspection of motor vehicles and the written disclosure of certain attributes of a motor vehicle's roadworthiness. The OAG has also determined that it is necessary for the enforcement and the administration of the act to add regulations concerning unfair market trade practices.

2. Policy and Determination

The OAG has long taken the policy position that unfair market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act in line with federal jurisprudence interpreting Section 5 of the Federal Trade Commission Act (FTCA) (15 U.S.C.A. § 45). During and following a public hearing on SB 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments.

Through the experience of investigation and litigation, the OAG has identified that Pennsylvanians have been disadvantaged by the lack of a clear articulation of state law that makes it easy to understand that Pennsylvanians can recover regardless of whether they have dealt directly or indirectly with the defendant or defendants for injury resulting from anti-competitive conduct. The OAG has determined that this draft proposed rulemaking under the act will remedy this unfair vacuum under the state law.

3. Unfair Market Trade Practices

The OAG has determined that the following general provisions in the Draft Proposed Rulemaking clarifies operative terms of the act consistent with the basic policy choice expressed in Section 3 of the act (73 P.S. § 201-3). Section 311.3(a) (relating to general provisions—unfair market trade practices) prohibits all contracts, combinations and conspiracies intended to impose resale price maintenance restraints. Section 311.3(b) prohibits all contracts, combinations and conspiracies between competitors for the purpose of price-fixing. Section 311.3(c) prohibits all contracts, combinations and conspiracies between competitors to allocate markets, reduce output or allocate customers. Section 311.3(d) prohibits all contracts, combinations and conspiracies intended to tie the sale of any commodity or service upon the purchase of another commodity or service. Section 311.3(e) prohibits all contracts, combinations and conspiracies for the purpose of reciprocal dealings.

Section 311.3(f) prohibits all contracts, combinations and conspiracies to effectuate a group boycott. Section 311.3(g) prohibits actual monopolization. Section 311.3(h) prohibits attempted monopolization. Section 311.3(i) prohibits joint monopolization. Section 311.3(j) prohibits incipient conspiracies to monopolize. For purposes of regulatory intent, an agreement among two or more persons to engage in collective bargaining does not come within the scope of this draft proposed rulemaking.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.3 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. Pennsylvania courts have held that Section 5 of the FTCA is virtually the same as Section 3 of the act and that

Pennsylvania courts may look to decisions under the FTCA for guidance in interpreting the act. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 462, 329 A.2d 812, 818 (1974); *Pirozzi v. Penske Olds-Cadillac-GMC, Inc.*, 605 A.2d 373, 376 (Pa. Super. 1992). Pennsylvania courts have interpreted that a violation of federal or state statutes aligned with the purpose of the FTCA and the act constitutes a violation of the act since the act is "broad enough to encompass all claims of unfair and deceptive acts or practices in the conduct of any trade or commerce." *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007). Section 5(a)(1) of the FTCA provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The OAG determines that it logically follows that a violation of Section 5 of the FTCA constitutes a violation of the act because such a conclusion incontrovertibly falls within the scope of the Legislature's basic policy choice in the act that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . are hereby declared unlawful."

In holding that the broad prohibition of section 3 and the catchall is broad and flexible, the Pennsylvania Supreme Court denied the application of the doctrine of ejusdem generis on the enumerated definitions of unfair methods, acts or practices to circumscribe the statutory construction of the catchall and Section 3 of the act. The Pennsylvania Supreme Court held "[s]uch a holding would negative the Legislature's understanding that 'Fraud is infinite' and would allow the broad prohibition of section 3 to be 'eluded by new schemes which the fertility of man's invention would contrive.' See note 42 supra. This we will not do." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 827 (1974). In Note 42 incorporated by reference in the holding, the Pennsylvania Supreme Court cites with approval a federal case which held "[f]raud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193-94, 84 S.Ct. 275, 284, 11 L.Ed.2d 237 (1963). This is in accord with the FTC's standard of unfairness. *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972). This standard was applied in *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983).

The United States Supreme Court has held that Section 5 of the FTCA protects consumers from unfair competitive practices regardless of the effect on competition unlike the federal antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). Rulings under the FTCA have held antitrust violations to constitute an unfair and deceptive practice. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016, 90 L. Ed. 2d 445 (1986); *FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *FTC v. Cement Inst.*, 333 U.S. 683, 688, 68 S. Ct. 793, 797, 92 L. Ed. 1010 (1948); and *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

In *Lisa Hunt v. Bayer AG*, Feb. Term 2005, No. 1038 (Phila. Comm. Pl.), the court recognized price-fixing to be a violation of the act. *In re Suboxone*, 64 F.Supp.3d 665 (E.D. Pa. 2014), the court held that anticompetitive schemes are redressable under the act. Through cases such as *Lisa Hunt* and *In re Suboxone*, the OAG has

identified in section 311.3 of the draft proposed rulemaking certain unfair market trade practices which are deemed to be unfair methods of competition and unfair or deceptive acts or practices under the act which are necessary for the enforcement and administration of the act.

4. *Catchall and Non-exhaustivity*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify the general prohibition of the act and the catchall. Section 311.4 (relating to catchall) codifies the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the Catchall is to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce. Section 311.5 (relating to nonexhaustivity) codifies the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the general prohibition provision is intended to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the per se violations, however enumerated, do not limit or otherwise circumscribe the basic policy choice set forth in the general prohibition provision.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that §§ 311.4 and 311.5 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. In *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983), the court held that “[a]n act or practice need not be deceptive to be declared ‘unfair.’” The court in *Nickel* looked to *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972) for guidance on what constitutes unfairness. The *Nickel* court adopted the unfairness standard: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983). Likewise in federal court construing the act, “an act or practice need not be proven to be deceptive in order to be declared “unfair”—which necessarily involves consideration of a variety of factors including whether the practice causes substantial injury to consumers or others. *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983) (citing *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)).” *Westfield Grp. v. Campisi*, 2006 WL 328415, at *18 (W.D. Pa. Feb. 10, 2006).

Thus, the OAG finds it necessary for the administration and enforcement of the act to define “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding,” “deceptive conduct,” and “unfair conduct” in line with the OAG’s original arguments to the Supreme Court that the catchall “was designed to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce” to which the Supreme Court unambiguously stated, “we agree.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478, 329 A.2d 812, 826 (1974). Moreover, the definitions are in line with the original legislative intent from 1968 “that

this package gives Pennsylvania the strongest consumer-protection laws in the States,” *Legislative Journal: House of Representatives*, 1968 Sess. vol. 1, no. 40, at 1231 (July 8, 1968). The Supreme Court has consistently mandated that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). Because the act is a statute that must be liberally construed to effectuate its objective to prevent unfair or deceptive business practices, the definition of “unfair methods of competition and unfair or deceptive acts or practices” as provided in section 2(4) of the act should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992). In other words, for an act that must be liberally construed, a definition of a term and any enumeration therein should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992).

5. *Trade and Commerce*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify Trade and Commerce within the meaning of the act. Section 311.6 (relating to trade and commerce) codifies the holding of the Supreme Court in *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. Feb. 21, 2018), that the second definition of Trade and Commerce is “an inclusive and broader view of trade and commerce than expressed by the antecedent language.” Section 311.6 codifies the holding in *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004), as amended (Apr. 7, 2004), opinion amended on reconsideration, 851 A.2d 987 (Pa. Commw. Ct. 2004), that a buyer-seller relationship is not relevant in the context of the definition for trade and commerce.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.6 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. The Draft Proposed Rulemaking resolves the longstanding tactic of defendants to confuse and conflate the limited standing provision of the private action with the broad standing provision of the OAG. Such dilatory and vexatious strategy only serves to unnecessarily tax the resources of the OAG at the expense of the public. The Supreme Court instructs “[t]here is no indication of an intent to exclude a class or classes of transactions from the ambit of the Consumer Protection Law. When the Legislature deemed it necessary to make an exception from the Law’s scope, it did so in clear language.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 457 n.5, 329 A.2d 812, 815 n.5 (1974); *Culbreth v. Lawrence J. Miller, Inc.*, 328 Pa. Super. 374, 382, 477 A.2d 491, 496 (1984) (The Legislature expressly excluded certain businesses from regulation under the act). In *Percudani*, a defendant argued that the Commonwealth failed to allege a buyer-seller relationship. The Commonwealth Court overruled the preliminary objection by illustrating the distinction between an action brought under section 9.2 of the act (73 P.S. § 201-9.2), which allows for private actions by any person “who purchases or leases goods or services primarily for personal, family or household purposes” and an action pursued by the Commonwealth under section 4 of the act (73 P.S. § 201-4), “which allows it to proceed when it has reason to believe that the Law is being or was violated.” *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004).

6. Rebate and Payment of Costs and Restitution

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 4.1 of the act. Section 311.7 (relating to payment of costs and restitution) reflects the economic reality that the payment of rebates do not reduce the amount to be restored to a person in interest under Section 4.1 of the act. The OAG also finds it necessary for the administration and enforcement of the act to define “moneys or property, real or personal” as used in section 4.1 of the act (73 P.S. § 201-4.1) and “rebate.” Based on practical experience, the OAG has observed that the payment of rebates do not negate the harm; and, as such, rebates do not constitute a defense to the award of a permanent injunction, payment of costs and restitution, and a civil penalty.

7. Direct or Indirect Recovery

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts and holdings of other jurisdictions construing law that is similar to the act to clarify Trade and Commerce further and monetary recovery under the act. Section 311.8 (relating to direct or indirect recovery) is designed to be in accord with and based on the definition of trade and commerce under the act and codify the holding of *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005) and *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators*, 574 A.2d 641, 645 (Pa. Super. Ct. 1990), affirmed, 605 A.2d 798 (Pa. 1992).

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.8 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Sections 3 and 9.2 of the act. In *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005), the court recognized that purchasers may recover monetarily regardless of whether the defendant or defendants were dealt with directly or indirectly. The Massachusetts Supreme Court relied on their statute’s similarly worded trade and commerce definition to find that indirect recovery is provided by the language: “directly or indirectly affecting the people of this commonwealth.” *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 58, 762 N.E.2d 303, 308 (2002). New Hampshire and Washington likewise allow for indirect recovery based on the same construction. *LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.H. 88, 96, 931 A.2d 571, 578 (2007); *Blewett v. Abbott Laboratories*, 86 Wash.App. 782, 938 P.2d 842, 846 (1997), rev. denied, 133 Wash.2d 1029, 950 P.2d 475 (1998). Consequently, the draft proposed rulemaking clarifies that indirect recovery is so provided under the act.

The draft proposed rulemaking clarifies the meaning of the term, ascertainable loss, under section 9.2 of the act to comport with the plain language of the provision, the 1996 amendment and the liberal construction mandate. Under the similarly worded New Jersey private action provision at N.J. Stat. Ann. § 56:8-19, an “ascertainable loss under the CFA is one that is ‘quantifiable or measurable,’ not ‘hypothetical or illusory.’” *D’Agostino v. Maldonado*, 216 N.J. 168, 185, 78 A.3d 527, 537 (2013). There is Supreme Court precedent under *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186 (2007) and *Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 777 A.2d 442 (2001) which construed the term, ascertainable loss, to mean or require justifiable reliance. However, these opinions apply to causes of action which accrued prior to the 1996 amendment of the act. See 1996, Dec. 4, P.L. 906

No. 146, § 1, effective in 60 days. This draft proposed rulemaking clarifies and recognizes the abrogation of these holdings.

8. Civil Penalty

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 8 of the act. Section 311.9 recognizes that a payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by section 3 of this act does not bar an award of a civil penalty. Further, the payment of a rebate does not negate the finding of a willful use of an unlawful method, act or practice.

9. Private Actions

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 9.2 of the act. Section 311.10 provides for the coordination of claims brought by the OAG which are also brought by a private class action to avoid protracted disputes over representation which would unnecessarily tax limited public resources and frustrate the public interest.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.10 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Section 9.2 of the act. The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.10 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Section 9.2 of the act. In ascertaining legislative intent, the “General Assembly intends to favor the public interest as against any private interest.” 1 Pa.C.S. § 1922 (relating to presumptions in ascertaining legislative intent). “It is axiomatic that a statute is never presumed to deprive the state of any prerogative, right or property unless the intention to do so is clearly manifest, either by express terms or necessary implication.” *Hoffman v. City of Pittsburgh*, 365 Pa. 386, 398, 75 A.2d 649, 654 (1950). The OAG determines that the limited right of private action does not empower persons to act as private attorneys general in any class action which would frustrate or otherwise undermine a parens patriae action by the OAG. A federal court has held that “in the situation where a state attorney general and a private class representative seek to represent the same class members, the parens patriae action is superior to that of a private class action.” *Com. of Pa. v. Budget Fuel Co., Inc.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

10. Administrative

The OAG has adopted the staff recommendation to make certain delegations and clarifications. Section 311.11 (relating to administrative) delegates certain powers and duties set forth in The Administrative Code of 1929 as supplemented by section 204(d) of the Commonwealth Attorneys Act (CAA) (71 P.S. § 732—204(d)). Regarding section 311.11, the powers and duties in section 918 of The Administrative Code of 1929 are the powers and duties of the Attorney General under section 204(d) of the CAA. It logically follows that the Attorney General is authorized to investigate practices occurring in trade or commerce under section 918(1) of The Administrative Code of 1929 and to issue subpoenas under section 919(a) of The Administrative Code of 1929, once The Administrative Code of 1929 and the CAA are read together.

11. Enforcement

The OAG has determined that it is reasonable to make certain clarifications introduced by the enactment of the

CAA concerning the permissibility of the direct use of documents obtained by an administrative subpoena in the enforcement of the act. Section 311.12 (relating to enforcement) implements the inherent investigative function of enforcement to gather Documentary Material, as defined by the act, and made necessary to satisfy the “reason to believe” standing requirement under Section 4 of the act.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.12 of the Draft Proposed Rulemaking is consistent with the basic policy choice expressed in Sections 2 and 3.1 of the act. The OAG takes notice of the 1976 amendments to the act which deleted the very restrictive civil investigative demand authority and retained the definition of documentary material while granting the OAG rulemaking authority. A principle of statutory construction is to ascertain legislative intent and to give effect to all provisions of a statute. 1 Pa.C.S. § 1921 (relating to legislative intent controls); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. at 513; *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 524 (1980).

Sections 918 and 919 of The Administrative Code of 1929, as supplemented by section 204(d) of the CAA, authorize the OAG to issue subpoenas to investigate commercial and trade practices and to require the production of documentary material related to those practices. By reading The Administrative Code of 1929 and the act as one since both relate to protecting consumers from detrimental practices in the conduct of trade and commerce and through the application of the two sources of rulemaking authority invoked in this draft proposed rulemaking, the draft proposed rulemaking gives effect to the retained definition which is used nowhere else within the act. 1 Pa.C.S. § 1932 (relating to statutes in pari materia); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. 509, 517-20 (1982); *Girard School District v. Pittenger*, 481 Pa. 91, 100 (1978).

12. Interpretation

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts. Section 311.13 (relating to interpretation) provides that the act is to be liberally construed and that the new definitions of what constitutes unlawful conduct enlarges upon existing definitions. The draft proposed rulemaking codifies the Supreme Court mandate that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). Because the intent of the draft proposed rulemaking is to enlarge the definition of what constitutes a method, act or practice in violation of the act, the draft proposed rulemaking is not to be interpreted to limit what methods, acts or practices may be considered to violate the act.

13. Automotive Industry Trade Practices

The OAG has adopted the staff recommendation to make certain amendments to the Automotive Industry Trade Practices regulations. Section 301.2(5.1) (relating to advertising and sales presentation requirements) requires a motor vehicle dealer to inspect a motor vehicle not more than 30 days prior to the sale of the motor vehicle. Section 301.4(9.1) (relating to general provisions—motor vehicle dealer) clarifies that compliance with section 301.2(5) (relating to written disclosures) is still required notwithstanding any use of the term, AS IS, under section 301.4(9) (relating to disclaiming warranty).

14. Basic Policy Choice

“The operative provision of the Unfair Trade Practices and Consumer Protection Law provides: ‘Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...are hereby declared unlawful.’” 73 P.S. § 201-3 (emphasis added). *Gabriel v. O’Hara*, 368 Pa. Super. 383, 391, 534 A.2d 488, 492 (1987). The operative provision of the act provides the Legislature’s basic policy choice which guides the OAG’s draft proposed rulemaking. The OAG proposes that Chapter 301 be amended and Chapter 311 be added to read as set forth in Annex A.

F. Paperwork

Generally, the draft proposed rulemaking will not increase paperwork and will not create new paperwork requirements. The draft proposed rulemaking will have a de minimus impact on paperwork for class action representatives purporting to settle and release OAG claims under the act.

G. Benefits, Costs and Compliance

Through this draft proposed rulemaking, consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The clear articulation of this unfair trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

The draft proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The draft proposed rulemaking will impose no new costs on the private sector or the general public.

H. Sunset Review

The OAG is not establishing a sunset date for these draft regulations because they are needed for the OAG to carry out its statutory authority and because the OAG will periodically review these regulations for their effectiveness.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 45.5(a)), on _____, the OAG submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Judiciary Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the OAG, the General Assembly and the Governor.

J. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about this draft proposed rulemaking to the Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120 within 30 days after publication of this draft proposed rulemaking in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted. A public hearing occurred on _____.

Comments also may be submitted by e-mail to antitrust@attorneygeneral.gov. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

Josh Shapiro
Attorney General

Annex A

TITLE 37. LAW

**PART V. [BUREAU OF CONSUMER PROTECTION]
UNFAIR TRADE PRACTICES**

**CHAPTER 301. AUTOMOTIVE INDUSTRY TRADE
PRACTICES**

§ 301.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Advertisement—An oral, written or graphic statement which offers for sale a particular motor vehicle or motor vehicle goods and services or which indicates the availability of a motor vehicle or motor vehicle goods and services, including a statement or representations made in a newspaper, periodical, pamphlet, circular, other publication or on radio or television; contained in a notice, handbill, sign, billboard, poster, bill, catalog or letter; **placed on a website, in a mobile application, on a social media outlet, or on any other electronic platform;** or printed on or contained in a tag or label which is attached to merchandise.

* * * * *

§ 301.2. Advertising and sales presentation requirements.

With respect to an advertisement or sales presentation offering or making available for sale a new or used motor vehicle or maintenance service or repair on a new or used motor vehicle, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

* * * * *

(5) The representation in an advertisement or sales presentation that a motor vehicle or motor vehicle goods or services are of a particular style, model, standard, quality or grade if they are of another or if the representation conflicts with a written notice or disclosure required under this chapter. For the purposes of this chapter, a motor vehicle which is offered for sale is represented to be roadworthy, and the advertiser or seller shall disclose **in writing** prior to sale the following conditions if the advertiser or seller knows or should know that the conditions exist in the motor vehicle:

- (i) Frame bent, cracked or twisted.
- (ii) Engine block or head cracked.
- (iii) Vehicle unable to pass State inspection.
- (iv) Transmission damaged, defective or so deteriorated as to require replacement.
- (v) Vehicle flood damaged.
- (vi) Differential damaged, defective or so deteriorated as to require replacement.

(5.1) No motor vehicle dealer or advertiser shall offer a motor vehicle for lease or sale unless a

certified inspection mechanic designated by the motor vehicle dealer has inspected the motor vehicle in accordance with 67 Pa. Code § 175, but in no case shall such inspection occur more than thirty days prior to the lease or sale of the motor vehicle by the motor vehicle dealer.

(6) The making of a representation or statement of a fact in an advertisement or sales presentation if the advertiser or salesperson knows or should know that the representation or statement is false and misleading or if the advertiser or salesperson does not have sufficient information upon which a reasonable belief in the truth of the representation could be based.

* * * * *

§ 301.4. General provisions—motor vehicle dealer.

(a) With regard to a motor vehicle dealer, the following will be considered unfair methods of competition and unfair or deceptive acts or practices:

* * * * *

AS IS

THIS MOTOR VEHICLE IS SOLD AS IS *WITHOUT ANY WARRANTY* EITHER EXPRESSED OR IMPLIED. THE PURCHASER WILL BEAR THE *ENTIRE EXPENSE* OF REPAIRING OR CORRECTING ANY DEFECTS THAT PRESENTLY EXIST OR THAT MAY OCCUR IN THE VEHICLE.

(9.1) In any instance where a motor vehicle is not roadworthy at the time the motor vehicle is offered for sale, using the term “AS IS” as set forth in this section does not satisfy the written disclosure requirement in Section 301.2(5) of this chapter.

§ 301.5. General provisions—repair shop.

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CHAPTER 311. UNFAIR MARKET TRADE PRACTICES

§ 311.1. Scope.

This chapter establishes what are determined to be unfair methods of competition and unfair or deceptive acts or practices by any person engaged in trade or commerce, but may not be interpreted to limit the power of the Attorney General to determine that another practice is unlawful under the Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1—201-9.3).

§ 311.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

Act—Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1—201-9.3).

Commodity—Real or personal property or any other thing of value that is bought, leased or sold.

Deceptive conduct—A method, act or practice which has the capacity or tendency to deceive.

Documentary material—The term as defined in section 2 of the act (relating to definitions) including any tangible document or recording.

Market structure—Of or relating to the interrelationship of sellers and buyers at all levels of distribution of a commodity or service including, but not limited to, manufacturers, suppliers, distributors, wholesalers and retailers.

Person—The term as defined in section 2 of the act (relating to definitions).

Rebate—Partial refund of the cost of a commodity or service to incentivize the sale of that commodity or service.

Representative—An authorized deputy attorney general of the Office of Attorney General.

Service—An activity, not covered by the definition of “commodity” which is performed in whole or in part for the purpose of financial gain.

Tangible document or recording—The original or any copy of any designated documents, including, but not limited to, writings, drawings, graphs, charts, photographs, electronically created data and other compilations of data.

Trade and commerce—The term as defined in section 2 of the act (relating to definitions).

Transaction—Exchange or transfer of any commodity or service.

Unfair conduct—A method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, the common law, or otherwise within at least the penumbra of any common law, statutory, or other established concept of unfairness; which is unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim.

§ 311.3. General provisions—unfair market trade practices.

Under section 2(4) of the act (relating to definitions), the term, *unfair methods of competition and unfair or deceptive acts or practices*, includes the following unfair market trade practices:

(a) A contract, combination or conspiracy between two or more persons at different levels of market structure to fix minimum prices for any commodity or service at one or more levels of market structure;

(b) A contract, combination or conspiracy between two or more persons at the same level of market structure to fix or otherwise stabilize prices for any commodity or service;

(c) A contract, combination or conspiracy between two or more persons at the same level of market structure to allocate marketing territories, to reduce output of commodities and services or to allocate customers to whom commodities and services are, has been or will be marketed;

(d) A contract, combination or conspiracy between two or more persons to condition or to have the effect of conditioning the sale of one commodity or service upon the purchase of another commodity or service;

(e) A contract, combination or conspiracy between two or more persons where the sale of a commodity or service is conditioned upon the seller’s purchase of commodities or services produced or performed by the buyer;

(f) A contract, combination or conspiracy between two or more persons at the same level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person;

(g) Actual monopolization, in which a person acquires or retains actual monopoly power through competitively unreasonable practices;

(h) Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved;

(i) Joint monopolization, in which two or more persons conspire to jointly retain or acquire monopoly power, where actual monopoly power is achieved through competitively unreasonable practices; and

(j) Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved.

§ 311.4. Catchall.

Under section 2(4) of the act, the term, *fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding*, includes unfair or deceptive conduct.

§ 311.5. Non-exhaustivity.

Under section 2(4) of the act, the definition of the term, *unfair methods of competition and unfair or deceptive acts or practices*, and any enumeration therein is not exhaustive.

§ 311.6. Trade and commerce.

(a) Under section 2(3) of the act (relating to definitions):

(1) The term, *sale*, includes the act of selling or buying; and

(2) The term, *any trade or commerce directly or indirectly affecting the people of this Commonwealth*, means any transaction proposed, initiated or engaged by any person regardless of privity.

§ 311.7. Rebates and payment of costs and restitution.

(a) The payment of a rebate by any person to a person in interest may not bar the imposition of a permanent injunction under section 4 of the act (relating to restraining prohibited acts) or the award of any form of monetary relief under the act.

(b) Under section 4.1 of the act (relating to payment of costs and restitution):

(1) The term, *moneys or property, real or personal*, includes something of value including, but not limited to, restitution, disgorgement, attorneys’ fees, expert fees, investigation and litigation costs, and court costs.

§ 311.8. Direct or indirect recovery.

(a) The fact that any person found to have violated any provision of the act dealt directly or indirectly with any person in interest may not bar the award of any form of monetary relief under the act.

(b) Under section 9.2 of the act (relating to private actions):

(1) The term, *ascertainable loss*, means any loss which is quantifiable but not speculative.

(2) The term, *as a result of*, means cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.

§ 311.9. Civil Penalty.

A payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by section 3 of

this act (relating to unlawful acts or practices; exclusions) may not bar an award of a civil penalty.

§ 311.10. Private actions.

(a) A person may not settle and release any claim under the act as part of a class action in any court of competent jurisdiction without first providing notice to and receiving written consent from the Office of Attorney General.

(b) Except as provided by 71 P.S. § 732-103 (relating to standing to question legal representation), no person has standing to question the authority of the legal representation of the Commonwealth and its citizens where the Office of Attorney General has not granted consent or has transmitted a written revocation of such consent under Section 311.10(a) of this chapter.

§ 311.11. Administrative.

(a) The powers and duties set forth in 71 P.S. § 307-2 (relating to powers and duties) are the powers and duties of the Attorney General pursuant to 71 P.S. § 732-204(d) (relating to administration of consumer affairs program).

(b) The Attorney General may delegate in whole or in part the powers and duties set forth in 71 P.S. § 307-2 (relating to powers and duties) to any representative including, but not limited to, the director of the Bureau of Consumer Protection pursuant to 71 P.S. § 732-201(c) (relating to bureaus, divisions and personnel).

(c) The Attorney General is authorized to enforce and to bring civil actions or other proceedings, under statute or common law, including, but not limited to the Unfair Trade Practices and Consumer Protection Law, state antitrust law, the federal antitrust laws, Pennsylvania Steel Products Procurement Act, and Institutions of Purely Public Charity Act which are among such other acts as may be incidental to the exercise of the powers and functions of the Attorney General pursuant to 71 P.S. § 307-2(3) (relating to powers and duties).

(d) The Attorney General is authorized to investigate practices occurring in trade or commerce pursuant to 71 P.S. § 307-2(1) (relating to powers and duties) and to issue subpoenas pursuant to 71 P.S. § 307-3(a) (relating to authority of the Attorney General).

(e) The Attorney General may share documentary material with any state or federal agency or with any person or entity that may be assisting in the investigation or prosecution of the subject matter of the subpoena and

may present documentary material before any court as the Attorney General or the representative of the Attorney General determines necessary for the enforcement of laws under which the Attorney General has standing pursuant to 71 P.S. § 307-3(b) (relating to authority of the Attorney General) and 71 P.S. § 307-2(3) (relating to powers and duties).

§ 311.12. Enforcement.

(a) Under 71 P.S. § 307-3 (relating to the authority of the Attorney General), a representative may:

(1) Issue subpoenas, examine witnesses and receive evidence necessary for all actions within the authority of the Attorney General under the act;

(2) Use such documentary material or copies thereof as the representative determines necessary in the enforcement of the act, including, but not limited to:

(i) Sharing such documentary material with any state or federal agency or with any person or entity that may be assisting in the investigation or prosecution of the subject matter of the subpoena; and

(ii) Presenting such documentary material before any court; and

(3) Invoke the aid of the Commonwealth Court or a court of record of this Commonwealth, in case of disobedience of a subpoena or the contumacy of a witness appearing before the Attorney General or a representative, to require the person subpoenaed to obey the subpoena or to give evidence or to produce documentary material relative to the matter in question.

§ 311.13. Interpretation—act.

(a) The act shall be liberally construed.

(b) No provision of this chapter may be interpreted to limit another method, act or practice which may be considered unlawful under the act.

§ 311.14. Waiver of rights.

A waiver of this chapter by any person prior to or at the time of a commission of a violation of Section 311.3 or any other section of this chapter is contrary to public policy and is void. An attempt by any person to have another waive his rights under this chapter shall be deemed to be a violation of the Act.

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