

# S.8308/A.8808 Part JJ

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<b>BILL</b> S.8308/A.8808 Part JJ
<b>SUBJECT</b> Consumer Protection Act
<b>DATE</b> February 26, 2024
<b>OPPOSE</b>

The Business Council strongly opposes Part JJ of S.8308/A.8808 (TEDE) of the Governor's FY2025 Executive Budget Proposal which would greatly expand the consumer protection deceptive acts and practices section of the general business law. While the bill claims to aid small business, in truth, the overly broad legislation would lead to a needless spike in the number of meritless lawsuits against businesses of all sizes in our already overly litigious state and put every single business that does business with the public at needless risk of frivolous litigation.

The "Consumer Protection Act" makes significant changes to New York's consumer protection laws on deceptive acts and practices statute to include "unfair" and "abusive" acts. Under the budget proposal, the definitions of unfair and abusive are as follows:

- "An act or practice is **unfair** when it causes or is likely to cause substantial injury, the injury is not reasonably avoidable, and the injury is not outweighed by countervailing benefits to consumers or competition."
- "An act or practice is **abusive** when:
  - i. it materially interferes with the ability of a person to understand a term or condition of a product or a service; or
  - ii. takes unreasonable advantage of:
    - (A) a person's lack of understanding of the material risks, costs, or conditions of the product or service; or
    - (B) a person's inability to protect their interests in selecting or using a product or service."

The budget proposal removes New York's consumer oriented standard by amending the law to apply "regardless of whether or not the underlying violation is directed at individuals or business or involves the offering of goods, services or property for personal, family or household purposes," therefore, expanding its reach to business-business transactions. There is also a private right of action,

which allows a plaintiff to recover their actual damages or \$1,000, whichever is greater, and mandates that a court award attorney's fees and costs to a prevailing plaintiff.

Additionally, the Governor's budget proposal creates a process for a business to cure a complaint for any action exceeding \$500. While this is a thoughtful inclusion which is absent from the Legislature's proposal (S.795 Comrie / A.7138 Weinstein), the language requires significant amendments to prevent abuse and misinterpretation of the statute. For example, it is unclear as to whom determines whether a cure has been satisfied, and the proposed statute lacks explicit language to prevent the plaintiff from bringing an action, even if cured, specifically for an amount under \$500. Every business should have the ability to address an allegation through a cure, regardless of the amount, to avoid costly and unnecessary regulation.

Supporters of the expansion of GBL §349 purport that 42 states expressly prohibit unfair and abusive practices. However, only two states prohibit abusive practices and only recently amended their laws to do so: Maryland and Indiana. While we are concerned with the inclusion of both unfair and abusive, we believe it is worth highlighting 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. In the context of comparison, it is worth noting that both Maryland and Indiana 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.

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. This proposal will lead to fewer jobs and higher costs of goods and services for all New Yorkers. The bill opens the door for plaintiff's attorneys to pursue baseless and endless litigation, which could jeopardize the livelihood of many hard-working small businesses and result in uncontrollable costs for all New York businesses and consumers.

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 Part JJ of S.8308/A.8808 (TEDE) of the Governor's FY2025 Executive Budget Proposal

and urges against its adoption in the final budget.