

First Extraordinary Session, 2005

HOUSE BILL NO. 109

BY REPRESENTATIVE TRAHAN

CONSUMERS/PROTECTION: Makes various changes to the Unfair Trade Practices and Consumer Protection Law

1 AN ACT

2 To amend and reenact R.S. 51:1402, 1404, 1405(B) and (C), 1406(3), 1407, 1408, 1409(A),  
3 (B), and (D), 1410, 1411(A) and (C), 1412(A) and (C), 1416, and 1417, relative to  
4 the Unfair Trade Practices and Consumer Protection Law; to provide relative to the  
5 duties of the Governor's Consumer Protection Division and its director; to provide  
6 for penalties for violations against persons aged sixty-five or older; to provide for  
7 service of investigative demands and subpoenas; to provide for penalties for  
8 violation of an assurance of voluntary compliance; to provide for an effective date;  
9 and to provide for related matters.

10 Be it enacted by the Legislature of Louisiana:

11 Section 1. R.S. 51:1402, 1404, 1405(B) and (C), 1406(3), 1407, 1408, 1409(A), (B),  
12 and (D), 1410, 1411(A) and (C), 1412(A) and (C), 1416, and 1417 are hereby amended and  
13 reenacted to read as follows:

14 §1402. Definitions

15 As used in this Chapter, the following words and phrases shall have the  
16 meanings hereinafter ascribed to them:

17 (1) "Consumer" means any person who uses, purchases, or leases goods or  
18 services.

19 (2) "Consumer interest" means those acts, practices, or methods that affect  
20 the economic welfare of a consumer.

1           (3) "Consumer transaction" means any transaction involving trade or  
2           commerce to a natural person, the subject of which transaction is primarily intended  
3           for personal, family, or household use.

4           ~~(4) "Director" means the executive assistant to the governor in charge of~~  
5           ~~consumer affairs.~~

6           ~~(5) "Division" means the Governor's Consumer Protection Division created~~  
7           ~~by this Chapter.~~

8           ~~(6)~~ (4) "Documentary material" means the original or a copy of any book,  
9           record, memorandum, paper, communication, tabulation, map, chart, photograph,  
10          mechanical transcription, or other tangible document or recording, wherever situated.

11          ~~(7)~~ (5) "Examination" of documentary material includes the inspection, study,  
12          or copying of any such material and the taking of testimony under oath or  
13          acknowledgment in respect to any such documentary material or copy thereof.

14          ~~(8)~~ (6) "Person" means a natural person, corporation, trust, partnership,  
15          incorporated or unincorporated association, and any other legal entity.

16          ~~(9)~~ (7) "Trade" or "commerce" means the advertising, offering for sale, sale,  
17          or distribution of any services and any property, corporeal or incorporeal, immovable  
18          or movable, and any other article, commodity, or thing of value wherever situated,  
19          and includes any trade or commerce directly or indirectly affecting the people of the  
20          state.

21          ~~(10)~~ (8) "Knowingly" means that the act or practice used was such that a  
22          reasonably prudent businessman knew or should have known that the act or practice  
23          was a violation of this Chapter.

24   \*           \*           \*

25          §1404. Powers and duties

26                 A. ~~The division of consumer protection~~ public protection division, consumer  
27          protection section of the Department of Justice shall have the following powers and  
28          duties:

1 (1)(a) To investigate, conduct studies and research, to conduct public or  
2 private hearings into commercial and trade practices in the distribution, financing,  
3 and furnishing of goods and services to or for the use of consumers.

4 (b) In the furtherance of the above, the ~~director~~ or attorney general shall  
5 notify said seller, distributor, packer, or manufacturer who shall have the right to put  
6 on the record any and all pertinent information that may substantiate the commercial  
7 or trade practice and shall have the right of cross examination.

8 (c) Public disclosure shall not be made of any trade secret and commercial  
9 or financial information obtained from a person which is of a privileged or  
10 confidential nature.

11 (2) To suggest means of securing adequate consumer representation on  
12 public boards and commissions.

13 (3) To advise the governor and the legislature on matters affecting consumer  
14 interests, and to assist in developing executive policies, and to develop, draft, and  
15 prepare legislative programs to protect the consumer.

16 (4) To promote consumer education.

17 ~~(5) To advise the attorney general with respect to any unfair method of~~  
18 ~~competition and unfair or deceptive acts or practices in connection therewith; to refer~~  
19 ~~any information or documentary material to the attorney general; and~~

20 ~~(6)~~ To do such other acts as are necessary and incidental to the exercise of  
21 the powers and functions of the ~~division~~ section.

22 B. The attorney general may receive information and documentary material  
23 ~~from the division and may receive~~ and otherwise investigate complaints with respect  
24 to acts or practices declared to be unlawful by this ~~chapter~~ Chapter or other laws of  
25 this state and inform the public with respect thereto. The attorney general may  
26 institute legal proceedings and take such other actions provided for herein or which  
27 are necessary or incidental to the exercise of his powers and functions.

1 C. The ~~division or the~~ attorney general, ~~or both~~, may receive funding  
2 available under federal grants and from other sources for the purposes set forth in  
3 this ~~chapter~~ Chapter.

4 §1405. Unfair acts or practices; interpretation and rulemaking authority

5 \* \* \*

6 B. The ~~director~~ attorney general may make rules and regulations interpreting  
7 the provisions of this Chapter consistent with the provisions in R.S. 51:1 through  
8 ~~R.S. 51:461.1, inclusive, and shall submit such rules and regulations to the attorney~~  
9 ~~general. Upon approval by the attorney general, such~~ Such rules and regulations  
10 shall be adopted in the form and manner prescribed by R.S. 49:951 et seq. The  
11 validity or applicability of a rule may be determined in an action for declaratory  
12 judgment in the district court of the parish in which the division is located or in the  
13 parish in which the plaintiff resides or is domiciled. Appeals may be had from any  
14 ruling of a district court in accordance with the Code of Civil Procedure, except that  
15 such appeals shall be given preference and heard in priority to other appeals.

16 C. The ~~director and his employees are~~ attorney general is entitled to receive  
17 reimbursement for expenses actually and necessarily incurred in the performance of  
18 their duties.

19 §1406. Exemptions

20 The provisions of this Chapter shall not apply to:

21 \* \* \*

22 (3) No seller of any product or service who disseminates any advertisement  
23 or promotional material in this state shall be liable under this ~~chapter~~ Chapter if he  
24 receives the advertisement or promotional material from a manufacturer, packer,  
25 distributor, or other seller from whom he has purchased the product or service unless  
26 he refused on the request of the attorney general, ~~or director~~, to provide the name and  
27 address of the manufacturer, packer, distributor, or other seller from whom he has  
28 purchased the product or service and said seller also agrees to enter into an assurance  
29 of voluntary compliance as prescribed by ~~the chapter~~ this Chapter from

1 disseminating any such advertisement or promotional material thereafter. This  
2 exemption does not in any way limit the right of action any consumer may have  
3 under this ~~chapter~~ Chapter.

4 \* \* \*

5 §1407. Restraining prohibited acts

6 A. Whenever the ~~director and the~~ attorney general ~~have~~ has reason to believe  
7 that any person is using, has used, or is about to use any method, act, or practice  
8 declared by R.S. 51:1405 to be unlawful, ~~the director~~ he may ~~instruct the attorney~~  
9 ~~general~~ to bring an action for injunctive relief in the name of the state against such  
10 person to restrain and enjoin the use of such method, act, or practice. The action  
11 may be brought in the district court having civil jurisdiction in any parish in which  
12 such person resides, or is domiciled or has his principal place of business, or in any  
13 parish in which such person did business, or, with consent of the parties, may be  
14 brought in the district court of the parish where the state capitol is located. In the  
15 event that such person was located outside of the state, but was soliciting in the state  
16 by mail, telephone, or any electronic communication, the action may be brought in  
17 the district court having civil jurisdiction in the parish in which the contact was  
18 made. It being against the public policy of the state of Louisiana to allow a  
19 contractual selection of venue or jurisdiction contrary to the provisions of the  
20 Louisiana Code of Civil Procedure, no provision of any contract which purports to  
21 waive these provisions of venue, or to waive or select venue or jurisdiction in  
22 advance of the filing of any civil action, may be enforced against any plaintiff in an  
23 action brought in these courts. These courts are authorized to issue temporary  
24 restraining orders or preliminary and permanent injunctions to restrain and enjoin  
25 violations of this Chapter, and such restraining orders or injunctions shall be issued  
26 without bond.

27 B. If a person is found by the court to have engaged in any method, act, or  
28 practice declared unlawful under this Act and the violation was committed against

1        a person sixty-five years of age or older, the court may impose an additional civil  
2        penalty not to exceed five thousand dollars for each violation.

3                C. In determining whether to impose a civil penalty under this Subsection  
4        and the amount of any penalty, the court shall consider the following:

5                (1) Whether the defendant's conduct was in willful disregard of the rights of  
6        the person sixty-five years of age or older.

7                (2) Whether the defendant knew or should have known that the defendant's  
8        conduct was directed to a person sixty-five years of age or older.

9                (3) Whether the person sixty-five years of age or older was substantially  
10       more vulnerable to the defendant's conduct because of age, poor health, infirmity,  
11       impaired understanding, restricted mobility, or disability than other persons.

12               (4) Any other factors the court deems appropriate.

13               D. An award of restitution under this Chapter has priority over a civil penalty  
14       imposed by the court under this Subsection.

15        §1408. Additional relief

16               The court may issue such additional orders or render judgments against any  
17       party, as may be necessary to compensate any aggrieved person for any property,  
18       movable or immovable, corporeal or incorporeal, which may have been acquired  
19       from such person by means of any method, act, or practice declared unlawful by R.S.  
20       51:1405, whichever may be applicable to that party under R.S. 51:1418. Such orders  
21       shall include but not be limited to appointment of a receiver, dissolution of domestic  
22       corporations or association suspension or termination of the right of foreign  
23       corporations or associations to do business in this state, and restitution. Unless  
24       otherwise expressly provided, the remedies or penalties provided by this Chapter are  
25       cumulative to each other and to the remedies or penalties available under all other  
26       laws of this state.

27        §1409. Private actions

28               A. Any person who suffers any ascertainable loss of money or movable  
29       property, corporeal or incorporeal, as a result of the use or employment by another

1 person of an unfair or deceptive method, act, or practice declared unlawful by R.S.  
 2 51:1405, may bring an action individually but not in a representative capacity to  
 3 recover actual damages. If the court finds the unfair or deceptive method, act, or  
 4 practice was knowingly used, after being put on notice by the ~~director~~ or attorney  
 5 general, the court shall award three times the actual damages sustained. In the event  
 6 that damages are awarded under this Section, the court shall award to the person  
 7 bringing such action reasonable ~~attorney's~~ attorney fees and costs. Upon a finding  
 8 by the court that an action under this ~~section~~ Section was groundless and brought in  
 9 bad faith or for purposes of harassment, the court may award to the defendant  
 10 reasonable ~~attorney's~~ attorney fees and costs.

11 B. Upon commencement of any action brought under Subsection A of this  
 12 ~~section~~ Section, the plaintiff's attorney shall mail a copy of the petition to the  
 13 attorney general and director, and, upon entry of any judgment or decree in the  
 14 action, shall mail a copy of such judgment or decree to the attorney general and  
 15 director, but failure to conform with this ~~subsection~~ Subsection shall not affect any  
 16 of plaintiff's rights under this ~~section~~ Section.

17 \* \* \*

18 D. If any person is enjoined from the use of any method, act, or practice or  
 19 enters into a voluntary compliance agreement accepted by the ~~director and the~~  
 20 attorney general under the provisions of this ~~chapter~~ Chapter, such person shall have  
 21 a right of action to enjoin competing businesses engaged in like practices.

22 \* \* \*

23 §1410. Assurances of voluntary compliance

24 In the administration of this ~~chapter~~ Chapter, ~~the director and the~~ attorney  
 25 general shall accept an assurance of voluntary compliance with respect to any  
 26 method, act, or practice deemed to be violative of this ~~chapter~~ Chapter from any  
 27 person who has engaged or was about to engage in such method, act, or practice.  
 28 Any such assurance shall be in writing and be filed with the district court having  
 29 civil jurisdiction in the parish in which the alleged violator resides, or is domiciled

1 or has his principal place of business, or in the district court of the parish in which  
2 the state capitol is located. Such assurance of voluntary compliance shall not be  
3 considered an admission of violation for any purpose.

4 §1411. Investigative demands

5 A. When the attorney general ~~and director have~~ has evidence that a person  
6 has engaged in or is engaged in any method, act, or practice declared to be unlawful  
7 by this ~~chapter~~ Chapter and ~~they believe~~ he believes it to be in the public interest that  
8 an investigation should be made to ascertain whether a person in fact has engaged  
9 in or is engaging in any act or practice declared to be unlawful, the attorney general  
10 ~~and director~~ may execute in writing and cause to be served by the sheriff or a post-  
11 certified commissioned law enforcement officer employed by the attorney general  
12 or through long-arm to a foreign corporation upon any person who is believed to  
13 have information, documentary material, or physical evidence relevant to the alleged  
14 or suspected violation, an investigative demand. Such investigative demand shall  
15 contain a description of the unlawful method, act, or practice under investigation and  
16 shall require such person to furnish, under oath or otherwise, a report in writing  
17 setting forth the relevant facts and circumstances of which he has knowledge, or to  
18 produce relevant documentary material or physical evidence for examination, at such  
19 reasonable time and place as may be stated in the investigative demand, concerning  
20 the advertisement, sale, or offering for sale of any goods or services or the conduct  
21 of any trade or commerce that is the subject matter of the investigation.

22 \* \* \*

23 C. If no protective order from the court is secured and the written request by  
24 the attorney general and director is not complied with by the return date thereof, the  
25 attorney general ~~and director~~ may apply to the court for an order compelling  
26 compliance with the demand under R.S. 51:1413.

27 §1412. Investigative depositions

28 A. When the attorney general ~~and director have~~ has evidence that a person  
29 has engaged in or is engaged in any method, act, or practice declared to be unlawful



1 by this ~~chapter~~ Chapter, and when they believe it to be in the public interest that an  
 2 investigation should be made to ascertain whether a person in fact has engaged in or  
 3 is engaging in any act or practice declared to be unlawful by this ~~chapter~~ Chapter in  
 4 connection with such investigation, the attorney general ~~and the director~~ may issue  
 5 an investigative subpoena for deposition testimony to be served by the sheriff or a  
 6 post-certified commissioned law enforcement officer employed by the attorney  
 7 general or through long-arm to a foreign corporation upon any person who is  
 8 believed to have information, documentary material, or physical evidence relevant  
 9 to the alleged or suspected violation, for the purpose of revealing, identifying, or  
 10 explaining documentary material or other physical evidence sought under R.S.  
 11 51:1411. Such investigative subpoena shall contain a description of the unlawful  
 12 method, act, or practice under investigation, and a notice informing the prospective  
 13 deponent of his right to counsel at the deposition with opportunity for cross-  
 14 examination, and such deposition shall be conducted at the principal place of  
 15 business of the deponent, at his place of residence, at his domicile, or, if agreeable  
 16 to the deponent, at some other place convenient to the attorney general or the director  
 17 and the lawful and designated attorney representative of the deponent. Such  
 18 deposition shall be held at a reasonable time, as may be stated in the investigative  
 19 subpoena.

\* \* \*

21 C. If no protective order from the court is secured and the investigative  
 22 subpoena is not complied with by the return date thereof, the attorney general ~~and~~  
 23 ~~director~~ may apply to the court for an order compelling compliance with the  
 24 subpoena under R.S. 51:1413.

\* \* \*

26 §1416. Civil penalties

27 In addition to remedies for contempt of court otherwise provided by law, any  
 28 person who violates the terms of an injunction issued under R.S. 51:1407 or ~~R.S.~~  
 29 ~~51:1408~~, or an assurance of voluntary compliance as authorized under R.S. 51:1410,

1           may be required to pay to the state treasurer a civil penalty of not more than five  
2           thousand dollars per violation. For the purposes of this ~~section~~ Section, the district  
3           court issuing an injunction shall retain jurisdiction ~~and the director~~ and the attorney  
4           general acting in the name of the state may petition for recovery of civil penalties  
5           provided in this ~~section~~ Section.

6           §1417. Duties of district attorneys

7                     District attorneys and their assistants under the supervision of the attorney  
8           general may institute and prosecute actions hereunder in the same manner as  
9           provided for the attorney general. In such cases, full reports shall be made to the  
10          attorney general ~~and director~~, including final disposition of the matter.

11          Section 2. This Act shall become effective upon signature by the governor or, if not  
12          signed by the governor, upon expiration of the time for bills to become law without signature  
13          by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If  
14          vetoed by the governor and subsequently approved by the legislature, this Act shall become  
15          effective on the day following such approval.

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#### DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument.

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Trahan

HB No. 109

**Abstract:** Makes various changes to the Unfair Trade Practices and Consumer Protection law.

Present law provides for the Governor's Consumer Protection Division and assigns it certain powers and duties. Further provides that the executive assistant to the governor in charge of consumer affairs shall be the director of the division and provides that the director shall have the duty to administer and enforce the Unfair Trade Practices and Consumer Protection Law.

Proposed law replaces the Governor's Consumer Protection Division with the consumer protection section of the public protection division in the Department of Justice.

Proposed law provides that the attorney general, not the executive assistant to the governor in charge of consumer affairs, shall have the responsibility to administer and enforce the Unfair Trade Practices and Consumer Protection Law.

Present law provides for actions for injunctive relief against persons who violate the provisions of the Unfair Trade Practices and Consumer Protection Law.

Proposed law provides that if any person engages in any method, act, or practice declared unlawful under the Unfair Trade Practices and Consumer Protection Law and the violation was committed against a person aged 65 or over, a district court may impose an additional penalty not to exceed \$5,000 for each violation. Further provides several factors for the court to consider when deciding to assess such a penalty.

Present law allows a court to issue additional orders against any party as may be necessary to compensate any aggrieved person for any property which may have been acquired by violations of the Unfair Trade Practices and Consumer Protection Law.

Proposed law clarifies that such orders shall include but not be limited to appointment of a receiver, dissolution of domestic corporations or association suspension or termination of the right of foreign corporations or associations to do business in this state, and restitution. Present law provides that when the attorney general has evidence that a person has engaged in or is engaged in any method, act, or practice declared to be unlawful under Unfair Trade Practices and Consumer Protection Law and he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any act or practice declared to be unlawful, he causes an investigative demand or an investigative subpoena for deposition testimony to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation.

Proposed law clarifies that the service provided for in present law may be accomplished by the sheriff or a post-certified commissioned law enforcement officer employed by the attorney general or through long-arm to a foreign corporation.

Present law provides that, in addition to remedies for contempt of court otherwise provided by law, any person who violates the terms of an injunction issued under R.S. 51:1407 or 1408, may be required to pay to the state treasurer a civil penalty of not more than \$5,000 per violation.

Proposed law provides that any person who violates the terms of an assurance of voluntary compliance as authorized under R.S. 51:1410 may also be required to pay the civil penalty required by present law.

Effective upon signature of governor or lapse of time for gubernatorial action.

(Amends R.S. 51:1402, 1404, 1405(B) and (C), 1406(3), 1407, 1408, 1409(A), (B), and (D), 1410, 1411(A) and (C), 1412(A) and (C), 1416, and 1417)