IN THE NEW MEXICO COURT OF APPEALS

ANDREA J. FELTS,
on behalf of herself and all others
similarly situated,

Plaintiff-Appellee;

v.

CLK MANAGEMENT, INC.,
f/k/a, BAT SERVICES, and,
CASH ADVANCE NETWORK, INC.,

Defendants-Appellants.

No. 29,702
Consolidated with No. 30,142

Second Judicial District
No. CV 2008-13084
Honorable Nan G. Nash

ATTORNEY GENERAL GARY K. KING'S *AMICUS CURIAE* BRIEF ON BEHALF OF PLAINTIFF-APPELLEE ANDREA J. FELTS

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with Rule 12-213(F)(3). According to Microsoft Office Word, the body of the Brief contains 3,600 words.

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INTRODUCTION

The issue before this Court is whether the class ban in the arbitration provision invoked by Defendants-Applicants CLK Management, Inc. (a/k/a BAT Services) ("CLK") and Cash Advance Network, Inc. ("CANI"), is enforceable, or whether this class ban renders the arbitration provision unconscionable and, therefore, unenforceable under New Mexico law. The Attorney General submits this *amicus curiae* brief because he believes that the arbitration provision, containing a class ban that, in effect, acts as an exculpatory clause, should be held by the Court to be contrary to New Mexico public policy and unenforceable.

I. THE ATTORNEY GENERAL'S UNIQUE ROLE UNDER THE NEW MEXICO UNFAIR PRACTICES ACT

The Attorney General is the state officer charged by the New Mexico legislature with enforcement of the New Mexico Unfair Practices Act, NMSA 1978, § 57-12-1 *et seq.* (1967) (hereafter "UPA"). Sections 57-12-8 and 15. Moreover, the Attorney General may "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action...." NMSA 1978, § 8-5-2(J) (1933). See also, § 8-5-2(B): The attorney general shall "prosecute and defend in any court or tribunal all actions and proceedings, civil and criminal, in which the state may be a party or

interested when, in his judgment, the interest of the state requires such action...."

In *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 11, 144 N.M. 464, 468, 188 P.3d 1215, 1219 (2008), the Supreme Court expressly recognized the importance of the Attorney General in matters of consumer protection:

> Yet another example of New Mexico's fundamental public policy in ensuring that consumers have an opportunity to redress their harm is the Consumer Protection Division of the Attorney General's Office, which is charged with protecting New Mexico citizens from unfair and deceptive trade practices. In this effort, the Consumer Protection Division is authorized and funded to investigate suspicious business activities, informally resolve the complaints of dissatisfied consumers, educate citizens about their consumer rights, and file lawsuits on behalf of the public.

The Attorney General's authority under the UPA is not limited to investigation, informal complaint resolution and litigation. Section 57-12-13 also empowers him or her to promulgate regulations implementing and enforcing the Act. Attorneys General over the years have done so in a broad range of areas, including Game Promotion Requirements (12.2.2.1 *et seq.* NMAC), Requirements for the Advertising and Sale of Motor Vehicles (12.2.4.1 *et seq.* NMAC), Requirements for Environmental Marketing Claims (12.2.5.1 *et seq.* NMAC), Requirements for Repair of Vehicles (12.2.6.1 *et seq.* NMAC), Comparative Price Advertising and Savings Claims for the Native American Jewelry and Arts and Crafts Retail Industry (12.2.7.1 *et seq.* NMAC), and, most recently, Collection of Time-Barred Debt (12.2.10.1 *et seq.* NMAC).

The foregoing demonstrates the Attorney General's unique position under the UPA, and the basis of his interest in this appeal. Further, much of the argument in this case centers on the meaning and application of *Fiser v. Dell Computer Corp.* The Attorney General filed an *amicus curiae* brief in that action, as well, supporting the arguments of the plaintiff-petitioner. He has an interest in a consistent result, and urges this Court to again determine that the mandatory arbitration and anti-class action provisions are contrary to public policy and are unenforceable.

II. THE UNFAIR PRACTICES ACT IS CONSTRUED LIBERALLY TO BENEFIT CONSUMERS

It is well-established that because the UPA is remedial legislation, it is to be liberally interpreted to facilitate and accomplish its consumer protection purpose and intent. *State ex re. Stratton v. Gurley Motor Co.*, 105 N.M. 803, 808, 737 P.2d 1180, 1185 (Ct. App. 1987), cert. denied, 105 NM. 781 (1987); *Salmeron v. Highlands Ford Sales, Inc.*, 271 F.Supp. 1314, 1318 (D.N.M. 2003). The New Mexico Supreme Court has explained that this liberal interpretation is to be accorded in order to offer broad protection to consumers: "By recognizing that the Act applies to all misleading or deceptive statements, whether intentionally or unintentionally made, we ensure that the Unfair Practices Act lends the protection of its broad application to innocent

consumers." *Ashlock v. Sunwest Bank of Roswell*, 107 N.M. 100, 102, 753 P.2d 346, 348 (N.M. 1988), overruled other grounds, *Gonzales v. Surdigev Corp.*, 120 NM 133, 899 P.2d 576 (1995). See also, *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 25, 142 N.M. 437, 442-43, 166 P.3d 1091, 1096-97, cert. denied, 142 N.M. 434, 166 P.3d 1088 (2007) ("The remedial purpose of the legislation, as a consumer protection measure, is also consistent with the broadest possible application.")

Under the UPA, a showing of intent is not required. *Ashlock*, 107 N.M. at 101, 753 P.2d at 347. ("Had the legislature wished intent to deceive to be an essential element of the offense, it would have so specified."); *Stevenson v, Louis Dreyfuss Corp.*, 112 N.M. 97, 100, 811 P.2d 1308 (1991) ("We agree that the misrepresentation need not be intentionally made, but it must be knowingly made.") "The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence, should have been aware that the statement was false or misleading." *Stevenson v. Louis Dreyfuss Corp.*, id. Neither actual deceit nor detrimental reliance is required. Recovery is permitted if the conduct merely has a tendency to deceive. *Smoot v. Physicians Life Insur. Co.*, 2004-NMCA-027, ¶¶ 21-22, 135 N.M. 265, 270-271, 87 P.3d 545; *Lohman v. Daimler*

Chrysler Corp., 2007-NMCA-100, ¶ 35; 142 N.M. 437, 166 P.3d 1091; cert. denied, 142 N.M. 434.

Further, the misrepresentation need not be a statement, but can be any "representation" (including an act or an omission; *e.g.*, § 57-12-2(D)(14)). *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459, 467, 50 P.3d 554, 562, cert. denied, 132 N.M. 288, 47 P.3d 447 (2002). ("The Bank's refusal to acknowledge liability was a false representation that misled Plaintiffs into believing they were liable to the Bank on the contract when they were not.") The misrepresentation need not be made directly to the consumer; it can be made to a third party, provided that the misrepresentation ultimately adversely affects the consumer. *Lohman Daimler Chrysler Corp.*, 142 N.M. at 443, ¶ 26, 166 P.3d at 1097 (The UPA covers misleading representations "made by and between third parties in the course of commercial transactions, particularly when misrepresentations are designed to enable a manufacturer to sell a product to consumers.") Damages need not be proven. *Page & Wirtz Construction Co. v. Solomon,* 110 N.M. 206, 211-212, 794 P.2d 349 (1990); *Lohman,* 142 N.M. at 446, ¶ 44, 166 P.3d at 1100 (The case law "...clearly establish[es] that the UPA does not require proof of actual monetary or property loss.") See also, *Pedroza v. Lomas Auto Mall, Inc.*, 663 F.Supp.2d 1123, 1133-1135 (D.N.M. 2009). All these holdings underline the breadth and liberality with which New Mexico

courts have consistently interpreted the UPA in order to fulfill its broad consumer protection purpose.

Based on the foregoing principles Attorney General King urges this Court to interpret the UPA broadly in this case and to reject the Defendants-Appellants' attempts to render enforcement of the UPA a practical nullity through their contractual ban on class actions. Such a holding will be consistent with the Court's statement in *Fiser*, discussed below, that contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging small consumer claims, and, therefore, are unenforceable.

III. CLASS ACTIONS ARE AN IMPORTANT ENFORCEMENT MECHANISM UNDER THE UNFAIR PRACTICES ACT

In the Unfair Practices Act the New Mexico legislature established the class action as an important enforcement tool. *See* NMSA 1978 § 57-12-10(E) (specifically providing for class actions under the UPA). The importance of the class action mechanism for UPA enforcement was recognized by the New Mexico Supreme Court in *Fiser*, where a class ban in an arbitration provision was struck down in the context of a small claims consumer class action lawsuit like this lawsuit. As stated by the Court, "... New Mexico's fundamental public policy requires that consumers with small claims have a mechanism for dispute resolution via the class action." 144 N.M. at 469, ¶ 18. The Court invoked this

"fundamental public policy" as a reason to except the application of Texas law to the case, which would have allowed the contractual ban on class actions. The Attorney General believes that the contractual ban on class actions in this case align with those in *Fiser*, and that, as in *Fiser*, New Mexico's strong public policy, articulated in the Unfair Practices Act, dictates that the Court should hold again that the ban is unenforceable as contrary to that policy.

IV. THE ATTORNEY GENERAL RELIES ON PRIVATE ENFORCEMENT OF THE UNFAIR PRACTICES ACT THROUGH THE PRIVATE ATTORNEY GENERAL SYSTEM

Courts across the nation have recognized that many consumer protection statutes operate through the private attorney general system. The federal Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), is one such statute. In *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982), the Eleventh Circuit noted: "The public benefits from enforcement of TILA because it creates a system of disclosure that improves the bargaining posture of all borrowers. To ensure the realization of this goal, Congress granted consumers a minimum recovery, plus costs and reasonable attorney's fees, without having to prove actual damages." These features signaled that the intent behind the statute was enforcement by private attorneys general: "Not only does TILA contemplate a public interest in the enforcement of individual rights, but the public must rely largely on the efforts of individual consumers acting as

'private attorneys general' to achieve the disclosure system envisioned by the Act." *Id.* See also, *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978) ("The scheme of [the TILA] is to create a system of private attorneys general to aid in its enforcement, and its language should be construed liberally in light of its remedial purpose."); *Gilkey v. Central Clearing Company*, 202 F.R.D. 515, 530 (E.D. Mich. 2001) (In class action against payday lender, class certification was granted, in part, because "[c]utting off the rights of consumers to vindicate their rights is contrary to the intent of the TILA and [the Michigan Consumer Protection Act] to encourage private attorneys general."); *Alexander v. Certified Master Builders Corp.*, 1 P.3d 899, 907 (Kan. 2000) ("The [Kansas Consumer Protection Act] provides a private remedy to consumers in the hope that they will enforce the KCPA as 'private attorneys general.'"); *Aral v. Earthlink, Inc.*, 134 Cal.App.4th 544, 561, 36 Cal.Rptr.3d 229, 241 (Cal. Ct.App. 2005) (In striking down class ban, the court noted that "...consumers with small monetary claims are ill served by a consumer protection scheme that prohibits private attorney general actions...."); *Adkinson v. Harpeth Ford-Mercury, Inc.*, No. 01-A-01-9009-CH-332, 1991 Tenn. App. LEXIS 114 at *25 (Tenn. Ct. App. Feb. 15, 1991) ("Plaintiffs under the Tennessee Consumer Protection Act also act as private attorneys general. The potential award of attorney's fees under the Tennessee Consumer Protection Act is intended to make prosecution of such

claims economically viable to plaintiff."); *Hernandez v. Monterey Village Associates Limited Partnership*, 17 Conn.App. 421,425, 553 A.2d 617, 619 (Conn. Ct.App. 1989) ("The policy behind [the Connecticut Unfair Trade Practices Act] is to encourage litigants to act as private attorneys general and to bring actions for unfair or deceptive trade practices."); *Nalen v. Jenkins*, 113 Idaho 79, 82, 741 P.2d 366, 369 (Idaho Ct.App. 1987) ("[The Idaho Consumer Protection Act's] function is to provide private attorney general actions to redress unfair and deceptive practices."); *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct.App. 1984) ("It is widely recognized that a dual purpose underlies private attorney general statutes: The award should eliminate financial barriers to the vindication of a plaintiff's rights, [citation omitted], and the award should provide incentive for counsel to act as private attorney general, [citation omitted].") The private attorney general system provides effective enforcement consistent with the reality that state regulatory and enforcement agencies are confronted with limited (and diminishing) resources, and cannot possibly pursue every law breaker. See, *Baierl v. McTaggart*, 629 N.W.2d 277, 285 (Wis. 2001) ("Such private action is a necessary backdrop to state enforcement actions given the limited resources available to the state that prevent state actions against every violator.")

New Mexico's Unfair Practices Act adopts the private attorney general system. NMSA 1978, § 57-12-10(E). In *Jones v. General Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 611, 953 P.2d 1104, 1109, the Court of Appeals explained the benefits of UPA enforcement by private attorneys, rather than through taxpayer funded regulatory agency enforcement. This Court noted with approval an opinion from the Washington Court of Appeals that the private attorney general system provided at least two intended benefits: "'(1) on the individual level, to enable the injured plaintiff to pursue his own claim; and (2) on the public level, to reimburse the individual plaintiff and his counsel for enforcing the Act on behalf of the general citizenry. [citation omitted]'" 124 N.M. at 611, ¶ 25.

Thus, it is clear that the New Mexico legislature intended consumers to be protected via enforcement of the UPA primarily by the private bar. (The vast majority of appellate decisions defining and interpreting the UPA are in cases filed by individuals represented by private counsel, rather than in cases brought by the Attorney General.) Through the provisions of the private remedies section of the Act, § 57-12-10, private attorneys are encouraged to act like attorneys general through incentives such as statutory damages (even where no economic harm is shown), the availability of broad injunctive relief for the private litigant, and fee shifting. *See* NMSA 1978, § 57-12-10(B) (recovery

allowed for "actual damages or the sum of one hundred dollars ($100), whichever is greater"); NMSA 1978, § 57-12-10(A) (private litigant "may be granted an injunction ... under the principles of equity and on terms that the court considers reasonable"); NMSA 1978, § 57-12-10(C) ("The court shall award attorneys' fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if he prevails"). See also, *Jones*, 124 N.M. at 611, ¶ 23 ("In the absence of actual losses, Plaintiff is still entitled under UPA to recover the statutory damages of one hundred dollars.").

This private attorneys general system allows the private bar to use the UPA to litigate consumer protection claims effectively and to a meaningful conclusion. As in this lawsuit, the amount in controversy in consumer protection lawsuits is often relatively small. However, not only does the UPA provides of recovery of damages suffered by an individual, it empowers that private litigant to actually enjoin an unlawful business practice, thereby preventing the business from injuring other consumers. The private attorney general system assures New Mexicans that consumers will be accorded the broad protection possible. The Attorney General cannot, and should not, litigate every one of the approximately four thousand consumer complaints the Consumer Protection Division receives every year. The Attorney General only

has the resources to litigate a few cases that target wrongdoing that affects a significant number of New Mexico citizens. The Attorney General is the attorney for the State of New Mexico and does not act as counsel for individual consumers. At any given time there are dozens of meritorious individual consumer claims that warrant action that the Attorney General is in no position to file. The vindication of the legal rights of these many consumers depends on the private attorney general system.

V. ENFORCING CLASS BANS IN THE CONTEXT OF RELATIVELY LOW DAMAGES CONSUMER CLASS ACTIONS, AS IN THIS LAWSUIT, WILL EVISCERATE TWO OF THE MOST IMPORTANT ENFORCEMENT MECHANISMS AVAILABLE UNDER THE UNFAIR PRACTICES ACT: THE CLASS ACTION AND THE PRIVATE ATTORNEY GENERAL SYSTEM

"In New Mexico, we recognize that the class action was devised for 'vindication of the rights of groups of people who individually would be without effective strength to bring opponents into court at all.' [citation omitted]." *Fiser v. Dell Computer Corp.* 144 N.M. at 468, ¶ 14. The ban of class actions through the types of adhesion contract provisions at issue in this lawsuit may very well constitute exculpatory clauses whose intentional effect is to insulate companies from the legal consequences of their misconduct. In *Fiser*, 144 N.M. at 470, ¶ 21, the Supreme Court wrote:

> By preventing customers with small claims from attempting class relief and thereby circumventing their only economically efficient means for redress, Defendant's class action ban exculpates the company from wrongdoing. "Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." [citation omitted] On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws. It is not hyperbole or exaggeration to say that it is a fundamental principle of justice in New Mexico that Corp.s may not tailor the laws that our legislature has enacted in order to shield themselves from potential claims of consumers.

The right of consumers to protect their interests and to obtain redress, as well as the private attorneys general system, are evaded by bans on class actions. Such bans, by their very terms, destroy one of the most effective enforcement tools otherwise available to injured consumers under § 57-12-10(E) of the UPA. Indeed, the United States Supreme Court has recognized that the class action mechanism and the private attorney general enforcement system operate together to allow for effective enforcement of consumer rights where the amounts in controversy are relatively small. In considering a consumer class action with small amounts in controversy, the United States Supreme Court, in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166, 1174 (1980), stated, "[f]or better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the

vindication of legal rights." Moreover, courts that have struck down class bans have recognized that these bans destroy private attorney general enforcement schemes. See, *e.g., McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845, 857 (Wash. 2008) ("...without class action suits, the public's ability to act as 'private attorneys general' as intended in the [Washington] Consumer Protection Act, was eviscerated. [citation omitted]").

The affidavits submitted to the District Court from private attorneys in New Mexico indicate that they will not take on this lawsuit as an individual matter because of the low value of the case, even in light of the UPA's fee shifting provisions. (RP:97-113; Supp.RP:600-613) These affidavits show that litigating this lawsuit on an individual basis is cost-prohibitive. However, these economic disincentives are minimized when the claim proceeds as a class action. As the United States District Court for the District of Utah stated in *Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 645 (D.Utah 1998):

> The individual plaintiffs are unlikely ever to sue because, at the level of rational economic calculation, the potential costs associated with individual lawsuits greatly exceed the potential rewards. Therefore, a class action suit is by far the most sensible means of aggregating these small individual claims in one proceeding.

The Attorney General is of the opinion that the evidence presented in this lawsuit indicates that, as a practical matter, it will be economically unfeasible to litigate unless it can be litigated on a class basis. Ms. Felts' eleven affidavits

from New Mexico private bar members confirm that they would not take on this litigation on an individual basis because of the factors discussed above. Ms. Felts has submitted an additional affidavit from a member of the New Mexico defense bar, Andrew J. Simons of Sutin Thayer & Browne P.C ., who defends payday lenders. (RP:110-111) Mr. Simons' affidavit states that he has never seen a consumer bring a lawsuit against a payday lender that was not a class action. See also, *Reyes v. AAA Title Loan, Inc.*, United States District Court No. 02-CV-247 (D. N.M.) (class action lawsuit against title lender defended by Mr. Simons). The record does not contain any affidavit in rebuttal, nor any other evidence that would support Defendants-Appellants' claim that someone in the New Mexico private bar might be willing to litigate this lawsuit on an individual basis.

The Attorney General and the public depend on the private attorney general system and the class action mechanism to provide effective consumer protection in New Mexico. CLK's and CANI's arbitration provisions, with their class ban, render this system completely ineffective. For this reason, the Attorney General strongly believes that in light of *Fiser,* the class ban, and thus the arbitration provisions, are directly contrary to New Mexico public policy, are unconscionable, and should be held unenforceable under New Mexico law.

VI. Conclusion

The New Mexico Attorney General believes that *Fiser* instructs this litigation and that the facts and circumstances are substantially the same. He urges the Court to reaffirm the commitment to New Mexico's fundamental public policy in ensuring that consumers have an opportunity to redress their injuries through a liberally interpreted Unfair Practices Act and its class action/ private attorney general mechanism. In summary, the Attorney General asks the Court to deny CLK's and CANI's appeal and to affirm the trial court's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 1, 2010, a true and correct copy of the foregoing *Amicus Curiae* brief was mailed by pre-paid, first class, U.S. mail to the following counsel of record:

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