To: XXXXXXXXX

From: Katherine Brim

Subject: Applicability of Utah Consumer Sales Protection Act to a Property Management Company Responsible for Billings and Collections for a Homeowner Association.

Date: 8 July 2011

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INTRODUCTION

You have asked me to research what causes of action a homeowner might have against a property management company hired by their homeowner association to handle billing and collection of receipts and revenues; specifically whether the Utah Consumer Sales Protection Act ("UCSPA") applies under these circumstances. You also requested that I research any additional avenues by which the client might compel the notices to stop and recover some form of damages. According to my research, the client could bring a civil complaint citing violations of the both the UCSPA and the Fair Debt Collection Practices Act ("FDCPA"); however, based on the facts I was given and the research I performed, there also appears to be a possibility that the client is mistaken as to the impropriety of the charges, and may in fact be financially obligated to pay them.

The Community Associations Act ("CAA") governs the actions of homeowner's associations as well as the obligations of their members. Depending on the nature of the charges in dispute, there is a possibility that the homeowner's association is actually legally permitted to assess the charges, even if the client never specifically agreed to whatever goods/services they reflect. The CAA provides homeowner associations strong recourse to compel payment, up to and including a lien on the homeowner's property interest, as well as sale or foreclosure to satisfy the lien. Because I did not have details regarding the charges in question I was unable to determine whether or not this issue is relevant. If it is not, please disregard Discussion 1. However, if the charges are permissible under this statute, any complaint against the property management company would be moot.

Assuming the foregoing is not an issue the client could bring a civil complaint against both the homeowner association and the property management company citing violations of the UCSPA. Violations of the FDCPA could also be cited, but would apply only to the property management company's collection attempts (see Discussion 4). Additionally, or alternatively, the client could file a complaint with the Division of Consumer Protection, the enforcing authority for the statute, who would investigate the claim and have standing to bring their own complaint (See Discussion 3).

Below I have provided Issues and Short Answers, Discussions of the applicability of the CAA, UCSPA, and FDCPA, and finally an Appendix of the relevant statutes.

ISSUES and SHORT ANSWERS

I. Does the Utah Consumer Sales Protection Act ("UCSPA") apply to a Homeowner Association ("HOA") which provides services and collects fees from its members?

ANSWER: Yes. UCSPA §13-11-3 (2), (6) provides definitions for the terms "consumer transaction" and "supplier" which may be interpreted to include the services provided by an HOA.

II. Does the UCSPA apply to a Property Management Company ("PMC") hired by an HOA to handle billing and collection?

ANSWER: Yes. UCSPA §13-11-3 (2), (6) provides definitions for the terms "consumer transaction" and "supplier" which may be interpreted to include the services provided by an HOA.

III. What claims are available to consumers under the UCSPA?

ANSWER: There are two main claims available:

1) **Deceptive** act or practice by supplier (§ 13-11-4) and
2) **Unconscionable** act or practice by a supplier (§13-11-5).

IV. To be actionable, must a violation of the UCSPA be knowing and intentional?

ANSWER: It depends on the violation.

1) **Deceptive:** Under §13-11-4(2) a Deceptive act must be knowing and intentional.
2) **Unconscionable:** Unconscionability is a question of law for the court, however, §13-11-5(3) specifically directs courts to consider circumstances which the supplier knew or had reason to know.

V. Which UCSPA claim is best supported by the facts?

ANSWER: Both. Based on the facts available, it appears that both claims may be tenable. Claims brought under the UCSPA typically cite both sections and allow the court to find the best fit.

VI. What is the statute of limitations for bringing an action under the UCSPA?

ANSWER: Action must be brought within two years after the violation occurs, or within one year after the termination of proceedings by the DCP with respect to a violation of the UCSPA, whichever is later.

VII. Must actual damages be proven to recover under the UCSPA?

ANSWER: No. The statute requires only a threshold showing of "loss" which the Utah Supreme Court has interpreted broadly to include situations where a consumer's actual damages are de minimus, speculative, or too difficult to prove. U.C.A. § 13-11-19(2); Andreason v. Felsted, 2006 UT App 188, 137 P.3d 1

VIII. Are statutory damages provided under the UCSPA?

ANSWER: Yes. Under § 13-11-19(2) a consumer who suffers loss as a result of a UCSPA violation may recover actual damages or $2000, whichever is greater, plus court costs.

IX. Is injunctive relief available under the UCSPA?

ANSWER: Yes. Under §13-11-19(1)(b) a consumer may bring an action to enjoin a supplier in violation of the UCSPA, whether or not the consumer seeks or is entitled to damages, or otherwise has an adequate remedy at law.

X. Are attorney's fees and costs available under the UCSPA?

ANSWER: Yes. Under §13-11-19(5) the court may award reasonable attorney's fees to the prevailing party.

XI. Are there additional statutes which could apply to the charges assessed to the client?

ANSWER: Yes, the following could possibly apply:

1) **Fair Debt Collection Practices Act** (15 U.S.C.A. § 1692, "FDCPA") might apply to the PMC's attempts to collect.

2) **Community Associations Act** (Utah Code Ann.§ 57-8a, "CAA") might apply with respect to the nature of the inaccurate charges as well as action taken by the HOA.

XII. What recovery is available under the FDCPA?

ANSWER: Actual damages and any additional damages allowed by the court up to $1000, plus costs and reasonable attorney fees. The defendant is also ordered to cease and desist.

XIII. What is the CAA?

ANSWER: The CAA regulates homeowner associations and provides boundaries for the discretionary powers of the HOA board. It also provides HOA's strong recourse against homeowners with unpaid assessments.

XIV. How Might the CAA Apply in this Case?

ANSWER: Depending on the details of the charges in question, the CAA could either compel the client to pay, or it could be helpful in providing limitations on fines or liens threatened by the HOA. See Discussion 1 below.

DISCUSSION 1: Applicability of the CAA and Potential Negative Complications.

I. Additional Client Information.

This statute may be helpful to the extent that it may clarify whether the charges assessed to the client and the impending fines are, in fact, improper. The CAA explains the type of charges properly assessed to homeowners subject to an HOA, as well as the procedure for handling disputes and the type of action an HOA may properly take against a homeowner. Because the information about the charges and the HOA's threatened action is unclear it is difficult to pinpoint which, if any, sections of the CAA may apply. Additional information needed to determine the applicability of the CAA includes the following:

1) The nature of the client's membership involvement in the HOA:
    a. Are they a voluntary member or is membership mandatory for homeowners in their development?
    b. Does the client have voting rights with respect to HOA services, common expenses, etc.?
2) The structure of the HOA:

a. Does the HOA have a board of directors having primary authority to manage the affairs of the association?

b. What powers are provided for in the governing documents and what are the common expenses involved in their exercise?

3) How the charges are characterized by the HOA:

a. Common expense, assessment, or a fine?

4) Copies of the governing documents and bylaws of the HOA .

II. Payment of Common Expense or Assessment, Utah Code Ann. §57-8a-201.

Under the CAA owners are required to pay their proportionate share of common expenses, which include any costs incurred by the association to exercise any of the powers provided for in the association's governing documents, plus any other assessments levied by the association. Assessments are charges imposed or levied by the association on against a lot or lot owner pursuant to a governing document recorded with the county recorder. The amount and timing of payment for expenses/assessments is determined by the board of directors in accordance with the terms of the HOA declaration or bylaws.

The client may not believe they are responsible for the charges in the notices, but if the charges relate to any of the foregoing the client may be mistaken about their financial obligations with respect to the HOA. It will be necessary to obtain a copy of the HOA's governing documents as well as a breakdown of the charges to determine whether or not they are actually improper.

III. Unpaid Assessment—Costs and Attorney Fees, Lien—Foreclosure, Utah Code Ann. §§57-8a-202, 203.

If the client is mistaken about the charges and they actually are proper, the CAA allows the HOA to recover all expenses incurred in collecting the assessment, including reasonable attorney fees. Additionally, if an owner refuses to pay an assessment when due, the amount constitutes a lien on the owner's interest in the property which may be enforced by a sale or foreclosure of the owner's interest, and the owner will be required to pay the costs and expenses of those proceedings as well as reasonable attorney's fees.

IV. Fines, Utah Code Ann. §57-8a-208.

It was unclear from the information provided as to whether or not the PMC's notices included fines assessed by the HOA. Under the CAA, the HOA may only impose fines for a violation of a rule, covenant, condition, or restriction that is specifically listed in the association's governing documents. Unpaid fines may be collected in the same manner as unpaid assessments.

The CAA gives owners the opportunity to request a hearing to dispute the fines within 14 days of the assessment, with late fees and interest suspended until after a final decision has been made. If the charges in question are actually fines, or fines have been assessed as a result of the other alleged charges remaining unpaid, it may be possible to request a hearing with the HOA board under this section; however, the language of the statute with respect to the hearing is permissive, merely allowing for homeowners to make the request. It is not mandatory, requiring the association to hold a hearing before enforcing the fine.

DISCUSSION 2: Applicability of Utah Consumer Sales Protection Act

I. Definitions, Utah Code Ann. §13-11-3.

The UCSPA is designed to protect consumers from suppliers who commit deceptive and unconscionable sales practices. Despite the fact that this case involves a homeowner and a third party hired to collect HOA fees as opposed to a traditional sales transaction, the definitions provided in §13-11-3 could be interpreted to bring the transaction, the HOA, and the PMC within the meaning of the statute. Under §13-11-3(2):

> (a) **"Consumer transaction" means a** sale, lease, assignment, award by chance, or other written or oral transfer or **disposition of** goods, **services**, or other property, both tangible and intangible (except securities and insurance) **to, or apparently to, a person for:**
>
> (i) primarily personal, family, or **household purposes**;
>
> (b) **"Consumer transaction" includes**:
>
> (i) any of the following with respect to a transfer or disposition described in Subsection (2)(a):
>
> (A) an offer;
>
> (B) a solicitation;
>
> (C) **an agreement**; or
>
> (D) **performance of an agreement;**

Under this definition the provision of services in exchange for HOA dues/fees could be found to constitute a consumer transaction.

With respect to the issue of whether the HOA and property management group are suppliers, §13-11-3 provides:

> (5) **"Person" means** an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or **any** other **legal entity.**
>
> (6) **"Supplier" means a** seller, lessor, assignor, offeror, broker, or other **person who regularly** solicits, engages in, or **enforces consumer transactions, whether or not he deals directly with the consumer.**

If the homeowner's agreement with the HOA is interpreted as a consumer transaction, then the HOA and PMC are both suppliers for the purposes of the UCSPA because both are legal entities which regularly enforce the transaction; the HOA through its use of the PMC and the PMC in its direct dealings with the homeowner.

There is, however, a possibility that the UCSPA will not apply to this case at all. The enforcing authority for the UCSPA is the Division of Consumer Protection ("DCP"); according to the DCP's Investigations Department, if the disputed charges relate to any decision regarding fees, goods, services, etc. in which the client, as a member of the HOA, had an opportunity to participate or vote, then the charges would not relate to a consumer transaction as defined by the statute.

DISCUSSION 3: Causes of Action under the UCSPA

I. Actions by Consumer, Utah Code Ann. §13-11-19.

Although the Division of Consumer Protection is the enforcing authority for the UCSPA, this section allows individuals to pursue a private cause of action:

> (1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:
>
> (a) obtain a declaratory judgment that an act or practice violates this chapter; and
>
> (b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who **suffers loss** as a result of a violation of this chapter may recover…actual damages or $2,000, whichever is greater, plus court costs.
…

(5) …the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) …a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment …

This section basically provides that the client can enjoin the PMC from sending the notices. It also provides for monetary recovery from the HOA or the PMC, provided they can show some type of loss.

A. "Loss" Requirement.

The Utah Supreme Court has interpreted the loss requirement broadly stating:

"It does not necessarily follow… that a consumer cannot prove he has suffered a loss without also proving actual damages. Instead, section 13-11-19 creates the opportunity for a consumer to recover what is essentially a civil penalty in the amount of $2000 where the consumer's actual damages may otherwise be de minimis, speculative, or too difficult to prove, but where the consumer can show that a loss has been suffered as a result of a violation of the UCSPA. Construing the "loss" requirement of section 13-11-19 in this manner is in accord with the protective and remedial nature of the UCSPA….

"We also hold that the Legislature, in the course of proscribing fraudulent consumer sales practices and putting some teeth into its policy, intended the term "loss" in section 13-11-19 to have a broad and generic meaning to allow consumers a greater opportunity to recover at least $2000 in statutory damages when the UCSPA has been violated."

Andreason v. Felsted, 2006 UT App 188, 137 P.3d 1, 6

In *Andreason* the plaintiff failed to prove actual damages in any amount, but the defendant admitted to causing negative information to be included in Adreason's credit report, which the court found more than sufficient to constitute "loss" under the statute. The court also indicated that the plaintiff's trouble and expense in defending against a collection action premised on a fraudulent claim would have been enough to constitute the requisite "loss." *Id.* Given this interpretation there is a strong argument that the ongoing hassle and need for legal action created by the client's situation satisfies the loss requirement.

II. Deceptive Act or Practice by a Supplier, Utah Code Ann. §13-11-4.

This section generally protects consumers from false claims made with respect to the quality, nature, sponsorship, or origin of the goods or services as well as the timing of payment and receipt of goods and services. There are two instances described by this section which potentially apply to the case at hand:

> **(2)** …a supplier commits a deceptive act or practice if the supplier **knowingly or intentionally**:
>
> **…**
>
> **(r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer;**
>
> **…**
>
> **(u) sends an unsolicited mailing** to a person **that appears to be a billing**, statement, or request **for payment for a product or service the person has not ordered or used**, or that implies that the mailing requests payment for an ongoing product or service the person has not received or requested;

A. Subsection (r): Charges Not Previously Agreed To.

Subsection (r) is probably the closest fit for this case, however, as discussed above, there is a possibility that the charges may have been properly assessed to the client regardless of whether they expressly agreed to the transaction, by virtue of their membership in the HOA and the HOA's powers under the governing documents. In that case the CAA protects the actions of the HOA, and by extension, the PMC (although the PMC may still be in violation of the FDCPA with respect to their attempts to collect the disputed charge).

If the disputed charges do not relate to the HOA's discretionary powers and the charges relate to a consumer transaction as defined by the statute, then this section could apply.

B. Subsection (u): Unsolicited Mailing for Payment for Goods/Services not Ordered/Used.

Section (u) is probably not the right fit because it only applies if the PMC is sending notices in addition to the regular HOA statements which charge the client for goods or services they never received or requested. It was unclear from the information provided about the client as to whether or not this is the case.

C. Knowing or Intentional.

Regardless of which subsection applies, the client must show the HOA/PMC acted knowingly or intentionally. This should be relatively easy to establish if the client can document 1) the notification they sent disputing the charges and 2) subsequent bills from the HOA/PMC showing a continued attempt to collect the disputed charges. It was unclear from the facts as to whether the client notified the PMC, the HOA, or both about the inaccuracy of the charges; however, even if the client only notified the PMC, the HOA may still be found in violation if knowledge can be imputed to the HOA as the principal.

D. Deceptive Practices and the Division of Consumer Protection.

The enforcing authority for the UCSPA is the Division of Consumer Protection. If this section does apply, and the HOA/PMC have knowingly continued billing the client inaccurately, the client has the option of filing a complaint against both the HOA and PMC with the DCP in addition to filing their civil complaint. In that case, the DCP will investigate the entities and pursue their own case against them which could result in administrative fines of up to $2500 per violation, plus the DCP's attorney costs and fees (§§13-11-17(4)(a), 13-11-17.5). It is unclear from the statute as to whether each notice would constitute a separate violation, but there is nothing to suggest otherwise.

Filing a complaint with the DCP does not increase the client's potential for monetary recovery, as administrative fines are remitted to the state, not the plaintiff; however, it does increase the defendant's potential financial liability if they don't resolve the matter privately with the client. Additionally, should the DCP find either entity in violation of the UCSPA, they will be placed on the Buyer Beware List published annually by the DCP, publicly available on their website (and provided as a link from multiple other consumer sites), and which will list the entity's name, business information, the nature of the violation, and the fines they were assessed. A DCP investigation is most effective for Deceptive claims, not Unconscionability, because the statute expressly reserves unconscionability as a question for the court.

III. Unconscionable Act or Practice by Supplier, Utah Code Ann. §13-11-5.

The term "unconscionable" is not defined by the UCSPA; the plain language leaves it specifically to the discretion of the court. Additionally, while a violation of this section does not require knowledge on the part of the supplier, a supplier's knowledge must be taken into consideration by the court.

§ 13-11-5:

> (2) **The unconscionability of an act or practice is a question of law for the court**. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.
>
> (3) In determining whether an act or practice is unconscionable, **the court shall consider circumstances which the supplier knew or had reason to know.**

A. Unconscionability Defined.

The UCSPA does not specify what type of acts rise to the level of unconscionability, nor do the comments. However, the comments do indicate that this section is modeled after the Uniform Consumer Sales Practices Act §4 ("Unif. CSPA") which does provide examples in six subsections as well as the comments. These examples indicate that "unconscionable" as used in the Unif. CSPA carries a similar meaning to its use in the context of contract law:

> "These subsections forbid unconscionable advertising techniques, unconscionable contract terms, and unconscionable debt collection practices… Unconscionability typically involves conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits to him of a related consumer transaction."
>
> Unif. Consumer Sales Practices Act § 4, Comment to Subsecs. (a) and (b)

1. Statutory Construction.

The HOA/PMC may argue that, given the interpretive guidance of the Unif. CSPA, the inaccurate charges do not rise to the level of unconscionability contemplated by the statute. However, despite being modeled after the Unif. CSPA, the Utah code specifically omits the six subsections mentioned in the comment above. It is reasonable to conclude that, since the language of the UCSPA §13-11-5 is identical to the Unif. CSPA §4 in all other respects except the omitted subsections, their omission was a purposeful decision by the Utah legislature intended to broaden the court's discretion in determining unconscionability.

Most of the cases involving claims of unconscionability under the UCSPA do involve unconscionable contracts; however, no court addressing the issue, including the Utah Supreme Court, has indicated that unconscionable acts/practices are limited to this arena or held that an act was not unconscionable because it did not relate to contracts or bargaining power.

In discussing interpretation of the UCSPA in *Andreason* the Utah Supreme Court instructed that statutes are to be construed in a manner that "render[s] all parts thereof relevant and meaningful (Andreason v. Felsted, 2006 UT App 188, 137 P.3d 1, 4). This instruction supports application of a broad interpretation of unconscionability because the UCSPA specifically instructs that it is to be "construed ***liberally*** to promote the following policies:

> (1) to simplify, clarify, and modernize the law governing consumer sales practices;
> (**2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;**
> (3) to encourage the development of fair consumer sales practices;..."
>
> Utah Code Ann. § 13-11-2 (emphasis added)

Additionally, the plain language of the statute indicates that "***if it is claimed***… that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence…" (Utah Code Ann. §13-11-5(2), emphasis added). This suggests that a complaint brought under the UCSPA may not be dismissed before the plaintiff has an opportunity to adduce evidence of unconscionability.

Given the fact that the legislature expressly declined to include the limiting subsections of the Unif. CSPA, but included language instructing that the statute be construed liberally, the term "unconscionable," as used in §13-11-5 should be given broad meaning beyond a narrow contract law interpretation, and should include the repeated over/inaccurate billing of the client by the HOA/PMC.

B. Knowledge.

As stated above, there is no knowledge requirement under §13-11-5, but the court must *consider* what the supplier knew or had reason to know.

In Wade v. Jobe, 818 P.2d 1006 (Utah 1991)[1] the court found that it was not unconscionable for a landlord to rent premises with sewer problems in the absence of knowledge of those problems, but it *was* unconscionable to fail to repair the problem once it became known. This suggests that knowledge weighs heavily in the court's determination of unconscionability.

IV. Recovery.

A. Monetary Relief.

The UCSPA allows consumers to recover actual damages or $2000, whichever is greater, plus court costs (§13-11-19(2)) and reasonable attorney's fees (§13-11-5(5)). This appears to be the maximum individual recovery as the statute does not specifically allow recovery for *each* violation like the administrative fines which could be imposed as a result of DCP action.

B. Injunctive Relief.

Injunctive relief may be granted as a result of an individual action under §13-11-19, or as a result of an action brought by the DCP under §13-11-17.

DISCUSSION 4: Applicability of the Fair Debt Collection Practices Act

I. Definitions, 15 USC 1692a (FDCPA §803).

The applicability of the FDCPA depends on whether the definitions of the terms "consumer," "creditor," "debt," and "debt collector" can be interpreted to include the client and the HOA, PMC, or both. §803 provides the following definitions:

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

This is likely to include the client, provided the charges are interpreted as a "debt."

> (4) **The term "creditor" means any person** who offers or extends credit creating a debt or **to whom a debt is owed**, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

[1] Note, *Wade v. Jobe* has since been overruled, but only because the Utah Supreme Court determined that the UCSPA should no longer be applied to landlord tenant disputes because it is superseded by the more specific Utah Fit Premises Act. The court's treatment of knowledge and unconscionability has not been overruled or negatively treated.

Since the inaccurate charges originated with the HOA, only the HOA could be a creditor under this definition since the PMC's relationship to the debt is excluded by the definition.

> (5) The term **"debt" means any** obligation or **alleged obligation of a consumer to pay money arising out of a transaction in which the** money, property, insurance or **services which are the subject of the transaction are primarily for personal, family, or household purposes**, whether or not such obligation has been reduced to judgment.

The services provided by the HOA could be interpreted as household services, bringing the charges within the meaning of the term "debt."

> (6) The term **"debt collector" means any person** who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or **who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.**

This definition could probably only be interpreted to include the PMC, since it's unlikely that the collection of debts would be considered the HOA's principal purpose of business.

If interpreted favorably, these definitions could bring the client's situation within the reach of this statute, since the charges would be considered a debt to a creditor, and the PMC would be considered a debt collector.

II. Validation of Debts, 15 USC 1692g (FDCPA §809)

As a debt collector under the FDCPA the PMC was required to provide written notification of the amount of the debt, the creditor (in this case the HOA), and inform the consumer that they had 30 days from receiving the notice to dispute the debt, otherwise the debt would be assumed valid by the collector. Under the FDCPA, once a debt is disputed the debt collector must cease collection until they receive verification of the debt from the creditor and mail a copy to the consumer.

According to the information provided about this case, it appears that the client disputed the inaccurate charges, but has yet to receive any explanation of the charges, suggesting that the PMC has failed to obtain a written verification from the HOA and mail the information to the client. If this is the case, and the client either properly disputed the charges within 30 days of the initial notice or the PMC failed to give notice of the 30 day window, then the PMC is in violation of this section.

III. False or Misleading Representations, 15 USC 1692e (FDCPA §807)

Under the FDCPA debt collectors may not falsely represent the amount of any debts owed by the consumer. Since the client notified the PMC that the charges were incorrect, continuing to bill the client for these charges without supplying the verification required by §809 puts them in violation of §807(2)(A) for falsely representing the character and amount of the debt. The PMC may also be in violation of §807(5) if they've threatened to take action that can't legally be taken, or that they don't actually intend to take, such as assessing a lien against the client's property if the HOA is not actually permitted to do so under the CAA.

IV. Civil Liability—Recovery and Statute of Limitations, 15 USC 1692k (FDCPA § 813)[i]

The FDCPA allows individuals to recover actual damages and any additional damages allowed by the court up to $1000, plus costs and reasonable attorney fees. Action must be brought within one year of the date the violation occurs.

CONCLUSION

No complaint should be filed until the questions concerning the client's potential liability under the CAA have been resolved. If this is a moot point due to the existence of information to which I have not had access, please disregard Discussion 1.

I. Likelihood of Success in Litigation.

Bringing this particular type of dispute within the purview of the UCSPA or the FDCPA may seem somewhat attenuated given that both statutes were drafted for the protection of consumers in the more traditional arenas of sales transactions and credit; however, they are also both remedial statutes, and the policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established (3 Sutherland Statutory Construction § 60:1 (7th ed.)). Because remedial statutes are favored by the courts and interpreted liberally to accomplish the greatest public good, doubts about the applicability of a remedial statute are resolved in favor of applying the statute. (82 C.J.S. Statutes § 523; Utility Service Co., Inc. v. Department of Labor and Indus. Relations, 331 S.W.3d 654 (Mo. 2011); 73 Am. Jur. 2d Statutes § 185).

Given the absence of case law directly on point with the client's circumstances it is uncertain whether a court will determine that the PMC or HOA have engaged in deceptive or unconscionable practices; however, the facts available and the relevant case law suggest a reasonable likelihood the client would prevail.

II. Settlement Leverage.

As long as there are no unforeseen liability complications under the CAA, it seems that the client has several solid leverage points to incentivize both the HOA and the PMC to resolve the issue privately. The recovery that will actually go to the plaintiff is relatively small compared to the multiple administrative fines, additional attorney fees and costs, and loss of business reputation and goodwill the two entities could suffer if the client prevails. Unless the disputed charges represent a significant amount of money, it seems unlikely either company would prefer litigation to settling.

APPENDIX: Statutes

I. COMMUNITY ASSOCIATIONS ACT; Utah Code Annotated Title 57, Chapter 8a.

A. Utah Code Ann. §57-8a-102, Definitions.

As used in this chapter:

(1) (a) "Assessment" means a charge imposed or levied:

(i) by the association;
(ii) on or against a lot or a lot owner; and
(iii) pursuant to a governing document recorded with the county recorder.

(b) "Assessment" includes a common expense.

(2)(a) Except as provided in Subsection (2)(b), "association" means a corporation or other legal entity, each member of which:

(i) is an owner of a residential lot located within the jurisdiction of the association, as described in the governing documents; and

(ii) by virtue of membership or ownership of a residential lot is obligated to pay:

(A) real property taxes;
(B) insurance premiums;
(C) maintenance costs; or
(D) for improvement of real property not owned by the member.

(b) "Association" or "homeowner association" does not include an association created under Title 57, Chapter 8, Condominium Ownership Act.

(3) "Board of directors" or "board" means the entity, regardless of name, with primary authority to manage the affairs of the association.

(4) "Common areas" means property that the association:

(a) owns;
(b) maintains;
(c) repairs; or
(d) administers.

(5) "Common expense" means costs incurred by the association to exercise any of the powers provided for in the association's governing documents.

(6)(a) "Governing documents" means a written instrument by which the association may:

(i) exercise powers; or
(ii) manage, maintain, or otherwise affect the property under the jurisdiction of the association.

(b) “Governing documents” includes:

(i) articles of incorporation;
(ii) bylaws;
(iii) a plat;
(iv) a declaration of covenants, conditions, and restrictions; and
(v) rules of the association.

B. Utah Code Ann. § 57-8a-201, Payment of a common expense or assessment.

(1) An owner shall pay the owner's proportionate share of:

(a) the common expenses; and
(b) any other assessments levied by the association.

(2) A payment described in Subsection (1) shall be in the amount and at the time determined by the board of directors in accordance with the terms of the:

(a) declaration; or
(b) bylaws.

(3) An assessment levied against a lot is:

(a) a debt of the owner at the time the assessment is made; and
(b) collectible as a debt described in Subsection (3)(a).

C. Utah Code Ann. § 57-8a-202, Unpaid assessment--Costs and attorney fees.

(1) An association may recover all expenses incurred by the association in collecting an unpaid assessment, including reasonable attorney fees.

(2)(a) An association may maintain an action to recover a money judgment for an unpaid assessment without foreclosing or waiving the lien securing the unpaid assessment.

(b) The prevailing party in an action described in Subsection (2)(a) may recover:

(i) costs; and
(ii) reasonable attorney fees.

D. Utah Code Ann. § 57-8a-203, Unpaid assessment--Lien—Foreclosure.

(1)(a) If an owner fails or refuses to pay an assessment when due, that amount constitutes a lien on the interest of the owner in the property.

(b) Upon the recording of notice of lien by the manager or board of directors, a lien described in Subsection (1)(a) is a lien on the unit owner's interest in the property prior to all other liens and encumbrances, recorded or unrecorded, except:

(i) tax and special assessment liens on the unit in favor of any assessing lot or special improvement district; and
(ii) encumbrances on the interest of the lot owner:

(A) recorded prior to the date of the recording of notice of lien described in Subsection (1)(b); and
(B) that by law would be a lien prior to subsequently recorded encumbrances.

(2)(a) The manager or board of directors may enforce a lien described in Subsection (1) by sale or foreclosure of the owner's interest.

(b) The sale or foreclosure described in Subsection (2)(a) shall be conducted in the same manner as foreclosures in:

(i) mortgages; or
(ii) any other manner permitted by law.

(3) In a sale or foreclosure described in Subsection (2)(a), the owner shall pay:

(a) the costs and expenses of the proceedings; and
(b) reasonable attorney fees.

(4) Unless otherwise provided in the declaration, the manager or board of directors may:

(a) bid at a sale or foreclosure described in Subsection (2)(a); and
(b) hold, lease, mortgage, or convey the lot that is subject to the lien.

E. <u>Utah Code Ann. § 57-8a-208, Fines.</u>

(1) Unless otherwise provided in the association's governing documents, the board of a homeowner association may assess a fine against a lot owner for a violation of the association's governing documents after the requirements of Subsection (2) are met.

(2) Before assessing a fine under Subsection (1), the board shall:

(a) notify the lot owner of the violation; and
(b) inform the owner that a fine will be imposed if the violation is not remedied within the time provided in the association's governing documents, which shall be at least 48 hours.

(3)(a) A fine assessed under Subsection (1) shall:

(i) be made only for a violation of a rule, covenant, condition, or restriction that is specifically listed in the association's governing documents;

(ii) be in the amount specifically provided for in the association's governing documents for that specific type of violation or in an amount commensurate with the nature of the violation; and
(iii) accrue interest and late fees as provided in the association's governing documents.

(b) Unpaid fines may be collected as an unpaid assessment as set forth in the association's governing documents or in this chapter.

(4)(a) A lot owner who is assessed a fine under Subsection (1) may request an informal hearing to protest or dispute the fine within 14 days from the date the fine is assessed.

(b) A hearing requested under Subsection (4)(a) shall be conducted in accordance with standards provided in the association's governing documents.

(c) No interest or late fees may accrue until after the hearing has been conducted and a final decision has been rendered.

II. UTAH CONSUMER SALES PROTECTION ACT; Utah Code Annotated Title 13, Chapter 11.

A. Utah Code Ann. § 13-11-2. Construction and purposes of act

This act shall be construed liberally to promote the following policies:

(1) to simplify, clarify, and modernize the law governing consumer sales practices;
(2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;

B. Utah Code Ann. § 13-11-3, Definitions (emphasis added).

(2)(a) **"Consumer transaction"** means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for:

(i) primarily personal, family, or household purposes;

…
(b) "Consumer transaction" includes:
(i) any of the following with respect to a transfer or disposition described in Subsection (2)(a):

(A) an offer;
(B) a solicitation;
(C) an agreement; or
(D) performance of an agreement;

(3) **"Enforcing authority"** means the Division of Consumer Protection.

(5) **"Person"** means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) **"Supplier"** means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

C. Utah Code Ann. § 13-11-4, Deceptive act or practice by supplier (emphasis added).

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist, including any of the following reasons falsely used in an advertisement:

(i) "going out of business";

(ii) "bankruptcy sale";

(iii) "lost our lease";

(iv) "building coming down";

(v) "forced out of business";

(vi) "final days";

(vii) "liquidation sale";

(viii) "fire sale";

(ix) "quitting business"; or

(x) an expression similar to any of the expressions in Subsections (2)(d)(i) through (ix);

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j)(i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false; or

(ii) fails to honor a warranty or a particular warranty term;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective

consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:

(i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund; or

(ii) extend the shipping date to a specific date proposed by the supplier;

(m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if:

(i) the sale is made other than at the supplier's established place of business pursuant to the supplier's personal contact, whether through mail, electronic mail, facsimile transmission, telephone, or any other form of direct solicitation; and

(ii) the sale price exceeds $25;

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false;

(p) if a consumer indicates the consumer's intention of making a claim for a motor vehicle repair against the consumer's motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told the consumer was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement;

(q) includes in any contract, receipt, or other written documentation of a consumer transaction, or any addendum to any contract, receipt, or other written documentation of a consumer transaction, any confession of judgment or any waiver of any of the rights to which a consumer is entitled under this chapter;

(r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer;

(s) solicits or enters into a consumer transaction with a person who lacks the mental ability to comprehend the nature and consequences of:

(i) the consumer transaction; or

(ii) the person's ability to benefit from the consumer transaction;

(t) solicits for the sale of a product or service by providing a consumer with an unsolicited check or negotiable instrument the presentment or negotiation of which obligates the consumer to purchase a product or service, unless the supplier is:

(i) a depository institution under Section 7-1-103;

(ii) an affiliate of a depository institution; or

(iii) an entity regulated under Title 7, Financial Institutions Act;

(u) sends an unsolicited mailing to a person that appears to be a billing, statement, or request for payment for a product or service the person has not ordered or used, or that implies that the mailing requests payment for an ongoing product or service the person has not received or requested;

(v) issues a gift certificate, instrument, or other record in exchange for payment to provide the bearer, upon presentation, goods or services in a specified amount without printing in a readable manner on the gift certificate, instrument, packaging, or record any expiration date or information concerning a fee to be charged and deducted from the balance of the gift certificate, instrument, or other record; or

(w) misrepresents the geographical origin or location of the supplier's business in connection with the sale of cut flowers, flower arrangements, or floral products.

D. <u>Utah Code Ann. §12-11-5. Unconscionable act or practice by supplier</u> (emphasis added)

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The **unconscionability** of an act or practice **is a question of law for the court**. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, **the court shall consider circumstances which the supplier knew or had reason to know.**

> **Comment 2:** Utah Consumer Sales Practices Act (UCSPA) applies to residential landlord and tenant relationship and, while it was not unconscionable for landlord to rent premises with sewer problems in the absence of knowledge of those problems, it was unconscionable to fail to repair the sewer despite complaints and reports from housing inspector and to have the house effectively condemned for the purpose of evicting the tenant. (Per Durham, J., with one Justice concurring.)

E. Utah Code Ann. § 13-11-7. Duties of enforcing authority

(1) The enforcing authority shall:

(a) enforce this chapter throughout the state;

…

(d) receive and act on complaints;

F. Utah Code Ann. § 13-11-17. Actions by enforcing authority

(1) The enforcing authority may bring an action:

(a) to obtain a declaratory judgment that an act or practice violates this chapter;

(b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter; and

(c) to recover, for each violation, actual damages… on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(4)(a) In addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to $2,500 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

G. Utah Code Ann. § 13-11-17.5, Costs and attorney's fees.

Any judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation.

H. Utah Code Ann. § 13-11-19, Actions by consumer.

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs.

…

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection 13-11-21(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under Section 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

III. FAIR DEBT COLLECTION PRACTICES ACT; 15 U.S.C.1692-1692p

A. § 803. Definitions

As used in this title—
…

(2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term “consumer” means any natural person obligated or allegedly obligated to pay any debt.

(4) The term “creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only 4 § 803 15 USC 1692a
for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
…

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity
(i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
(ii) concerns a debt which was originated by such person;
(iii) concerns a debt which was not in default at the time it was obtained by such person; or
(iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

B. § 807. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
…

(2) The false representation of—
(A) the character, amount, or legal status of any debt; or
(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

C. § 809. Validation of debts

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

D. § 813. Civil liability

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000