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## **Consumer Welfare: Would Competitive Injury Claims under the New Mexico Unfair Practices Act Actually Undermine Consumer Protection?**

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# CONSUMER WELFARE: WOULD COMPETITIVE INJURY CLAIMS UNDER THE NEW MEXICO UNFAIR PRACTICES ACT ACTUALLY UNDERMINE CONSUMER PROTECTION?

Raquel Koch Pinto\*

*When the New Mexico Unfair Practices Act (UPA) was enacted in 1967, the language adopted did not clearly state whether the legislature intended to confer standing to competitors to sue for unfair or deceptive trade practices. Before the New Mexico Supreme Court decision in *Gandydancer, LLC v. Rock House CGM, LLC*,<sup>1</sup> the New Mexico Court of Appeals and the U.S. District Court for the District of New Mexico—applying state law—had interpreted the statutory term “any person” as an opening for businesses to sue competitors under the UPA in certain circumstances. However, the New Mexico Supreme Court approached the UPA in a different way and limited standing under the UPA to consumers, based on the legislative history of the statute. This interpretation of the UPA goes in the opposite direction taken by other jurisdictions interpreting similar statutes and limits the resources available to businesses to recover for actual damages suffered due to their competitors’ misconduct under the UPA. Moreover, as this note intends to prove, this interpretation of the UPA affords less protection for consumers. This note explores the topic of competitive injury under the UPA in New Mexico by (1) presenting the background of the adoption of the UPA and the New Mexico Supreme Court decision in *Gandydancer*; (2) discussing how consumers’ rights would not be diminished by allowing business competitors to sue for competitive injury under the UPA; (3) discussing the similarities between the UPA and antitrust law, which accomplishes its goals by allowing suits for competitive injury; (4) arguing that the violations of the UPA would be deterred if business competitors had standing to sue for competitive injury under the UPA; (5) discussing whether*

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1. 2019-NMSC-021, ¶ 1, 453 P.3d 434, 436.

*there is a possible trend—with the recent amendments to the Motor Carrier Act—indicating that the legislature is inclined to expand a right of action for competitive injury under the UPA; (6) exploring how other jurisdictions have adopted and interpreted statutes similar to the UPA; and finally (7) suggesting that the New Mexico legislature should revisit the UPA and include a provision that clearly grants standing not only to consumers but also to business competitors to sue for competitive injury.*

## INTRODUCTION

Are consumers better protected against businesses engaging in unfair or deceptive trade practices when the law grants standing under consumer protection statutes only to the consumer and the state attorney general? Or would the market, and as a consequence, consumers, be better off if business competitors were granted standing to sue competitors for engaging in unfair or deceptive trade practices? This is an issue that only recently reached New Mexico's highest court.

New Mexico case law makes it clear that business competitors may not sue for competitive injury<sup>2</sup> under the New Mexico Unfair Practices Act (UPA).<sup>3</sup> In *Gandydancer, LLC v. Rock House CGM, LLC*, the New Mexico Supreme Court held that competitive injury suits are not allowed under the UPA.<sup>4</sup> The Supreme Court reasoned that when the legislature amended the statute and removed the phrase “unfair methods of competition” from the statute, it eliminated competitive injury claims from the protected zone of interest under the UPA.<sup>5</sup> Moreover, the court also stated that consumer protection would be undermined if business competitors had standing to sue competitors under the UPA.<sup>6</sup>

Consumer protection statutes serve two main functions: first, they bring justice when there is a violation of the law, which impacts an innocent consumer, and second, they deter future violations that could impact the public as a whole.<sup>7</sup> Consumer welfare is the ultimate goal of such statutes, and, seeking this goal, New Mexico courts have recognized that the UPA, as a consumer protection statute, should receive the “broadest possible application.”<sup>8</sup> The UPA created a private right of action for “any person who suffers any loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful

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2. *Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“Competitive injury . . . A wrongful economic loss caused by a commercial rival, such as the loss of sales due to unfair competition; a disadvantage in a plaintiff's ability to compete with a defendant, caused by the defendant's unfair competition.”).

3. *Gandydancer*, 2019-NMSC-021, ¶ 1, 453 P.3d at 436.

4. *Id.*

5. *Id.* ¶ 20, 453 P.3d at 440; see also discussion *infra* Part I.B.

6. *Gandydancer*, 2019-NMSC-021, ¶¶ 24–28, 453 P.3d at 441–442.

7. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 933 (2017).

8. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, ¶¶ 10–11, 429 P.3d 338, 342; see also *Gandydancer*, 2019-NMSC-021, ¶ 24, 453 P.3d at 441.

by the Unfair Practices Act.”<sup>9</sup> Before the New Mexico Supreme Court decision in *Gandydancer*,<sup>10</sup> the New Mexico Court of Appeals<sup>11</sup> and the New Mexico federal court<sup>12</sup>—making an *Erie-guess*<sup>13</sup>—both had recognized that businesses had a private right of action against competitors under the UPA, based on the plain language of the statute and the New Mexico Supreme Court dicta in a previous case.<sup>14</sup>

This note argues that the New Mexico Supreme Court’s holding in *Gandydancer* overlooks one reasonable and critical interpretation of the UPA. Under such interpretation, the court could have found that the legislature did not eliminate business competitor standing from the UPA with the 1971 amendment. Furthermore, this note argues that consumer protection would, in fact, be enhanced if business competitors had standing to sue under the UPA. The legislature itself has signaled that it agrees with this position as it has created a private right of action for business competitors to sue a competitor who engages in unfair or deceptive trade practices under the New Mexico Motor Carrier Act.<sup>15</sup>

Part I of this note provides a brief history of the adoption of the UPA by New Mexico—including the amendments that changed the statutory language—as well as an assessment of competitive injury prior to the New Mexico Supreme Court’s decision in *Gandydancer*. Part I next discusses *Gandydancer*, with an analysis of the New Mexico Supreme Court’s holding and the reasoning behind the decision that reversed the New Mexico Court of Appeals’ ruling.

Part II argues that, contrary to the New Mexico Supreme Court’s opinion, competitive injury claims under the UPA do not undermine consumer protection. This section provides a comparison between the UPA and federal antitrust laws—a framework with similar consumer protection goals. Federal antitrust laws recognize that business competitors have standing to sue competitors who have engaged in unlawful conduct under antitrust laws. Part II also addresses how deterrence goals can be achieved by allowing businesses to sue for competitive injury.

Part III first explores how the New Mexico Legislature expanded the zone of interests protected from unfair and deceptive trade practices within the context of the Motor Carrier Act.<sup>16</sup> It then considers whether this expansion suggests a possible trend indicating that the legislature is inclined to expand a right of action for competitive injury under the UPA. Additionally, Part III examines other states’ approaches to competitive injury under consumer protection laws similar to the UPA.

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9. N.M. STAT. ANN. § 57-12-10 (2005).

10. *Gandydancer*, 2019-NMSC-021, ¶ 1, 453 P.3d at 436.

11. *Gandydancer*, 2018-NMCA-064, ¶ 1, 429 P.3d at 340.

12. *First Nat’l Bancorp Inc. v. Alley*, 76 F. Supp. 3d 1261, 1266 (D.N.M. 2014).

13. *Erie Doctrine*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The principle that a federal court exercising diversity jurisdiction over a case that does not involve a federal question must apply the substantive law of the state where the court sits.”); *see also* *Bhasker v. Kemper Cas. Ins. Co.*, 361 F. Supp. 3d 1045, 1137 n.34 (D.N.M. 2019) (“In the absence of an authoritative pronouncement from the highest court, a federal court’s task under the *Erie* doctrine is to predict how the state’s highest court would rule if presented with the same case.”).

14. *Gandydancer*, 2018-NMCA-064, ¶¶ 1, 22, 429 P.3d at 340, 345; *Alley*, 76 F. Supp. 3d at 1263, 1266 (citing *Page & Wirtz v. Solomon*, 1990-NMSC-063, 110 N.M. 206, 794 P.2d 349 (1990)).

15. N.M. STAT. ANN. § 65-2A-33 (2013); *see also* discussion *infra* Part III.A.

16. N.M. STAT. ANN. § 65-2A-33 (2013); *see also* *Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F. Supp. 3d 1215, 1218 (D.N.M. 2020).

This note ultimately suggests that the New Mexico Legislature revisit this statute and create an explicit cause of action for business competitors who suffered actual damages due to their competitors' unlawful practices under the UPA.

## I. COMPETITOR STANDING UNDER THE UPA

On the federal level, consumer protection and federal antitrust laws are part of an overlapping system with the common goal of promoting consumer welfare.<sup>17</sup> Consumer protection laws date back to the enactment of the Federal Trade Commission (FTC) Act in 1914.<sup>18</sup> But, on the state level, most unfair practices act statutes were enacted between the 1960s and 1970s, when states and the FTC itself realized that the FTC alone could not protect all consumers.<sup>19</sup> This section provides (a) a brief history of the development of consumer protection laws on the federal and state levels; (b) details on the evolution of the New Mexico UPA; (c) the U.S. District Court for the District of New Mexico and New Mexico Court of Appeals' interpretations of competitor standing under the UPA before the New Mexico Supreme Court's decision in *Gandydancer*; and (d) a closer look into the facts of *Gandydancer* and the rationale behind the New Mexico Supreme Court's decision.

### A. Consumer Protection Laws

The concepts of consumer protection laws and antitrust<sup>20</sup> walk hand in hand. In 1890, Congress passed the Sherman Act—the first antitrust legislation—aimed at “preserving free and unfettered competition as the rule of trade.”<sup>21</sup> And in 1914, Congress passed two other important antitrust laws, the Clayton Act and the Federal Trade Commission (FTC) Act.<sup>22</sup> The Clayton Act regulates mergers and acquisitions that may “substantially lessen competition” or have a tendency to “create a monopoly.”<sup>23</sup> The FTC Act initially made unlawful the “unfair methods of competition.”<sup>24</sup> Later, in 1938, with the Wheeler-Lea Amendment, the FTC Act also prohibited “unfair or deceptive acts or practices.”<sup>25</sup> Although the concept of “unfairness” might be “elusive and imprecise,” its use allows the law to be “elastic and evolutionary.”<sup>26</sup> With that in mind and recognizing that a settled list of unlawful

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17. See Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2239 (2012).

18. *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.

19. Pridgen, *supra* note 7, at 911, 915.

20. *Antitrust Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“antitrust law (1890) 1. The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination . . . Often shortened to antitrust. — Also termed (BrE) competition law.”).

21. *The Antitrust Laws*, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id.*; 1 CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 119, Development of F.T.C. Standards, Westlaw (database updated Sept. 2020).

25. *The Antitrust Laws*, *supra* note 18; CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 119, *supra* note 24.

26. CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 119, *supra* note 24; see also Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 648 (1931) (noting that the phrase “unfair methods

practices could soon become obsolete, Congress selected this broad language when it enacted this antitrust and consumer protection law.<sup>27</sup>

Antitrust laws protect competition in the marketplace for the benefit of consumers.<sup>28</sup> Congress's intent to protect consumers and competition can be inferred from the FTC Act public policy discussion regarding FTC's authority:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves *and not outweighed by countervailing benefits to consumers or to competition.*<sup>29</sup>

Additionally, the commission was entrusted with enforcing both federal consumer protection laws and federal antitrust laws.<sup>30</sup>

However, the FTC's authority to enforce consumer protection was limited to interstate commerce.<sup>31</sup> Thus, there was a need to extend consumer protection to the states.<sup>32</sup> Between the 1960s and 1970s, the majority of states adopted some kind of consumer protection legislation, empowering states and consumers "in the fight against fraud in the marketplace."<sup>33</sup> These consumer protection laws—commonly known as "little FTC acts"—largely extended the protections created by the FTC Act to the states—usually granting enforcement powers to the state attorney general—and to the consumers—granting a private right of action to consumers.<sup>34</sup> In most states, the consumer protection laws that protect against unfair and deceptive trade practices provide that relevant interpretations of the FTC Act should guide the law's

of competition" has a broader meaning and stating that it "does not admit a precise definition"); Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (referencing the process of "measuring a practice against the elusive, but congressionally mandated standard of fairness [the FTC] considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").

27. CONSUMER LAW SALES PRACTICES AND CREDIT REGULATION § 119, *supra* note 24 ("Congress deliberately selected the general language of 'unfairness' because it recognized that a statutory list of specific forbidden practices would invite circumvention and would quickly become obsolete.") (quoting Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO.L.J. 225, 226 (1981)).

28. *Antitrust Div.*, DEP'T JUST., <https://www.justice.gov/atr/mission#:~:text=The%20goal%20of%20the%20antitrust,fair%20competition%20in%20the%20marketplace.&text=Competition%20provides%20businesses%20the%20opportunity,field%2C%20unhampered%20by%20anticompetitive%20restraints> ("The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice."); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) ("[T]he Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.").

29. 15 U.S.C.A. § 45(n) (West) (emphasis added).

30. *Enforcement*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement>.

31. Pridgen, *supra* note 7, at 915.

32. *See id.*

33. *Id.* at 911–12.

34. *Id.*

application.<sup>35</sup> While the FTC Act does not create a private right of action, “[a]ll states currently feature such a private right of action in their [consumer protection] statutes.”<sup>36</sup> This private right of action serves two functions: to bring justice when there was a violation of the consumer protection laws and to “deter unfair practices in a way that protects the public as a whole.”<sup>37</sup>

## B. The Enactment and Evolution of the UPA

The UPA was modeled after the Uniform Deceptive Trade Practices Act,<sup>38</sup> which also served as a model to other states’ consumer protection statutes.<sup>39</sup> The model act was “designed to bring state law up to date by removing undue restrictions on the common-law action for deceptive trade practices.”<sup>40</sup> The prefatory note that accompanied the 1964 draft of the model act clarified that “unfair trade practices,” also referred to as “unfair competition,” included an array of legal wrongs—“notoriously undefined”—for which limits had not been established.<sup>41</sup>

When the New Mexico Legislature enacted the UPA in 1967, section 3 of the act—titled *Unfair Competition and Practices Declared Unlawful*—declared unlawful “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>42</sup> New Mexico’s UPA was first amended in 1971 when the state legislature expanded the definition of unfair or deceptive trade practice and described as unlawful any conduct that falls within the definition of “unfair or deceptive practices and unconscionable trade practices in the conduct of any trade or commerce.”<sup>43</sup> This amendment also removed the—apparently repetitive<sup>44</sup>—term “unfair methods of competition” from the prohibited practices section.<sup>45</sup>

Initially, the only form of a private right of action available under the UPA was injunctive relief.<sup>46</sup> However, the 1987 amendment created the possibility for

35. *Id.* at 917; *see, e.g.*, N.M. STAT. ANN. § 57-12-4 (1967).

36. Pridgen, *supra* note 7, at 932.

37. *Id.* at 933.

38. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 12, 112 N.M. 97, 811 P.2d 1308.

39. Pridgen, *supra* note 7, at 912.

40. Richard F. Dole Jr., *Uniform Deceptive Trade Practices Act: A Prefatory Note*, 54 TRADEMARK REP. 435, 436 (1964).

41. *Id.* at 435 (“This type of conduct [(unfair trade practices)] is notoriously undefined. Commonly referred to as ‘unfair competition,’ its metes and bounds have not been charted.”).

42. Unfair Practices Act, ch. 268, § 3, 1967 N.M. Laws 1459.

43. Unfair Practices Act, ch. 240, § 3, 1971 N.M. Laws 826.

44. In the “Definitions” section of the original UPA, unfair methods of competition and unfair or deceptive trade practices received a common definition under Section 2(C): “‘Unfair methods of competition and unfair or deceptive acts or practices’ means any one or more of the following . . .”). Unfair Practices Act, ch. 268, § 2, 1967 N.M. Laws 1459.

45. Unfair Practices Act, ch. 240, § 3, 1971 N.M. Laws 826.

46. Unfair Practices Act, ch. 268, § 8, 1967 N.M. Laws 1459 (“A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that

the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.”).

recovery of actual damages,<sup>47</sup> available to “any person” who “suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the [UPA].”<sup>48</sup> The UPA broadly defines “person” as “natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates.”<sup>49</sup>

Under the current version of the UPA, the legislature defined “unfair or deceptive trade practices” and itemized a non-exhaustive<sup>50</sup> list of conduct that is considered unlawful:

“[U]nfair or deceptive trade practices” means an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person’s trade or commerce, *that may, tends to or does deceive or mislead any person and includes* [19 listed practices].<sup>51</sup>

Thus, it is possible to interpret that, as stated by the New Mexico Court of Appeals,<sup>52</sup> a business competitor—which would fall under the term “any person”—who “suffers any loss of money or property, real or personal, as a result of any employment by” another competitor—falling under the term “another person”—“of a method, act or practice declared unlawful” by the UPA has a right of action under the statute. If, under the UPA, any person who suffers a loss of money or property, as a consequence of an act declared unlawful under the statute, has a right of action, and a business competitor is considered a person, then a plain reading of the statute allows a conclusion that a business competitor has a right of action under the UPA.

### C. Competitive Injury in New Mexico: A Pre-*Gandydancer* View

Until *Gandydancer*, New Mexico courts had not explicitly decided whether a business had standing to sue a competitor for violation of the UPA. Although the UPA states that any person who suffers damages due to another person’s unlawful conduct under the statute may recover actual damages and the fact that businesses

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47. Recovery for actual damages or the sum of one hundred dollars, whichever is greater. *See* Unfair Practices Act, ch. 187, 1987 N.M. Laws 1051.

48. N.M. STAT. ANN. § 57-12-10(B) (2005); *see also* Unfair Practices Act, ch. 187, 1987 N.M. Laws 1051.

49. N.M. STAT. ANN. § 57-12-2(A) (2019).

50. *Gandydancer, LLC v. Rock House, CGM, LLC*, 2019-NMSC-021, ¶ 12, 453 P.3d 434, 438.

51. N.M. STAT. ANN. § 57-12-2(D) (2019) (emphasis added).

52. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, ¶ 1, 429 P.3d 338, 340 (holding that a business may sue a competitor under the UPA when the alleged unlawful conduct involves consumer protection concerns or is addressed to the market generally).



fall within the statutory definition of person, this question had not reached the highest court in New Mexico.<sup>53</sup> However, this was not a new issue for New Mexicans.<sup>54</sup>

The issue of competitive injury under the UPA had been previously brought to court in 2014, but a federal court decided it because of diversity of jurisdiction.<sup>55</sup> In *First National Bancorp, Inc. v. Alley*, the competitor-plaintiff brought a claim for competitive injury against the competitor-defendant, alleging that the defendant had violated the UPA and that, as a result, the plaintiff had suffered damages.<sup>56</sup> The defendant moved to dismiss the claim, alleging that the UPA did not recognize a competitive injury claim.<sup>57</sup> Three factors persuaded the U.S. District Court for the District of New Mexico in its decision: (1) the unambiguous plain language of the statute; (2) dicta from a New Mexico Supreme Court case that “strongly suggest[ed] that the [court] would recognize competitor standing should a case presenting that issue [came] before [it]”;<sup>58</sup> and (3) the fact that the UPA is a remedial statute and, as such, should be “liberally construed” according to New Mexico Supreme Court precedent.<sup>59</sup> The New Mexico District Court denied the motion to dismiss and, making an *Erie-guess*, held that the UPA “recognize[d] a claim by a competitor-plaintiff against a competitor-defendant.”<sup>60</sup>

The issue of competitor standing under the UPA was first addressed by New Mexico state courts in *Gandydancer*. The New Mexico Court of Appeals concluded that the broad language of the statute provided standing for businesses to seek the statutory private remedy “so long as the competitor allege[d] a loss of money or property resultant from any unlawful act ‘involving consumer protection concerns or trade practices generally.’”<sup>61</sup> The New Mexico Court of Appeals first looked at the plain language of the statute and noted that the plain language should only be rejected if the “literal interpretation . . . is contrary to [the statute’s] obvious intent or renders

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53. N.M. STAT. ANN. §§ 57-12-2(A), 57-12-10(B) (2019).

54. See *First Nat’l Bancorp, Inc. v. Alley*, 76 F. Supp. 3d 1261 (2014). See generally *Navajo Nation v. Urban Outfitters, Inc.*, 191 F. Supp. 3d 1238, 1240 (2016) (analyzing the issue of competitor standing under the Indian Arts and Crafts Act; competitor-defendant allegedly “violated the [act] by deceptively marketing their products to suggest they were Indian made when, in fact, they were not”).

55. *Alley*, 76 F. Supp. 3d at 1261.

56. *Id.* at 1264. The plaintiff alleged that the defendant confused and mislead its consumers of financial services by using a similar name, creating a similar website with a similar appearance, and making misleading statements to First National Bancorp’s consumers, in violation of subsections 57-12-2(D)(2), (3), (8) of the UPA. *Id.* See also N.M. STAT. ANN. § 57-12-2(D)(2) (2019) (“causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services”); N.M. STAT. ANN. § 57-12-2(D)(3) (2019) (“causing confusion or misunderstanding as to affiliation, connection or association with or certification by another”); N.M. STAT. ANN. § 57-12-2(D)(8) (2019) (“disparaging the goods, services or business of another by false or misleading representations”).

57. *Alley*, 76 F. Supp. 3d at 1262.

58. *Id.* at 1263 (citing *Page & Wirtz v. Solomon* 110 N.M. 206, 794 P.2d 349 (1990) (“suggesting that competitor of NMUPA defendant would have standing to obtain injunction against deceptive advertising and that both consumers and a competitor of enterprise engaged in deceptive practice could recover damages upon a showing of ‘loss of money or property’”).

59. *Alley*, 76 F. Supp. 3d at 1266.

60. *Id.* at 1262.

61. *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 10, 12, 453 P.3d 434, 438 (quoting *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, ¶ 20, 429 P.3d 338, 344).

it absurd.”<sup>62</sup> Furthermore, the Court of Appeals noted that the UPA, as remedial legislation, should be construed “liberally to facilitate and accomplish its purpose and intent”<sup>63</sup> and that the UPA’s fundamental purpose is to protect consumers from unscrupulous business practices regardless of whether those consumers are directly or indirectly affected.”<sup>64</sup>

Nevertheless, the New Mexico Supreme Court ultimately reversed the Court of Appeals’ decision and held that “the legislature excluded competitive injury from the causes of action permitted under the [UPA].”<sup>65</sup> Consequently, business competitors in New Mexico have no standing under the UPA.

#### **D. *Gandydancer, LLC v. Rock House CGM, LLC*: the UPA Does Not Create a Cause of Action for Competitive Injury**

##### *i. Facts*

In *Gandydancer*, petitioner and respondent were business competitors, providing “railway construction services and repair services to BNSF Railway Company.”<sup>66</sup> BNSF awarded a contract in New Mexico to Rock House. “GandyDancer filed a complaint with the New Mexico Construction Industries Division (CID) in 2015 that alleged that Rock House violated the Construction Industries Licensing Act (CILA) . . . by performing unlicensed construction work in New Mexico.”<sup>67</sup> Rock House reached a settlement with CID regarding the alleged CILA violation.<sup>68</sup> GandyDancer then filed a complaint in district court, alleging that Rock House had violated the UPA to obtain the contract with BNSF.<sup>69</sup> As a result of Rock House’s actions, GandyDancer alleged that it had suffered damages.<sup>70</sup> GandyDancer further alleged that, but for Rock House’s failure to disclose its lack of license to provide railway contracting services, GandyDancer would have been awarded the BNSF contract.<sup>71</sup> Rock House filed a motion to dismiss, which was denied by the district court. Subsequently, the district court certified, in an interlocutory appeal to the New Mexico Court of Appeals, the question “whether the UPA affords private-party standing to business competitors who are both sellers of services, or only to buyers of goods and services.”<sup>72</sup> Based on the statute’s plain language, the Court of Appeals held that the UPA afforded standing.<sup>73</sup> The New Mexico Supreme Court disagreed with the Court of Appeals and held that the UPA

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62. *Gandydancer*, 2018-NMCA-064, ¶ 9, 429 P.3d at 342.

63. *Id.* ¶ 11, 429 P.3d at 342 (quoting *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73).

64. *Id.* ¶ 10, 429 P.3d at 342 (citing N.M. STAT. ANN. § 57-12-2(C)).

65. *Gandydancer*, 2019-NMSC-021, ¶ 1, 453 P.3d at 436.

66. *Id.* ¶ 2, 453 P.3d at 436.

67. *Id.* ¶ 3, 453 P.3d at 436.

68. *Id.*

69. *Id.* ¶ 4, 453 P.3d 437.

70. *Id.*

71. *Id.*

72. *Id.* ¶ 5, 453 P.3d at 437.

73. *Id.* ¶¶ 10–12, 453 P.3d at 438 (quoting *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, ¶ 20, 429 P.3d 338, 344).

does not recognize competitive injury as a cause of action.<sup>74</sup> Thus, a business that suffers a loss of money or property due to its competitors' unlawful practices under the UPA may not recover based on this statute.

*ii. Rationale*

The New Mexico Supreme Court agreed with the Court of Appeals that it should begin the interpretation of a statute with plain language.<sup>75</sup> However, the Supreme Court held that “plain meaning rule must yield when ‘equity, legislative history, or other sources’ demonstrate that applying the plain meaning would result in a construction contrary to the spirit of the statute.”<sup>76</sup> In defining the zone of interest protected by the statute, the New Mexico Supreme Court analyzed the amendments to the statute.<sup>77</sup> It concluded that when the legislature “removed ‘unfair methods of competition’ from the text of the UPA,” it “remove[d] competitive injury claims from the protected zone of interest.”<sup>78</sup> Furthermore, the court concluded that “[t]he alteration evinces an intent to limit the zone of interest protected from unfair trade practices by the UPA to consumers, not competitors.”<sup>79</sup>

The New Mexico Supreme Court also reasoned that allowing standing for competitive injury would ultimately undermine consumer protection—contrary to what the New Mexico Court of Appeals had debated—by suggesting that it could “effectively displace a consumer’s remedy.”<sup>80</sup> Additionally, the Supreme Court held that prior New Mexico case law did not establish that the UPA created a cause of action for competitive injury and rejected the use of dicta from *Page & Wirtz v. Solomon*.<sup>81</sup> Finally, the Court found that case law from other states interpreting other states’ consumer protection statutes was unpersuasive because the statutes had a different language and different legislative histories from the UPA.<sup>82</sup>

## II. COMPETITIVE INJURY CLAIMS UNDER THE UPA: A SUITABLE TOOL TO ENHANCE CONSUMER PROTECTION

The decision in *Gandydancer* could have gone in the other direction. The New Mexico Supreme Court could have easily concluded that when the New Mexico legislature removed the phrase “unfair methods of competition” from the UPA language, it was not precluding competitive injury claims, but merely removing repetitive language—considering that “unfair trade practices” and “unfair methods of competition” were seen as synonyms by some at that time.<sup>83</sup> Moreover, when the

74. *Id.* ¶ 1, 453 P.3d at 436.

75. *Id.* ¶ 13, 453 P.3d at 438, 439.

76. *Id.* ¶ 14, 453 P.3d at 439.

77. *Id.* ¶¶ 19–20, 453 P.3d at 440.

78. *Id.* *But see supra* text accompanying note 44.

79. *Gandydancer*, 2019-NMSC-021, ¶ 20, 453 P.3d at 440.

80. *Id.* ¶ 26, 453 P.3d at 442.

81. *Id.* ¶ 36, 453 P.3d at 443. *But see* *Page & Wirtz v. Solomon*, 1990-NMSC-063, ¶ 22, 110 N.M. 206, 794 P.2d 349 (1990) (stating that “[damages] suffered either by a consumer of goods or services, or the commercial competitor of an enterprise engaged in deceptive trade practices” could potentially be recovered).

82. *Gandydancer*, 2019-NMSC-021, ¶ 38, 453 P.3d at 444.

83. *See* discussion *supra* Part I.B.

legislature later created a private right of action for recovery of damages for violations of the UPA and used a broad language—*any person*—it seems clear that it was including business competitors within the protected zone of interest of the statute.<sup>84</sup>

However, even if the Supreme Court’s interpretation of the statute—that the UPA 1971 amendment removed competitive injury claims from the protected zone of interest—was the only one correct, consumers get hurt by the loss of this avenue in the fight against unfair or deceptive practices. This section proposes that not only would consumer protection not be undermined, as stated by the New Mexico Supreme Court, but it would actually be strengthened if competitive injury claims under the UPA were allowed.

#### A. Consequences to the Consumer if Competitor Standing Was Allowed

In *Gandydancer*, the New Mexico Supreme Court stated that UPA’s primary purpose of protecting innocent consumers would be undermined if competitive injury claims were allowed.<sup>85</sup> As an example, the Court offered the situation that BNSF—the consumer in *Gandydancer*—would be placed, had GandyDancer been allowed to recover for competitive injury.<sup>86</sup> BNSF would have a cause of action against Rock House for violation of the Construction Industries Licensing Act (CILA), being able to assert a claim for all the payments it made to Rock House for the work performed while Rock House was unlicensed.<sup>87</sup> The Supreme Court stated that “if Gandydancer were allowed to recover damages under the UPA, and such recovery totaled all of the Rock House assets such that Rock House was rendered bankrupt or judgment proof, the consumer . . . could be precluded from recovering damages under CILA.”<sup>88</sup> Thus, BNSF’s remedies under CILA would be undermined.<sup>89</sup> The Supreme Court held that statutes “must be construed, if possible, to give effect to each” one when there is an apparent conflict between them.<sup>90</sup> Thus, the Supreme Court “presume[d] that the Legislature . . . has limited the zone of interest protected under the UPA to harmonize” the tension between the UPA and CILA, and “decline[d] to expand the zone of interest under the UPA.”<sup>91</sup>

BNSF was not a party and did not assert any claim in GandyDancer’s action against Rock House.<sup>92</sup> Additionally, the New Mexico Supreme Court’s decision does not indicate that BNSF intended to bring suit against Rock House for the unlicensed work provided. Still, it is clear that, under CILA, BNSF would be allowed to recover

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84. *Id.*

85. *Gandydancer*, 2019-NMSC-021, ¶ 27, 453 P.3d at 442.

86. *Id.* ¶ 26, 453 P.3d at 442.

87. *Id.*

88. *Id.*

89. *Id.* ¶ 27, 453 P.3d at 442.

90. *Id.* ¶ 28, 453 P.3d at 442.

91. *Id.*

92. *Id.* ¶ 5, 453 P.3d at 437.

payments made to Rock House for the unlicensed work that it received.<sup>93</sup> Furthermore, BNSF could recover damages under the UPA for the injuries it suffered as a result of Rock House's unfair or deceptive practices because the UPA provides that the relief established on this statute is in addition to other remedies available under the common law or other state statutes.<sup>94</sup> The same provision that allows BNSF to bring a suit under the UPA in addition to other remedies available under common law and other statutes—such as CILA—also provides guidance as to the intent of the legislature when it enacted the UPA. The New Mexico Supreme Court held that there was a tension between the UPA and CILA if competitor standing was recognized under the UPA and consumer standing under CILA.<sup>95</sup> However, the statute is clear that the legislature anticipated the possibility of a cause of action arising under the UPA at the same time that another cause of action could arise under another statute for the same conduct.<sup>96</sup> Nothing in the statute's language suggests that the relief under the UPA would be exclusive to the party who has another remedy available under the common law or another statute. This statutory provision potentially shows that the legislature was aware of the possibility of recovery under the UPA and another statute—CILA. Thus, there is no true tension between these two statutes.

The Court further reasoned that BNSF's recovery under CILA would be undermined if GandyDancer had standing to sue Rock House under the UPA.<sup>97</sup> But there is no indication that Rock House would be rendered bankrupt, judgment proof, or otherwise unable to pay a judgment if BNSF decided to assert a CILA or a UPA claim and GandyDancer was awarded damages on its claim under the UPA.

Limiting standing under the UPA based on the possibility that a damages award will render a competitor bankrupt and consequently hurt the consumer's chances of recovery is an unsound conclusion. The legislature created the possibility of recovery under the UPA concomitantly with recovery under other statutes or the common law. The chance that a defendant might be rendered bankrupt if a business competitor is awarded damages under the UPA in detriment of a consumer that has not yet been awarded damages or restitution—or that could never invoke these rights, like BNSF—does not seem like a sound reason to deprive business competitors of a private right of action under the UPA. Particularly considering that such a private right of action brings potential benefits to the consumers as a whole with the deterrent effect against violations of the statutes.<sup>98</sup>

## B. Competitive Injury Standing: A Parallel with Federal Antitrust Law

Federal antitrust law offers helpful insight for an analysis of the UPA. The purpose of the UPA is to promote consumer protection against unfair or deceptive

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93. *Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 16, 111 N.M. 410, 806 P.2d 59 (holding that to allow recovery for payments made to an unlicensed contractor presents a deterrent effect by inhibiting unlicensed contractors from performing unlicensed work).

94. N.M. STAT. ANN. § 57-12-10(D) (2005).

95. *Gandydancer*, 2019-NMSC-021, ¶ 28, 453 P.3d at 442.

96. N.M. STAT. ANN. § 57-12-10(D) (2005).

97. *Gandydancer*, 2019-NMSC-021, ¶ 27, 453 P.3d at 442.

98. See discussion *infra* Part II.C.

trade practices.<sup>99</sup> Similarly, federal antitrust laws “protect the process of competition for the benefit of consumers.”<sup>100</sup> As stated by Professor Wright, “[b]oth competition and consumer protection law have aimed to protect consumer welfare, and, in turn, consumer choices, from business practices that would diminish it.”<sup>101</sup>

The federal antitrust system is comprised of several acts, including the Sherman Act, the Clayton Act, the Federal Trade Commission (FTC) Act, and the Lanham Act.<sup>102</sup>

The 1890 Sherman Act, the first antitrust law, was designed as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”<sup>103</sup> It makes a contract, conspiracy, or combination that could result in unreasonable restraints on free trade or commerce among the several states illegal.<sup>104</sup> As stated by the United States Supreme Court, “the Sherman Act was enacted to assure customers the benefits of price competition, and [the Court’s] cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.”<sup>105</sup> Under the Sherman Act, a private right of action was initially established in section 7 of the Sherman Act,<sup>106</sup> which was later replaced by section 4 of the Clayton Act. Section 4 of the Clayton Act expanded a private right of action for money damages to all the antitrust laws.<sup>107</sup>

The Clayton Act makes several practices unlawful, including mergers and interlocking directorates,<sup>108</sup> that may substantially “lessen competition . . . or tend to create a monopoly in any line of commerce.”<sup>109</sup> Section 4 of the Clayton Act states

99. *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051, ¶ 17, 137 N.M. 524, 113 P.3d 347.

100. *The Antitrust Laws*, *supra* note 18; *see also, e.g.*, 15 U.S.C.A. § 45(n) (West) (establishing the Federal Trade Commission’s authority to declare an act unfair or practice unlawful only if it causes a “substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).

101. Wright, *supra* note 17, at 2239.

102. *The Antitrust Laws*, *supra* note 18; *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/statutes?page=2>.

103. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *see also The Antitrust Laws*, *supra* note 18.

104. 15 U.S.C.A. § 1 (West) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *see also Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 186 (2010).

105. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983).

106. Richard Alan Arnold, *Implied Right of Action under the Antitrust Laws*, 21 WM. & MARY L. REV. 437, 440 (1979) (quoting Sen. Sherman’s statements when he introduced the bill that puts restraints on free trade or commerce among the several states—“the purpose of this section was ‘to give to private parties a remedy for personal injury caused by such a combination’”).

107. *Id.*

108. *Interlocking Directorate*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (“The relationship between two or more corporations who have directors or officers in common.”); *Directorship*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“interlocking directorships. (1912) 1. The situation in which a director or top executive of one corporation also serves as a director of another. 2. The situation in which a person closely related to a director or top executive of one corporation serves as a director of another corporation.”).

109. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C.A. § 18 (West)); *The Antitrust Laws*, *supra* note 18.

that “*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”<sup>110</sup>

Created in the same year—1914—as the Clayton Act, the FTC Act does not contemplate a private right of action.<sup>111</sup> Its enforcement was restricted to cases brought by the FTC.<sup>112</sup> The commission was also empowered to enforce other antitrust laws.<sup>113</sup> Notwithstanding the FTC’s vast enforcement powers, private plaintiffs bring about 95 percent of all antitrust cases.<sup>114</sup> While the FTC Act declared unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” an unlawful practice under the FTC Act can also be found to be a violation of other antitrust laws.<sup>115</sup> Thus, a potential plaintiff could establish a private right of action under another antitrust law.

Similar to the Sherman and Clayton Acts, the Lanham Act creates a private right of action and “seeks to safeguard an element of the competitive marketplace as a means of enhancing consumer welfare.”<sup>116</sup> The Lanham Act complements antitrust laws by prohibiting deceptive advertising; thus, “protect[ing] the transmission of truthful information to consumers, which is essential to a well-functioning, competitive market.”<sup>117</sup> Section 43(a) of the Lanham Act establishes that “any person who believes that he or she is or is likely to be damaged by” the acts of a person in violation of this section may bring a civil action against such person.<sup>118</sup> In interpreting section 43(a), courts largely consider competitors to be the “logical and best-placed private plaintiff.”<sup>119</sup> Competitors are considered to be in a position to vindicate consumers’ rights in cases of false advertising.<sup>120</sup>

In *POM Wonderful LLC v. Coca-Cola Co.*, the competitor-plaintiff POM brought a civil action under the Lanham Act against Coca-Cola alleging that the defendant engaged in deceptive and misleading conduct.<sup>121</sup> POM produced and sold

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110. 15 U.S.C.A. § 15(a) (West) (emphasis added).

111. Allan Bruce Currie, *A Private Right of Action under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268 (1971) (“Since 1926 federal courts have held that there is no private right of action under this section, declaring that only the Federal Trade Commission (FTC) could institute an action for its violation.”).

112. *Id.*

113. *Enforcement*, *supra* note 30.

114. Pridgen, *supra* note 7, at 934 n.109 (2017) (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 16.1 (4th ed. 2011)).

115. *The Antitrust Laws*, *supra* note 18 (“The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act.”).

116. Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 50 (1994).

117. *Id.* at 55–56.

118. 15 U.S.C.A. § 1125(a)(1) (West); Burns, *supra* note 116, at 56.

119. Burns, *supra* note 116, at 56–57.

120. *Id.* at 66–67; *see also id.* at 67 n. 80 (citing *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989), *aff’d in part, rev’d in part*, 913 F.2d 958 (D.C. Cir. 1990) (“While the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.”)).

121. 573 U.S. 102, 106 (2014).

a pomegranate-blueberry juice blend product.<sup>122</sup> Its competitor, Coca-Cola Co., also sold a juice blend labeled as pomegranate-blueberry juice.<sup>123</sup> However, the label displayed in much smaller words that the juice was, in fact, a blend of five different fruits and that it contained 0.3% pomegranate juice and 0.2% blueberry juice.<sup>124</sup> POM alleged that the use of such a label tricked and deceived consumers and that it suffered injury as a competitor.<sup>125</sup> The United States Supreme Court held that POM could bring a Lanham Act claim based on the misleading product label.<sup>126</sup>

POM, which produced actual pomegranate-blueberry juice, was “aggrieved by [Coca-Cola]’s marketing” and lost would-be consumers.<sup>127</sup> At the same time, consumers lost by purchasing a product with a different quality than expected. Each misled consumer might lack the incentives to pursue a civil action against a company such as Coca-Cola Co.. However, a business competitor that is being injured by the loss of potential consumers will likely be motivated to challenge its competitor’s unlawful practices. As a result, a competitive market is maintained, and consumer welfare is enhanced. The dominant understanding of antitrust law defends that, by allowing competitor standing, competitors can recover damages and, more importantly, misconduct that harms consumers is deterred.<sup>128</sup> The damages that can be recovered serve as an incentive to competitor-plaintiffs to bring claims for the benefit of the public.<sup>129</sup>

Similar to antitrust law, the UPA seeks to protect consumer welfare.<sup>130</sup> When the New Mexico Legislature created a private right of action under the UPA, it opted for using a broad language, similar to the one used by antitrust laws.<sup>131</sup> It stated that “*any person* who suffers any loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful under the [UPA] may bring an action to recover actual damages.”<sup>132</sup> After New Mexico Supreme Court’s holding in *Gandydancer*—that competitors do not have standing to sue under the UPA—, the New Mexico Legislature could follow a similar rationale applied to antitrust law and amend the statute by expressly allowing business competitors to bring suit for violation of the UPA. Business competitor suits can serve as an instrument to deter misconducts that could harm consumers; thus, these suits can advance the UPA’s primary purpose.

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122. *Id.* at 105.

123. *Id.* at 106.

124. *Id.*

125. *Id.* at 110.

126. *Id.* at 121.

127. Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030, 2041 (2020).

128. *Id.* at 2045–46.

129. *Id.*

130. *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051, ¶ 17, 137 N.M. 524, 113 P.3d 347.

131. *See* N.M. STAT. ANN. § 57-12-10 (2005).

132. *Id.* (emphasis added).



### C. Deterrence of Future Unlawful Conduct

This note proposes that businesses would be less likely to act in violation of the UPA if business competitors had standing to sue for competitive injury under the UPA.

Just like tort law, one of the goals of antitrust law is to have a deterrent effect and prevent harm from occurring. In a dissenting opinion in *Associated Gen. Contractors of Cal., Inc v. Cal. State Council of Carpenters*, Justice Marshall established this analogy between antitrust law and intentional tort.<sup>133</sup> Justice Marshall emphasized that the private enforcement mechanism established by Congress in section 4 of the Clayton Act was created to “deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.”<sup>134</sup> In *Merck Eprova AG v. Gnosis S.p.A.*, the District Court for the Southern District of New York highlighted that the award of damages for the violation of the Lanham Act, another antitrust law, was justified by three rationales, including “to deter the willful wrongdoer from doing so again.”<sup>135</sup>

Similar to antitrust legislation, the UPA was created to prevent harm due to unfair and deceptive trade practices from occurring.<sup>136</sup> And similar to antitrust law, a private remedy allowing business competitors to sue for competitive injury would serve to deter violators of the UPA. The risk of having to compensate competitors for damages would prevent businesses from acting unfairly or deceptively against consumers.

There is little doubt that deterrent effect of the UPA would be strengthened if businesses were allowed to sue for competitive injury. Numerous consumers do not know about their rights under consumer protection acts, and even when they know, they might not choose to file a consumer protection act lawsuit.<sup>137</sup> Consumer protection acts, including the UPA, exercise their ex-ante deterrent effect more effectively when businesses have standing to sue their competitors for violations. For example, businesses would likely realize that a competitor that suffered damages due to the UPA violations of another business has more incentive to sue than a consumer who might have been slightly injured. This knowledge would likely encourage businesses to avoid any misconduct under the UPA.

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133. 459 U.S. 519, 547 (1983) (Marshall, J., dissenting).

134. *Id.*

135. *Merck Eprova AG v. Gnosis S.p.A.*, 901 F. Supp. 2d 436, 457 (S.D.N.Y. 2012), *aff'd*, 760 F.3d 247 (2d Cir. 2014) (citing *Pedinol Pharmacal, Inc. v. Rising Pharm. Inc.*, 570 F. Supp. 2d 498, 504 (E.D.N.Y.2008)).

136. See N.M. STAT. ANN. § 57-12-10(A) (2005) (allowing the grant of injunctive relief when a person is likely to be damaged by an unfair or deceptive trade practice, even when there is no proof of monetary damage).

137. Omri Ben-Shahar, *One-Way Contracts: Consumer Protection without Law*, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS WORKING PAPER NO. 484 (2009), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1347&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1347&context=law_and_economics); see also Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 458 (2011) (noting that various studies show that only a small percentage of tort victims consult with a lawyer and even a smaller percentage attempt to file a lawsuit). Also, potential litigants might have difficulty finding an attorney.

Competitive injury standing, combined with state and consumer standing, affords adequate deterrence of future unfair and deceptive trade practices that could harm consumers. With violations of the UPA less likely to happen, consumers would be less likely to be injured, and it would be less likely that a consumer or competitor would need to assert a claim for damages.

### III. HOW SHOULD NEW MEXICO PROCEED?

Competitor standing under the UPA's current language is not as clearly against the legislative intent of the New Mexico Legislature as the New Mexico Supreme Court suggested in *Gandydancer*. Besides the broad language used in the statute to create private remedies,<sup>138</sup> the New Mexico Legislature signaled that competitor standing could be a tool to prevent unfair or deceptive trade practices when it amended the Motor Carrier Act (MCA).<sup>139</sup> This section discusses the MCA, in which the New Mexico Legislature created a private right of action for business competitors injured by a competitor's unfair or deceptive trade practices. Next, this section looks at other states for examples of how a private right of action for business competitors under consumer protection law can aid in promoting consumer welfare. Finally, this section advocates that the New Mexico Legislature should amend the UPA and unequivocally recognize that business competitors are within the zone of interest protected by the UPA and thus free to bring claims against competitors who employ unfair or deceptive trade practices.

#### A. Motor Carrier Act: New Mexico Legislature Recognizes Competitive Injury Claims

The most recent amendments to the New Mexico Motor Carrier Act (MCA) demonstrate the legislature's belief that it is in consumers' interest to allow competitive injury suits by business competitors when a transportation service carrier performs unauthorized services.<sup>140</sup>

The New Mexico Legislature amended the MCA in 2013 and included a provision stating that "it is an unfair and deceptive trade practice under the [UPA] for any transportation service carrier to offer or provide [unauthorized] transportation

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138. See N.M. STAT. ANN. § 57-12-10(A) (2005) ("A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it"); N.M. STAT. ANN. § 57-12-10(B) (2005) ("Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages.").

139. See generally Motor Carrier Act, ch. 77, 2013 N.M. Laws 753 (H.B. 194) (allowing authorized transportation service carriers who have been damaged by a competitor that is an unauthorized transportation service carrier to bring suit under the UPA).

140. See generally *id.*; 2013–2014 Annual Report, THINK NEW MEXICO, <https://www.thinknewmexico.org/wp-content/uploads/pdfs/2013AR.pdf>. The 2013 amendments to the MCA made it easier for services to enter the market and were supported by Think New Mexico, a think tank that has a mission of improving the quality of life for New Mexicans. *Id.* Think New Mexico states that it successfully helped achieve this change in the law, "[m]odernizing the state's regulation of taxis, limos, shuttles, and moving companies to promote job creation, small business formation, and lower prices for consumers." *Id.*

services.”<sup>141</sup> The statute allows the attorney general or a person who has been damaged or will likely be damaged to bring a claim, under the UPA, against the unauthorized transportation service carrier.<sup>142</sup> The legislature explicitly listed “authorized transportation service carrier” within the meaning of “person.”<sup>143</sup> Thus, the statute allows a business competitor—that is an authorized transportation service carrier—to sue under the UPA for competitive injury when another business offers or performs unauthorized transportation service.<sup>144</sup>

The possibility of an authorized transportation service carrier bringing a claim for competitive injury under the UPA was addressed by the U.S. District Court for the District of New Mexico in *Albuquerque Cab Company, Inc. v. Lyft, Inc.*<sup>145</sup> In this case, a taxi company—an authorized transportation service carrier—brought a competitive injury claim against the ride-share companies Uber and Lyft.<sup>146</sup> The plaintiff alleged that the ride-share companies had violated the MCA by providing unauthorized transportation service when they first entered the city’s market.<sup>147</sup> In ruling on the defendant’s motion to dismiss, the court found that the complaint plausibly alleged that the taxi company and the ride-share company were both transportation service carriers operating in the same market.<sup>148</sup> And, because the ride-share company did not obtain authorization pursuant to the MCA, the court held that the taxi company had a cause of action against its business competitor.<sup>149</sup> The court explained that the MCA authorizes claims when “a lawfully operating transportation service carrier is damaged by the unlawful operation of a transportation service carrier in the same market.”<sup>150</sup>

The defendant argued that because the MCA “merely refers to and incorporated the provisions of the UPA, and because the UPA does not permit business competitors suits,” the provision of the MCA should be disregarded.<sup>151</sup> In addressing this argument, the court raised an interesting question: “if the legislature wanted to allow business competitor lawsuits for MCA violations, why would it choose the UPA, which does not otherwise allow such a lawsuit, as the vehicle to carry out this goal?”<sup>152</sup> The plain language of the MCA “demonstrates that the legislature intended to allow an authorized transportation service carrier to sue a transportation services carrier who operates without authorization.”<sup>153</sup> However, one possible interpretation is that the legislature, when amending the MCA in 2013,

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141. N.M. STAT. ANN. § 65-2A-33(J) (2013).

142. *Id.*

143. *Id.*

144. *Id.*

145. 460 F. Supp. 3d 1215, 1222–24 (D.N.M. 2020).

146. *Id.* at 1216.

147. *Id.* (in 2016, the New Mexico legislature enacted the Transportation Network Company Services Act, exempting ride-share companies from the Motor Carrier Act. The complaint in this case regards facts prior to 2016).

148. *Id.* at 1218, 1221. Plaintiff reached a settlement with defendant Lyft; however, the suit continued against defendant Uber. *Id.* at 1217.

149. *Id.* at 1222–23.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

believed that the UPA provided a private remedy for business competitors and that this remedy was also adequate to rectify a violation of the MCA. Furthermore, the UPA's ultimate purpose is to protect consumers,<sup>154</sup> and the legislature's choice of allowing business competitor lawsuits for MCA violations pursuant to the UPA indicates that the purpose of the UPA is advanced by allowing this type of suit.

Thus, even if the legislature in 2013 intended that the UPA ought to be applied in competitive injury claims exclusively under the limited context of MCA violations, the same rationale could justify a statutory change to clarify and explicitly confer standing to business competitors to sue for violations of the UPA in general. As stated by the New Mexico Supreme Court in *Gandydancer*, “[i]t is within the purview of the Legislature to expand the zone of interest protected by the UPA to include competitor suits for competitive injury if that is a policy that the Legislature decides to pursue.”<sup>155</sup> And allowing competitive injury claims as a mechanism to increase consumer protection is a policy consistent with the legislature's choice when it amended the MCA. Therefore, the legislature should expand competitor standing to all other cases of unfair or deceptive trade practices.

### B. Competitor Standing: A Comparison with the Approach Taken by Other Jurisdictions

When states created their first consumer protection laws between the 1960s and 1970s, not all of them recognized a private right of action as an alternative enforcement of these statutes.<sup>156</sup> However, recognizing that “states and federal agencies could only prosecute a fraction of [unfair or] deceptive business practices,” states adopted different forms of private remedy in an effort to deter violations of their consumer protection laws.<sup>157</sup> Today only Arkansas, Iowa, and North Dakota do not have private rights of action for violations of consumer protection laws.<sup>158</sup> Many states allow actions for violations of consumer protection laws to be brought not only by consumers but also by other actors. In addressing the necessity behind expanding standing for violations of consumer protection laws beyond just consumers, the *Blue Cross & Blue Shield v. Philip Morris, Inc.* court stated: “[r]ecognizing that consumers may lack incentives to prosecute small claims, many states created broad provisions, allowing ‘any person’—not only consumers—to sue violators of [their consumer protection acts].”<sup>159</sup> These statutes commonly include “businesses . . . and

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154. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, ¶ 10, 429 P.3d 338, 342 (2018) (“Its fundamental purpose is to protect consumers from unscrupulous business practices regardless of whether those consumers were directly or indirectly affected.”).

155. *Gandydancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 23, 453 P.3d 434, 441 (2019).

156. Pridgen, *supra* note 7, at 911–12.

157. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 239 (E.D.N.Y. 2001), *rev'd in part, question certified sub nom.*, *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211 (2d Cir. 2003), *certified question accepted*, 100 N.Y.2d 636, 801 N.E.2d 417 (2003), *and certified question answered sub nom.* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 818 N.E.2d 1140 (2004), *and rev'd sub nom.* *Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004).

158. *Blue Cross & Blue Shield*, 178 F. Supp. 2d at 239.

159. *Id.*

other legal entities injured as a result of a violation” within the definition of “any person.”<sup>160</sup> States like New York and California, known to be among the states with the most “aggressive statutes regarding enforcement of consumer protection laws,” are also among the states that created private remedies for violations of consumer protection laws.<sup>161</sup> This section brings some examples of states that had adopted some form of private remedy.<sup>162</sup>

*i. Michigan*

Michigan’s consumer protection statute provides that “a person may bring an action to . . . [e]njoin . . . a person who is engaging or about to engage in’ an unlawful method, act, or practice, and may recover actual or statutory damages and reasonable attorneys’ fees.”<sup>163</sup> Under Michigan’s statute, a person is defined as an “individual, corporation . . . or other legal entity.”<sup>164</sup> Interpreting this statute, the U.S. District Court for the Eastern District of Michigan held that a business competitor injured due to unfair, unconscionable, or deceptive trade practices had standing to bring an action under the consumer protection act.<sup>165</sup>

In *John Labatt Ltd. v. Molson Breweries*, plaintiff Labatt and defendants Molson Breweries and Miller Breweries were all in the business of importing, marketing, and selling beer.<sup>166</sup> Defendants were marketing some of their beers under similar or identical terms used and registered as marks by the plaintiff.<sup>167</sup> Plaintiff filed a complaint claiming that, among other things, the defendants had violated the Michigan consumer protection law, and as a result, plaintiff suffered damages.<sup>168</sup> Defendants argued that the plaintiff—as a business competitor—did not have standing to bring an action under the consumer protection statute.<sup>169</sup> The court held that an injured business competitor had a right of action under the statute and stated that “finding a right of action in non-consumers under the [consumer protection act] is the understanding that the intent of protecting consumers is well served by allowing suit to be brought by non-consumers who have a significant stake in the events.”<sup>170</sup>

*ii. Connecticut*

The Connecticut consumer protection statute created a similar private remedy. It provides that “[a]ny person who suffers any ascertainable loss of money

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160. *Id.* at 240.

161. *Id.* at 232.

162. The states selected here were chosen because their consumer protection statutes provide for some kind of standing for business competitors. This selection serves merely as an illustration and should not be interpreted as an exhaustive list of the states that confer such type of standing.

163. *John Labatt Ltd. v. Molson Breweries*, 853 F. Supp. 965, 967 (E.D. Mich. 1994); *see also* MICH. COMP. LAWS ANN. §§ 445.903, 445.911(1) (West 2018).

164. MICH. COMP. LAWS ANN. § 445.902(d) (West 2018).

165. *John Labatt Ltd.*, 853 F. Supp. at 970.

166. *Id.* at 966.

167. *Id.*

168. *Id.* at 967.

169. *Id.*

170. *Id.* at 970.

or property . . . as a result of [an unlawful conduct under the statute] may bring an action . . . to recover damages.”<sup>171</sup> The Supreme Court of Connecticut held that a violation of the state’s consumer protection law does not need to arise only from a consumer relationship; a non-consumer may bring a claim under Connecticut’s consumer protection statute.<sup>172</sup>

*iii. Illinois*

Illinois’s consumer protection statute created a cause of action for actual damages and allowed “any person who suffers actual damages as a result of a violation of [the] act committed by any other person [to] bring an action against such person.”<sup>173</sup> In *Sullivan’s Wholesale Drugs Co., Inc. v. Faryl’s Pharmacy*, the defendants argued that a competitor-plaintiff did not have standing under Illinois’s consumer protection act because it was not a consumer.<sup>174</sup> The Appellate Court of Illinois, Fifth District, disagreed, reasoning that, because the statute included “any corporation, company or business entity” in the definition of person, and because of the “clear and unambiguous language of the statute,” injured businesses had “standing to bring a suit under the [a]ct.”<sup>175</sup>

*iv. New York*

New York’s consumer protection act states that “any person who has been injured by reason of any violation of [the act] may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages . . . or both such actions.”<sup>176</sup> *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*<sup>177</sup> provides a good illustration of how the courts interpret the private remedy created by the statute. A plaintiff must show “that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.”<sup>178</sup> Additionally, the matter must “[affect] consumer interests,” regardless of whether a consumer or business competitor brings the claim.<sup>179</sup>

In *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, the plaintiffs (health insurers) brought a claim under the New York consumer protection statute, alleging that the defendants fraudulently “distort[ed] the body of public

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171. CONN. GEN. STAT. ANN. § 42-110g(a) (West 2004).

172. *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 498–99, 656 A.2d 1009, 1020 (1995).

173. 815 ILL. COMP. STAT. ANN. 505/2 (West 1973)

174. 214 Ill. App. 3d 1073, 1082, 573 N.E.2d 1370, 1376 (1991).

175. *Id.* at 1082–83, 573 N.E.2d at 1376.

176. N.Y. GEN. BUS. LAW § 349 (McKinney 2014)

177. 178 F. Supp. 2d 198 (E.D.N.Y. 2001), *rev’d in part, question certified sub nom.* *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211 (2d Cir. 2003), *certified question accepted*, 100 N.Y.2d 636, 801 N.E.2d 417 (2003), *and certified question answered sub nom.* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 818 N.E.2d 1140 (2004), *and rev’d sub nom.* *Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004).

178. *Blue Cross & Blue Shield*, 178 F. Supp. 2d at 232 (quoting *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000)).

179. *Blue Cross & Blue Shield*, 178 F. Supp. 2d at 232 (citing *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir.1995)).

knowledge” regarding smoking.<sup>180</sup> Plaintiffs claim that defendants’ fraud induced plaintiffs’ clients to smoke, and, as a result, plaintiffs were injured when they absorbed the extra medical costs on behalf of their clients.<sup>181</sup> The U.S. District Court for the Eastern District of New York held that “a health provider . . . damaged by a fraud visited upon its insured may enforce the [consumer protection] statute in the same way as other injured business.”<sup>182</sup> On appeal, the U.S. Court of Appeals for the Second Circuit explained that New York’s consumer protection act “allow[s] a corporation to use [the statute] to halt a competitor’s deceptive consumer practice” when the matter affects the public interest in the state.<sup>183</sup> Thus, plaintiffs “ha[d] standing to sue on [their] own behalf under [the statute].”<sup>184</sup> However, the Court of Appeals for the Second Circuit could not “predict whether the New York Court of Appeals would find [plaintiffs’] direct claim sufficiently direct to be actionable under the consumer protection statute.”<sup>185</sup> Subsequently, the Court of Appeals of New York held that plaintiffs had no standing to bring the action under the consumer protection law not because they were not consumers, but because they were not the party actually injured; plaintiffs’ claims were too remote.<sup>186</sup>

v. *California*

A private right of action is recognized under two California consumer protection statutes, each one with its own particularities. Under California’s Unfair Competition Law, “any person who has suffered injury in fact and has lost money or property as a result of unfair competition” may sue for injunctive relief and restitution of money or property acquired through unfair competition.<sup>187</sup> Suits for money damages are allowed under the Consumer Legal Remedies Act, but they are restricted to consumer-plaintiffs.<sup>188</sup> Even though California limits claims for money damages to consumers, business competitors still have a private right of action to sue a competitor that has engaged in unfair competition: a claim for injunctive relief and restitution.<sup>189</sup> The purpose behind allowing injunctive relief is that it remedies a public wrong.<sup>190</sup>

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180. *Blue Cross & Blue Shield*, 178 F. Supp. 2d at 206, 210.

181. *Id.* at 206.

182. *Id.* at 230.

183. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 218 (2d Cir.), *certified question accepted*, 100 N.Y.2d 636, 801 N.E.2d 417 (2003), and *certified question answered sub nom.* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 818 N.E.2d 1140 (2004).

184. *Blue Cross & Blue Shield*, 344 F.3d at 219.

185. *Id.* at 222.

186. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 208, 818 N.E.2d 1140, 1145 (2004).

187. CAL. BUS. & PROF. CODE §§ 17203, 17204 (West 2008)

188. CAL. CIV. CODE § 1780(a) (West 2009) (“Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful [unfair methods of competition and unfair or deceptive acts or practices] may bring an action against that person to recover.”).

189. *Flannery v. VW Credit, Inc.*, 232 Cal. App. 4th 606, 617, 181 Cal. Rptr. 3d 589, 597 (2014).

190. *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 919 (N.D. Cal. 2020), *appeal dismissed in part*, No. 20-15689, 2020 WL 9257963 (9th Cir. Nov. 17, 2020).

vi. *Lessons that Can be Drawn from Other States' Approaches*

Recognizing competitor standing under consumer protection laws does not mean a free pass to each and every type of claim against a business competitor. Legislatures and courts can and should create limits to ensure that consumer welfare will be protected. New York's approach is a good example, where any person who suffered injuries due to violations of the consumer protection act can recover—including a business competitor. But recovery cannot occur when the damages are too remote, as was the case in the *Blue Cross & Blue Shield* case,<sup>191</sup> or when the competitor's actions do not impact consumers in general.<sup>192</sup> Another alternative—maybe with a less deterrent effect than New York's approach—would be a system similar to California's, which allows “any person”—including a business competitor—to sue for injunctive relief and restitution.

The examples described in this section show that a private right of action for business competitors to sue for competitive injury under consumer protection laws serves as another tool available to protect consumer welfare.

**C. A Suggestion**

Recognizing that business competitors play a role in protecting the marketplace and, consequently, in consumer protection is not a new idea. Antitrust laws have long allowed suits by business competitors against competitors who violated antitrust laws.<sup>193</sup> As exemplified above, other states have also adopted the approach that injured non-consumers—including business competitors—should be allowed to sue businesses that engage in unfair or deceptive trade practices.<sup>194</sup> The New Mexico Legislature itself has already used competitor standing as a tool to combat unfair or deceptive trade practices.<sup>195</sup>

Now that the New Mexico Supreme Court decision in *Gandydancer* has eliminated competitive injury claims under the UPA—which is likely not what the legislature intended—the New Mexico Legislature should revisit the UPA and amend the statute to explicitly include a provision allowing business competitors to sue competitors who engage in unfair or deceptive trade practices. Such an amendment would be consistent with the history of the UPA, but more importantly, would help deter future violations of the UPA; therefore, enhancing consumer protection.

**CONCLUSION**

The argument that consumer protection would be undermined if competitive injury claims were allowed under the UPA is simply not consistent with

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191. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 208, 818 N.E.2d 1140, 1145 (2004).

192. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 218 (2d Cir.), *certified question accepted*, 100 N.Y.2d 636, 801 N.E.2d 417 (2003), and *certified question answered sub nom.* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 818 N.E.2d 1140 (2004).

193. See discussion *supra* Part II.B.

194. See discussion *supra* Part III.B.

195. See discussion *supra* Part III.A.



the experience encountered in antitrust law where competitive injury claims serve as a tool to advance not only the protection of the market but also to protect the market for the benefit of consumers. A private remedy allowing business competitors to sue competitors under the UPA would be an effective way to protect consumers as a whole when individual consumers might lack the motivation and resources to sue someone who is engaging in unfair or deceptive practices. Aware of the possibility of being sued by a competitor, a business would be less likely to engage in unlawful conduct under the UPA, and this legislation would achieve its deterrent effect.

A provision explicitly conferring standing for business competitors to bring suit for violations of the UPA would be consistent with the broad current language of the UPA, which allows *any person* to bring a suit for damages. Such a provision would also be consistent with the MCA provision, which allows suits for competitive injury due to competitors' unfair or deceptive trade practices. After *Gandydancer*, this is the most logical—and best—approach to avoid limiting the available tools for consumer protection.