EXHIBIT B

White Paper on Proposed Revisions to Fla. Stat. § 501.207

I. BACKGROUND

The proposed legislation amends § 501.207(3), Fla. Stat., to address recent federal court decision(s) that frustrate § 501.207(3) from being applied as intended by the Florida legislature.

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") is Florida's consumer protection law. The Office of the Attorney General, State of Florida, Department of Legal Affairs ("Attorney General") is statutorily authorized to bring FDUTPA enforcement actions against business enterprises engaged in "unconscionable acts or practices" or "unfair or deceptive acts or practices in the conduct of any trade or commerce," and FDUTPA creates remedies that the Attorney General may pursue for the benefit of consumers harmed by such practices. §§ 501.204, 501.207, Fla. Stat.

When the Attorney General determines that it is in the public interest to commence a suit to enforce FDUTPA, the court, upon motion by the Attorney General, may appoint a receiver to oversee the defendant business, prevent further FDUTPA violations, and preserve the value of the business, including operating it both lawfully and profitably if at all possible, while the lawsuit is pending. § 501.207, Fla. Stat. If the Attorney General prevails in the lawsuit, it may recover damages for the benefit of consumers harmed by the unfair or deceptive acts or practices. To facilitate consumer redress, a receiver appointed under § 501.207 may be charged to marshal the assets of the defendant business, which can include bringing claims and legal actions that the defendant holds against third parties.

Prior to 2006, Florida law precluded a business entity controlled entirely by individuals engaged in wrongful conduct, and the receiver for such a business, from bringing a lawsuit against third parties that assisted the wrongful conduct. This rule was established by a Florida appellate court in *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d DCA 2003), which held that the unclean hands of the individuals formerly in control of the business deprives a receiver of jurisdiction to sue third parties, despite the fact that any recoveries in such circumstances would benefit the victims, not the wrongdoers.

Under *Freeman*, a receiver cannot bring such claims unless the business entity had at least one innocent stockholder or director before the receiver's appointment. *Freeman*, 865 So. 2d 551. This presented a significant impediment to the Attorney General's mission to provide redress to consumers, because the businesses that the Attorney General regulates under FDUTPA are often controlled entirely by individuals engaged in conduct that violates FDUTPA. This allows those third party individuals and/or entities that aided and abetted the FDUTPA violation to avoid liability for their actions.

To rectify the *Freeman* decision, in 2006, the Florida legislature revised § 501.207(3) to overrule *Freeman* as to receivers appointed in FDUTPA cases brought by the Attorney General. The legislature revised the statute to provide that such a receiver may "**bring actions in the name of and on behalf of the defendant enterprise, without regard to any wrongful acts that were**

committed by the enterprise." § 501.207(3), Fla. Stat. (emphasis added). The legislative Staff Analysis accompanying the amendment explained that the legislature determined that consumers "would stand to recover more from the defendant corporation" if receivers were permitted to assert such claims. Staff of Fla. S. Judiciary Comm., CS/SB 202 (2006), Staff Analysis, V.B (April 21, 2006).

II. CURRENT SITUATION

In 2017, the Attorney General commenced a FDUTPA enforcement action against a business engaged in a telemarketing debt relief scam, which had swindled millions of dollars from Florida consumers. A receiver was appointed over the business pursuant § 501.207(3), displacing the former owner and control persons, all of whom had known about and been involved in the scheme. Subsequently, the receiver sued a financial institution that had accepted a bribe from the individual owner of the debt relief business in exchange for the financial institution's agreement to continue providing banking services despite the financial institution having actual knowledge that the business was a front for a consumer fraud.

In court, the defendant-financial institution argued that the receiver's claims failed under *Freeman*, 865 So.2d 543, the holding of which had since been adopted by Florida federal courts in a decision called *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296 (11th Cir. 2020). The receiver argued that *Freeman* did not apply because under the 2006 amendment to FDUTPA, receivers can bring lawsuits "without regard to any wrongful acts that were committed by the enterprise."

A three judge panel of the Atlanta-based federal Eleventh Circuit Court of Appeals rejected the receiver's argument in *Perlman v. PNC Bank, N.A.*, 38 F.4th 899 (11th Cir. 2022). In a split decision, the two-judge majority ruled that the amended version of § 501.207(3) did not impact the rule from *Freeman* (later adopted by the federal court in *Isaiah*) that a corporation must have an innocent stockholder or director for a receiver for the corporation to be able to bring suit against a party which aided and abetted the violation. The majority did not address the fact that the Florida legislature amended the statute expressly to overrule *Freeman*. In a dissenting opinion, however, the third judge on the *Perlman* panel wrote that the "State of Florida spoke clearly in 2006, when it amended Florida Statutes § 501.207(3)" to overrule *Freeman*, and the dissent criticized the majority for effectively nullifying the will of the Florida legislature. *Perlman*, 38 F.4th at 908.

Perlman is binding on federal courts throughout the State of Florida, where the Attorney General and receivers appointed pursuant to the Attorney General's enabling authority often pursue FDUTPA violators. Thus, *Perlman* renders meaningless the 2006 amendment to § 501.207(3) in numerous cases, preventing the recovery of assets that otherwise would be available to provide relief to consumers. Further, decisions from the Eleventh Circuit are highly persuasive in Florida state courts, so there is a significant risk that the decision from *Perlman* will be adopted by Florida state courts unless it is addressed through legislation.

The purpose of this amendment is to further revise the statutory language in § 501.207(3) to address the *Perlman* decision by eliminating the "innocent stockholder or director"

requirement as to receivers appointed in FDUTPA cases brought by the Attorney General. The amendment does this by expressly stating that such a receiver may "bring actions in the name of and on behalf of the defendant enterprise, without regard to any wrongful acts that were committed by the enterprise, its stockholders, directors, or employees, whether or not the enterprise had any innocent stockholders or directors." The full text of the statute is set forth below with the proposed revisions highlighted. The revision will require federal and Florida courts to apply the revised statute in the manner that the Florida legislature intended so as to advance the legislature's policy objectives in FDUTPA.

501.207 Remedies of enforcing authority.—
(1) The enforcing authority may bring:
(a) An action to obtain a declaratory judgment that an act or practice violates this part.
(b) An action to enjoin any person who has violated, is violating, or is otherwise likely to violate, this part.
(c) An action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of this part. However, damages are not recoverable under this section against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.
(2) Before bringing an action under paragraph (1)(a) or paragraph (1)(c), the head of the enforcing authority shall review the matter and determine if an enforcement action serves the public interest. This determination shall be made in writing, but shall not be subject to the provisions of chapter 120.
(3) Upon motion of the enforcing authority or any interested party in any action brought under subsection (1), the court may make appropriate orders, including, but not limited to, appointment of a general or special magistrate or receiver or sequestration or freezing of assets, to reimburse consumers or governmental entities found to have been damaged; to carry out a transaction in accordance with the reasonable expectations of consumers or governmental entities; to strike or limit the application of clauses of contracts to avoid an unconscionable result; to bring actions in the name of and on behalf of the defendant enterprise, without regard to any wrongful acts that were committed by the enterprise, its stockholders, officers, directors, or employees, and without regard to whether the enterprise had any innocent stockholders or directors at the time of such wrongful acts, which wrongful acts by any stockholders, directors, officers or employees shall not be ascribed to the enterprise or the receiver; to order any defendant to divest herself or himself of any interest in any enterprise, including real estate; to impose reasonable restrictions upon the future activities of any defendant to impede her or him from engaging in or establishing the same type of endeavor; to order the dissolution or reorganization of any enterprise; or to grant legal, equitable, or other appropriate relief. The court may assess the expenses of a general or special magistrate or receiver against a person who has violated, is violating, or is otherwise likely to violate this part. Any injunctive order, whether temporary or permanent, issued by the court shall be effective throughout the state unless otherwise provided in the order.