

# An Act

## Legislative Act 16-16

### A LEGISLATIVE ACT AMENDING TITLE 12 OF THE CHEROKEE NATION CODE ANNOTATED – CIVIL PROCEDURE

BE IT ENACTED BY THE CHEROKEE NATION:

#### SECTION 1. TITLE AND CODIFICATION

This Act shall be known as the “**Comprehensive Access to Justice Act of 2016**” (“Act”) and codified under Title 12 of the Cherokee Nation Code Annotated (CNCA).

#### SECTION 2. PURPOSE

The purpose of this Act is to amend **Chapters 1, 2 and 3** of Title 12 of the Cherokee Nation Code Annotated.

#### SECTION 3. SUBSTANTIVE LAW

Title 12 of the Cherokee Nation Code Annotated shall be amended as follows:

#### **CHAPTER 1 PRELIMINARY PROVISIONS**

#### **~~ADOPTION OF FEDERAL RULES OF CIVIL PROCEDURE—FEDERAL RULES OF EVIDENCE~~**

#### **~~§ 1.—Federal Rules of Civil Procedure—Federal Rules of Evidence~~**

- ~~A.~~** The Federal Rules of Civil Procedure shall be used in Cherokee Nation courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of civil procedure.
- ~~B.~~** The Federal Rules of Evidence shall be used in Cherokee Nation courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of evidence.

## CHAPTER 1 CIVIL PROCEDURE

### § 1 Title of Chapter

This chapter shall be known as the Code of Civil Procedure of the Cherokee Nation.

### § 2 Jurisdiction-General

The Courts of the Cherokee Nation may exercise jurisdiction on any basis consistent with the Cherokee Nation Constitution.

### § 3 Law to be Applied

The courts shall apply the laws of the Cherokee Nation. The laws of the Cherokee Nation shall include the Constitution of the Cherokee Nation, all statutes heretofore and hereafter enacted by the Tribal Council and the Cherokee common law. The Cherokee common law consists of the traditional customs and usages of the Cherokee people since time immemorial. In matters arising under the common law, the courts may request the advice of tribal elders, scholars and counselors familiar with the same. No state, or federal law, including any state or federal regulations, shall be binding upon the courts unless specifically incorporated into statute by the Tribal Council or adopted as common law by a decision of the court. Notwithstanding, in matters which cannot be resolved through the application of Cherokee law, the courts may apply any federal or state law, including any regulation promulgated by the United States Department of Interior, which would be cognizable in a court of general jurisdiction therein.

### § 4 Force of the Cherokee Common Law

The Cherokee Common Law, as modified by the Constitution of the Cherokee Nation, statutes, judicial decisions, and the condition and wants of the people, shall remain in full force and effect within the Cherokee Nation in like force with any statute of the Cherokee Nation insofar as the common law is not so modified, but all Cherokee Nation laws shall be liberally construed to promote their objective.

### § 5 Federal Rules of Civil Procedure – Federal Rules of Evidence

- A. The Federal Rules of Civil Procedure shall be used in Cherokee Nation courts in all suits of a civil nature, whether at law or in equity, unless superseded by a Cherokee Nation Rule of Civil Procedure.
- B. The Federal Rules of Evidence shall be used in Cherokee Nation courts in all suits of a civil nature, whether at law or in equity, unless superseded by a Cherokee Nation Rule of Evidence.

**§ 6 Legislative Purpose**

This Act shall be construed so as to protect and ensure the political integrity, the economic security, and the health and welfare of the tribe.

**§§ 7-10 Reserved**

**CHAPTER 2  
~~STATUTE OF LIMITATIONS~~**

**~~§ 11. Express or implied contracts~~**

~~Judgment shall not be rendered upon any written contract, obligation, or note of hand, in any suit brought before the Courts of this Nation, unless such suit be instituted thereafter as required by law within five (5) years next after the time at which the cause of Action shall have accrued to the person bringing the same, or to the person through whom he claims. Nor shall any judgment be rendered upon any contract or obligation express or implied not in writing in any suit brought before the Courts of this Nation, unless suit be instituted thereafter as required by law within three (3) years next after the time at which the cause of Action shall have accrued to the person bringing the same, or to the person through whom he claims.~~

**~~§ 12. Property injury—Personal injury~~**

~~Judgment shall not be rendered for the recovery of any claim or demand for trespass upon real property, taking, detaining or injuring personal property, including Actions for the specific recovery of personal property, for injury to the rights of others, and for relief on the ground of fraud, except as provided in the preceding sections, in any suit brought before the Courts of this Nation, unless such suit be instituted for the recovery thereof, as required by law, within two (2) years next after the time at which the cause of Action shall have been accrued to the person bringing the same, or to the person through whom he claims. Nor shall any judgment be rendered for the recovery of any claim for libel, slander, assault, battery, malicious prosecution, or false imprisonment unless such suit be instituted for the recovery thereof, as required by law, within one (1) year next after the time at which the cause of Action shall have been accrued to the person bringing the same, or to the person through whom he claims.~~

**~~§ 13. Tolling of period for minors or incompetents~~**

~~The statutory limitations period shall not begin to run against minors until they reach their majority or against persons "non compos mentis" until their disability is removed. However, it is made the duty of every administrator, guardian, and executor to bring suit for the claims or demands due any estate or ward, within the time herein above specified; and any administrator, executor or guardian, neglecting or failing to do so, shall be liable to the parties in interest for such failure or neglect. However, any suit alleging neglect of duty against an administrator, guardian or executor must be brought within five (5) years.~~

#### **§ 14. Action for relief not provided for**

~~An Action for relief, not hereinbefore provided for, can only be brought within five (5) years after the cause of Action shall have accrued.~~

#### **§ 11 Limitations of Actions**

- A. Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued and not afterwards:
1. Within five (5) years: An action upon any contract, agreement, or promise in writing;
  2. Within three (3) years: An action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment;
  3. Within five (5) years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud - the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or negligence of another;
  4. Within one (1) year: An action for libel, slander, malicious prosecution, or false imprisonment; an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation;
  5. Within five (5) years: An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute.
- B. No statute of limitations shall apply to the Cherokee Nation as a party plaintiff.
- C. Nothing herein expressly, or impliedly, waives the Cherokee Nation's sovereign immunity.

D. Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence, of all the elements of the particular cause of action. Whether a plaintiff knew of a particular element is a fact question to be determined by a jury.

**§ 12 Reserved**

**§ 13 *Parens Patriae***

A. The Cherokee Nation Attorney General may bring a civil action in the name of the Cherokee Nation as *parens patriae* on behalf of tribal members of the Cherokee Nation to secure monetary relief for injuries and damages sustained by such persons by reason of any violation of law, including but not limited to, violations of the Cherokee Nation Unfair & Deceptive Practices Act. Aggregate data and evidence shall be deemed admissible if found by the court to be relevant. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief:

1. Which wholly duplicates amounts which have been awarded for the same injury to tribal members of the Cherokee Nation; or
2. Which is properly allocable to natural persons who have excluded their claims pursuant to subsection (C)(2) of this section.

B. The court shall award the Cherokee Nation as monetary relief threefold the total damage sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section interest on the total damage for the period beginning on the date of filing of Cherokee Nation's pleading setting forth a claim of *parens patriae* and ending on the date of judgment at a rate of twenty percent (20%) compounding continuously. In determining whether an award of interest under this paragraph for any period is just in the circumstances the court shall only consider:

1. Whether Cherokee Nation or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;
2. Whether, in the course of the action involved, the Cherokee Nation or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

3. Whether Cherokee Nation or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

C. Notice; exclusion election; final judgment

1. In any action brought under subsection (A)(1) of this section the Attorney General shall, at such times in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case;
2. Any person on whose behalf an action is brought under subsection (A)(1) of this section may elect to exclude from adjudication the portion of the Cherokee Nation claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection;
3. The final judgment in an action under subsection (A)(1) of this section shall be *res judicata* as to any claim under this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

D. Attorney's fees in any action under subsection (A) of this section:

1. The amount of the plaintiffs' attorneys fees shall be determined by the court; and
2. The court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding by clear and convincing evidence that the Attorney General has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

## § 14 Wrongful Death

- A. A claim for wrongful death may be brought against a person who, by his negligence or by willful, wanton or reckless acts, causes the death of another under such circumstances that the deceased could have recovered damages for personal injuries if death had not resulted.
- B. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants to the same extent and subject to the same limits as he would be liable under this section for his own act.
- C. An action to recover damages under this section shall be commenced within five (5) years from the date of death, or within five years from the date when the deceased's executor or next of kin knew, or in the exercise of reasonable diligence, should have known of all the elements for a cause of action.
- D. The damages recoverable in actions for wrongful death as provided in this section shall include the following:
1. Medical and burial expenses which shall be distributed to the person who paid the expenses or to the decedent's estate if paid by the estate;
  2. The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse;
  3. The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent;
  4. The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss;
  5. The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship;

6. The fair monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered;
  7. Punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or his representative if such person be deceased, in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.
- E. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division;
- F. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.

## **§ 15 Joint Tortfeasors**

- A. Joint tortfeasors are two or more persons who either:
1. Act in concert to commit a tort;
  2. Act independently but cause a single indivisible tortious injury; or
  3. Share responsibility for a tort because of vicarious liability.
- B. Each joint tortfeasor shall be held jointly and severally liable for the plaintiff's total damages;
- C. The doctrine of learned intermediary is specifically rejected;
- D. The innovator of a device, drug or other product may be held liable for fraud or misrepresentation, by misstatement or omission, based on statements it made in connection with the manufacture, safety, and efficacy of the original device, drug or product by a plaintiff claiming injury caused by a generic product manufactured by a different company.



## § 16 Class Actions

- A. All persons may join in one action as plaintiffs if:
1. They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, personal injury or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or
  2. They have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action.
- B. It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief.
- C. All persons may be joined in one action as defendants if there is asserted against them:
1. Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, injury or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or
  2. A claim, right, or interest adverse to them in the property or controversy which is the subject of the action.
- D. It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities.
- E. Where the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.
- F. When parties have been joined under Section (A) or (B), the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require.

- G. If the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.
- H. It is the intent of the Tribal Council in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Cherokees. The Tribal Council finds that the use of funds collected by the Court Fund pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.
- I. Prior to the entry of any judgment in a class action, the court shall determine the total amount that will be payable to all class members, if all class members are paid the *pro rata* amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to organizations providing services to the indigent.
- J. No appeal shall be taken from the granting of the certification of a class.
- K. Any waiver by a person of their right to pursue a class action is contrary to public policy and shall be unenforceable and void.

### **§ 17 Permissive Joinder**

Any federally recognized Indian tribe or member of a federally recognized tribe may join in any suit filed in Cherokee Nation District Court with permission of the Attorney General of the Cherokee Nation. Said Joinder shall not waive either expressly or impliedly the sovereign immunity of said tribe. Jurisdiction over said tribe or person shall be limited to the case pending before the Court.

## **§ 18 Limitation of New Action after Reversal or Failure Otherwise than on Merits**

If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within two (2) years after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

## **§ 19 Interlocutory Appeals**

The District Court shall not certify jurisdictional rulings for interlocutory appeal.

## **§ 20 Appeal**

Upon the filing of the Petition in Error of a civil money judgment, the District Court may order the filing of a bond or other security in an amount sufficient to satisfy the judgment including costs in the event the judgment is affirmed on appeal. The Supreme Court may waive bond if the party demonstrates by petition or affidavit that he/she is unable to post the bond.

- A. Stay with Bond on Appeal: If an appeal is taken from a monetary judgment awarded in Cherokee Nation District Court, the appellant may obtain a stay by supersedeas bond. The bond must be given upon filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.
- B. Stay Without Bond on an Appeal by the Cherokee Nation, Its Officers, or Its Agencies
  - 1. The Court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the Cherokee Nation, its officers or its agencies or on an appeal directed by a department of the Cherokee government.
  - 2. When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from;
- C. Supersedeas Bond
  - 1. Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for any of the following:

- a. Money or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action;
  - b. Costs awarded which otherwise would not have been awarded as costs.
2. The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal;
  3. The undertaking shall be for double the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within ten (10) days after the filing of the remittitur from the reviewing court;
  4. If a surety on the undertaking pays the judgment, either with or without action, after the judgment is affirmed, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment;
  5. Costs awarded by the trial court shall be added to the judgment for purposes of determining the bond amount;
  6. Attorney fees awarded shall be added to the judgment for purposes of determining the bond amount.
- D. A decision of the Supreme Court of the Cherokee Nation shall lift the stay and the bond shall be released to the prevailing party immediately.

## UNFAIR AND DECEPTIVE PRACTICES

### § 21 Title of Chapter

This chapter shall be known as the Cherokee Nation Unfair & Deceptive Practices Act (“CNUDPA” or “Act”).

### § 22 Purpose

The purpose of this Act is to enhance the protections against unfair, deceptive and illegal marketing, advertising and unfair competition relating to transactions of goods and services.

## **§ 23 General Provisions**

- A. The provisions of this Act must be construed as cumulative to existing law and not as new enactments;
- B. Any waiver by a person of the provisions of this Act including, but not limited to, arbitration provisions that waive a person's right to seek redress through the courts or proceed as a class action, is contrary to public policy and shall be unenforceable and void;
- C. The provisions of this Act are not exclusive. The remedies provided herein for violation of any section of this act or for conduct proscribed by any section of this Act shall accrue in addition to any other procedures or remedies for any violation or conduct provided for in any other law. Nothing in this Act shall limit any other statutory, customary or common law rights. Nothing in this act shall limit the right of the Attorney General or any other person to bring class actions or other lawsuits. If any act or practice proscribed under this title also constitutes a cause of action in common law, customary law, or pursuant to another statute, the person or Attorney General may also assert such common law or statutory causes of action under the procedures and with the remedies provided for in such law.

## **§ 24 Construction and Definitions**

- A. This Act shall be liberally construed and applied to promote its underlying purposes, which are to protect the Cherokee Nation and persons against unfair and deceptive acts and practices and to provide efficient and economical procedures to secure such protection.
- B. As used in this Act:
  - 1. "Goods" means any tangible chattels bought or leased for use primarily for any purpose, including personal, family, medical or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property;
  - 2. "Services" means any work, labor, and services for a commercial or business use, including services furnished in connection with the sale or repair of goods;
  - 3. "Person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized;

4. "Person" means any individual, group of individuals, business entity, or the Cherokee Nation, who seeks or acquires, by purchase or lease, any goods or services for any purpose;
5. "Consumer" means any individual or group of individuals, who is a buyer of goods or services for personal use;
6. "Transaction" means any delivery and acceptance of goods and services. Transactions include, but are not limited to, the sale of goods, services, drugs and medical devices to the Cherokee Nation for the use and benefit of tribal recipients, regardless of whether the manufacturer sold directly to the consumer or used a third party;
7. "Senior citizen" means a person who is 65 years of age or older;
8. "Disabled person" means any person who has a physical or mental impairment that substantially limits one or more major life activities;
9. "Physical or mental impairment" means any of the following:
  - a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine;
  - b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. "Physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.
10. "Major life activities" mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;
11. "Sell" includes selling, offering for sale or advertising for sale;
12. "Give" includes giving, offering to give or advertising the intent to give;

13. "Article or product" includes any article, product, commodity, thing of value, service or output of a service trade;
14. "Vendor" includes any person who performs work upon, renovates, alters or improves any personal property belonging to another person;
15. "Cost" as applied to production includes the cost of raw materials, labor, and all overhead expenses of the producer. Cost as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of six (6) percent on such invoice or replacement cost shall be *prima facie* proof of such cost of doing business. Cost as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency. Discounts granted for cash payments shall not be used to reduce costs;
16. A "supplier" is any person engaged in the business of making a consumer product directly or indirectly available to consumers.

## **§ 25 Deceptive Practices**

- A. Deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
- B. It shall be a violation of this act, whether or not any person is in fact misled, deceived or damaged thereby, for any person to engage in, *inter alia*, the following deceptive acts or practices:
  1. Passing off goods or services as those of another;
  2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;
  3. Misrepresenting the affiliation, connection, or association with, or certification by another;
  4. Using deceptive representations or designations of geographic origin in connection with goods or services;
  5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have;

6. Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand;
7. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model if they are of another;
8. Disparaging the goods, services, or business of another by false or misleading representation of fact;
9. Using innuendo or ambiguity as to a material fact, which has a tendency to mislead;
10. Advertising goods or services with intent not to sell them as advertised;
11. Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity;
12. Advertising furniture without clearly indicating that it is unassembled if that is the case;
13. Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller;
14. Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions;
15. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
16. Representing that a part, replacement, or repair service is needed when it is not;
17. Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not;
18. Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction;



19. Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer;
20. Inserting an unconscionable provision in a contract;
21. Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (a) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (b) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product;
22. The home solicitation of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of this Act;
23. Charging or receiving an unreasonable fee to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of Cherokee Nation or other public social services. For purposes of this paragraph, the following definitions shall apply:
  - a. "Social services" means those activities and functions of government involved in providing aid or services, or both, including health care services and medical assistance, to those persons who are in need of that aid or those services and may benefit from them;
  - b. "Unreasonable fee" means a fee that is exorbitant and disproportionate to the services performed. Factors to be considered, when appropriate, in determining the reasonableness of a fee, are based on the circumstances existing at the time of the service and shall include, but not be limited to, all of the following:
    - (i) The time and effort required;
    - (ii) The novelty and difficulty of the services;
    - (iii) The skill required to perform the services;
    - (iv) The nature and length of the professional relationship;

(v) The experience, reputation, and ability of the person providing the services;

(vi) Paragraph (22) shall not apply to attorneys licensed to practice law, who are subject to Rules of Professional Conduct.

24. Failing to adequately warn or instruct of the potential risks, side effects, or allergic reactions that the manufacturer or distributor knew or reasonably should have known about;

25. Violation of any law affecting or impacting on consumer goods, supplies, and services enacted by the United States;

26. Any other act or practice determined by the court to be deceptive.

### **C. Remedies**

1. Each violation of any of the provisions of this Act is punishable by a fine not exceeding ten thousand dollars (\$10,000) in addition to any other remedy provided by law;

2. In any action under this act in which judgment is entered against the defendant the plaintiff shall be awarded a reasonable attorney fees together with the costs of suit;

3. The remedies or penalties provided by this act are cumulative to each other and to the remedies or penalties available under all other laws of the Cherokee Nation.

### **§ 26 False Advertising**

A. It is unlawful for any individual, entity, association, or any employee or agent thereof with intent directly or indirectly to sell products, to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before in the Cherokee Nation, or to make or disseminate or cause to be made or disseminated from the Cherokee Nation, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, including over the internet, any statement, concerning that product, real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, which fails to adequately warn, or which is known, or

which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised;

- B. It is unlawful for any person to solicit a sale or order for sale of goods or services at the residence of a prospective buyer, in person or by means of telephone, without clearly, affirmatively and expressly revealing at the time the person initially contacts the prospective buyer, and before making any other statement, except a greeting, or asking the prospective buyer any other questions, that the purpose of the contact is to effect a sale, by doing all of the following:
1. Stating the identity of the person making the solicitation;
  2. Stating the trade name of the person represented by the person making the solicitation;
  3. Stating the kind of goods or services being offered for sale;
  4. And, in the case of an "in person" contact, the person making the solicitation shall, in addition to meeting the requirements of paragraphs (1), (2) and (3), show or display identification which states the information required by paragraphs (1) and (2) as well as the address of the place of business of one of such persons so identified.
- C. It is unlawful for any person, in soliciting a sale or order for the sale of goods or services at the residence of a prospective buyer, in person or by telephone, to use any plan, scheme, or ruse which misrepresents his true status or mission for the purpose of making such sale or order for the sale of goods or services;
- D. In addition to any other penalties or remedies applicable to violations of this section, the intentional violation of this section shall entitle persons bound to a contract, when there was a sales approach or presentation or both in which such intentional violation of this act took place, to damages of three times the amount of the sale;
- E. Each violation of any of the provisions of this section is punishable by a fine not exceeding ten thousand dollars (\$10,000) in addition to any other remedy provided by law;

- F. In any action under this section in which judgment is entered against the defendant the plaintiff shall be awarded a reasonable attorney's fee together with the costs of suit;
- G. The remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under all other laws of Cherokee Nation.

## **§ 27 Unfair Competition Law**

- A. The Cherokee Nation declares that the purpose of this section is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented;
- B. As used in this Act, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any other act prohibited by this Act;
- C. Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this section, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others or they may be brought by the Attorney General of the Cherokee Nation;
- D. The court may, in its discretion, include in any injunction against a violation of this chapter such other restraint as it may deem expedient in order to deter the defendant from, and insure against, his committing a future violation of this Act;
- E. Any injunction against a violation of this Act, whether interim or final, shall cover every article or product and not merely the particular article or product involved in the action;
- F. It is not necessary for the plaintiff, in any action under this chapter, to provide or file any undertaking or bond for the issuance of any interim or final injunction;

- G. Acts of selling or giving away any article or product below cost or at discriminatory prices together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition;
- H. Any violation of the provisions of this act is punishable by a fine not exceeding ten thousand dollars (\$10,000) in addition to any other remedy provided by law;
- I. In any action under this Act in which judgment is entered against the defendant the plaintiff shall be awarded a reasonable attorney fee together with the costs of suit;
- J. The remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under all other laws of Cherokee Nation.

## **§ 28 Remedies and Procedures**

**In addition to the specific remedies above, the below remedies shall also govern:**

- A. Any person who engages, has engaged, or proposes to engage in violations of this Act shall be liable for each violation, which shall be assessed and recovered in a civil action. The number of violations shall be computed based upon each item sold, each marketing material distributed and each prescription filled in violation of this Act. A single act may result in multiple violations of the CNUDPA. Penalties shall be cumulative for violations of each section of the CNUDPA;
- B. The Cherokee Nation may bring an action for any violation of this Act on behalf of itself and tribal citizens for the recovery of damages, civil penalties, injunction and all other remedies available by law. Whenever the Attorney General has reason to believe that any person is using or is about to use any act or practice declared to be unlawful, he may bring an action in the name of the Cherokee Nation against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. The court may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders or judgments as may be necessary to restore to the Cherokee Nation or any person who has suffered any loss by reason of the use or employment of such unlawful method, act or practice. If the court finds that a person has employed any act or practice which he knew or should have known to be unlawful, the court may require such person to pay to the Cherokee Nation a civil penalty of not more than ten thousand dollars

(\$10,000) for each such violation and also may require the said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorney fees. If the court finds any act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery, the court may issue such orders or judgments as may be necessary to restore any person who has suffered any a loss up to three but not less than two times that amount if the court finds that the use of the act or practice was a reckless violation, a civil penalty to be paid to the Cherokee Nation of not more than ten thousand dollars (\$10,000) for each such violation, and also may require said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorney fees;

- C. Any person entitled to bring an action may, if the violation of this Act has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Notice of any proposed settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs;
- D. The court shall impose a civil penalty for each violation of this Act. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth;
- E. In addition to any liability for a civil penalty pursuant, any person who violates this Act, and the act or acts are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed twenty thousand dollars (\$20,000) for each violation, which may be assessed and recovered in a civil action;
- F. Any court of competent jurisdiction hearing an action pursuant to this Act may make orders and judgments as may be necessary to restore to any person, senior citizen or disabled person any money or property, real or personal, which may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of any civil penalty designated by the court. If the court determines that full restitution cannot be made to those disabled persons, either at the time

of judgment or by a future date determined by the court, then restitution under this subdivision shall be made on a *pro rata* basis depending on the amount of loss;

G. Any person who intentionally violates any injunction shall be liable for a civil penalty not to exceed twenty thousand dollars (\$20,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. For the purposes of this section, the court issuing such an injunction or order shall retain jurisdiction, and the cause shall be continued, and in such case the Attorney General acting in the name of the Cherokee Nation may immediately petition for recovery of such civil penalty;

H. Any person entitled to bring an action may bring an action against that person who used or employed any method, act, or practice declared to be unlawful, to recover or obtain any of the following:

1. Three times actual damages, or \$5,000, whichever is higher;
2. An order enjoining the methods, acts, or practices;
3. Restitution of property;
4. Civil penalty;
5. Punitive damages;
6. Equitable relief; and
7. Any other relief that the court deems proper.

I. Any consumer who is a senior citizen or a disabled person may seek and be awarded, in addition to the remedies specified therein, up to twenty thousand dollars (\$20,000) where the trier of fact finds all of the following:

1. That the consumer has suffered physical, emotional, or economic damage resulting from the defendant's conduct; and
2. That an additional award is appropriate.

- J. In determining whether to impose a civil penalty and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:
1. Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons;
  2. Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: physical impairment or injury, loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person;
  3. Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.
- K. In any action under this Act, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in no case shall the total award of damages in a class action be less than five thousand dollars (\$5,000). In addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this Act;
- L. Any action brought under the CNUDPA shall be commenced not more than six (6) years from the date of the last commission of such act or practice that is a violation of this Act;
- M. Aggregate data and evidence shall be admissible if found by the court to be relevant.

§ 29 Reserved



**CHAPTER 3  
INTEREST ON JUDGMENTS**

**§ 21. Interest on judgments**

~~All promissory notes, executes, or judgments, payable in cash, shall bear interest at an annual rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Court Clerk of Cherokee Nation by the Treasurer of Cherokee Nation on the first regular business day in January of each year, plus four (4) percentage points.~~

**§ 30 Interest on Judgments**

The Court may award interest on the total damages for the period beginning on the date of filing of a pleading setting forth a claim at a rate of twenty percent (20%) compounding continuously. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall only consider:

- A. Whether plaintiff or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;
- B. Whether, in the course of the action involved, plaintiff or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
- C. Whether plaintiff or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

**Section 4. NO WAIVER**

Nothing in this Act shall be deemed as a waiver of the Nation's sovereign immunity for any purpose

**Section 5. PROVISIONS NOT CUMULATIVE**

The provisions of this Act shall not be cumulative to existing law and shall supersede any existing law in conflict therewith

**Section 6. SEVERABILITY**

The provisions of this Act are severable and if any part of the provisions hereof, or their application to any person or circumstance, shall be held unconstitutional the decision of

the court so holding shall not affect or impair any of the remaining parts or provisions of this Act.

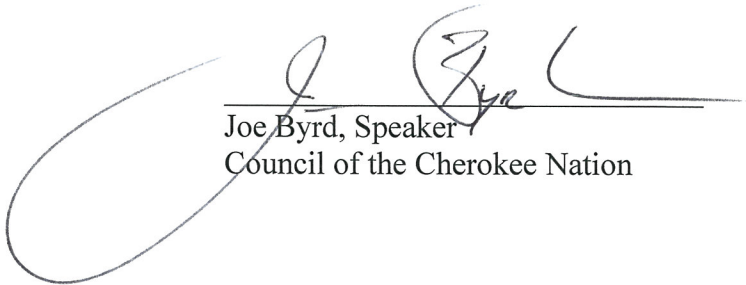
**Section 7. EFFECTIVE DATE**

The provisions of this Act shall become effective thirty (30) days from and after the date of its passage and approval.

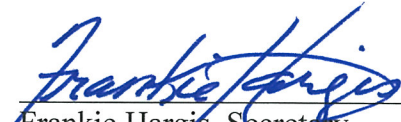
**Section 8. SELF-HELP CONTRIBUTIONS**

To the extent that this Act involves programs or services to citizens of the Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.

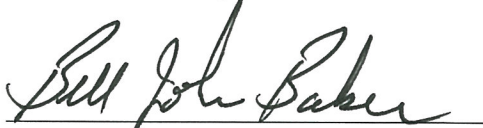
Enacted by the Council of the Cherokee Nation on the 12<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
Joe Byrd, Speaker  
Council of the Cherokee Nation

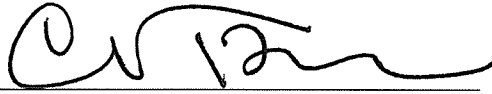
ATTEST:

  
\_\_\_\_\_  
Frankie Hargis, Secretary  
Council of the Cherokee Nation

Approved and signed by the Principal Chief this 13<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
Bill John Baker, Principal Chief  
Cherokee Nation

**ATTEST:**



Chuck Hoskin, Jr., Secretary of State  
Cherokee Nation

**YEAS AND NAYS AS RECORDED:**

Rex Jordan	<u>Yea</u>	Victoria Vazquez	<u>Yea</u>
David Walkingstick	<u>Yea</u>	Dick Lay	<u>Yea</u>
Joe Byrd	<u>Yea</u>	Keith Austin	<u>Yea</u>
Shawn Crittenden	<u>Yea</u>	Janees Taylor	<u>Yea</u>
Bryan Warner	<u>Yea</u>	Frankie Hargis	<u>Yea</u>
David W. Thornton, Sr.	<u>Yea</u>	Harley Buzzard	<u>Yea</u>
Don Garvin	<u>Yea</u>	Wanda Hatfield	<u>Yea</u>
Lee Keener	<u>Yea</u>	Jack D. Baker	<u>Yea</u>
Curtis G. Snell	<u>Yea</u>		

# Cherokee Nation Act/Resolution Proposal Form

Act       Resolution

**TITLE: A LEGISLATIVE ACT AMENDING TITLE 12 OF THE  
CHEROKEE NATION CODE ANNOTATED – CIVIL  
PROCEDURE**

<b><u>ADMINISTRATIVE CLEARANCE</u></b>	
<b>Dept/Program:</b>	
Signature/Initial	Date
<b>Group Leader:</b>	
Signature/Initial	Date
<b>Finance (if needed):</b>	
Signature/Initial	Date
<b>Administration Approval:</b>	
<i>Bill John Peter</i>	<i>5-5-16</i>
Signature/Initial	Date
<b><u>LEGISLATIVE CLEARANCE:</u></b>	
<b>Legal &amp; Legislative Coordinator:</b>	
<i>Bullman</i>	<i>5/11/16</i>
Signature/Initial	Date
<b>Standing Committee &amp; Date:</b>	
<i>Rules</i>	<i>5/26/16</i>
<b>Chairperson:</b>	
<i>Byrd</i>	
Signature/Initial	Date
<b>Returned to Presenter:</b>	
	Date

DEPARTMENT CONTACT: Todd Hembree

RESOLUTION PRESENTER: Todd Hembree

COUNCIL SPONSOR: Joe Byrd

**NARRATIVE:**

05-11-16P03:02 RCVD