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Stolen Profits: Civil Shoplifting Demands and the Misuse of Neb. Rev. Stat. § 25–21,194

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Stolen Profits: Civil Shoplifting Demands and the Misuse of NEB. REV. STAT. § 25-21,194

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I. INTRODUCTION

Imagine a prospective client—we’ll call her Samantha Smith—walks into your office and needs your help. She was caught shoplifting Zicam and vitamin C tablets from the local Walmart. Her six-year-old daughter had the flu, and without health insurance, Samantha could not afford prescription medication. A security guard saw the act, confronted her, and led her back to a small room in the rear of the store. The local police arrived after a few minutes and issued her a citation. According to Samantha, she fully cooperated, confessed on the spot, and personally observed the recovered items—valued at approximately \$20—being placed back on the shelf as she left the store.

Surprisingly, however, Samantha did not come to you to discuss her criminal case—all charges were dismissed upon her successful completion of a criminal diversion program.¹ Instead, Samantha

1. Nebraska statute provides for the establishment of voluntary pre-trial diversion programs as an alternative to formal prosecution proceedings. NEB. REV. STAT. §§ 29-3601 to -3604 (Reissue 2008). Matters are referred to the diversion program by the county attorney’s office. Diversion programs typically involve the payment of program fees, attending educational courses, offering an apology to the victim, completing community service, and making restitution to the victim for any losses due to the offense. Upon successful completion of the diversion program, the criminal complaint is dismissed. *See id.* § 29-3603(4). Eligibility requirements vary, but generally a first time offender will qualify for diversion as long as the crime committed was an “eligible offense.” Theft is typically an eligible offense. *See Lancaster County Adult Diversion Program Eligibility Criteria and Program Conditions*, LANCASTER CTY. ATT’YS OFFICE, <http://www.lancaster.ne.gov/attorney/pdf/adultpretrial.pdf> [<http://perma.unl.edu/L7BT-98UP>]; *Adult Felony Diversion Program Information for Applicants*, DOUGLAS CTY. ATT’YS DIVERSION SERV., http://www.judicialdiversion.org/douglas/images/NE_DOU-InformationSheet.pdf [<https://perma.unl.edu/S6C2-RVQS>]; *Sarpy County Adult Diversion*, SARPY CTY. NEB., http://www.sarpy.com/diversion/adult_alcohol_diversion.html [<http://perma.unl.edu/K5NQ-X8MU>].

wants your advice on a letter she received from an attorney representing Wal-Mart Stores. The letter references the shoplifting incident and demands payment of \$200 “in accordance with Nebraska Rev. Stat. § 25-21,194.”² The letter further demands the amount be paid within thirty days, implying further action would be taken upon failure to do so. Confusion sets in. The charges were dismissed and the stolen items were returned to the store’s shelf without damage. On what grounds does Samantha owe the retailer \$200? This must be a scam, you conclude.

Unfortunately, it’s not a scam—at least not one explicitly prohibited by law. Millions of these “civil demand” letters are sent by Wal-Mart and other retailers every year to individuals accused of shoplifting.³ The concept is known as civil recovery⁴ and is authorized by state civil shoplifting statutes.⁵ Retailers often partner with collection firms to capitalize on their statutory *right* of recovery.⁶ Laws authorizing civil recovery vary greatly from state to state, but in most instances allow for a remedy significantly greater than the value of the item stolen.⁷

The Nebraska statute cited by Wal-Mart in its demand letter to Samantha allows for recovery of property damage, cost of suit, and even attorney’s fees incurred in bringing an action.⁸ While Ne-

2. The authors have access to three different form letters sent by the Law Offices of Michael Ira Asen, P.C., a collection firm that sends civil shoplifting demand letters on behalf of Wal-Mart Stores, Inc. The first letter states, in relevant part: “As a result of [the shoplifting] incident, you are liable for a civil demand in the amount of \$200.00. This civil demand is being made in accordance with Nebraska Rev. Stat. § 25-21,194, which allows retailers to recover a civil demand as a result of such incidents.” Letter from Michael Ira Asen, Counsel for Wal-Mart, to [Confidential Client], Nebraska Resident (Confidential Date) (on file with authors) [hereinafter Asen Letter 1]. Upon non-payment, a recipient will likely receive a second letter containing the following language: “Your failure to pay [\$200] may cause Walmart Stores, Inc. [sic] to consider further action to enforce its rights under the law.” Letter from Michael Ira Asen, Counsel for Wal-Mart, to [Confidential Client], Nebraska Resident (Confidential Date) (on file with authors) [hereinafter Asen Letter 2]. The third letter uses language almost identical to that found in the second. Letter from Michael Ira Asen, Counsel for Wal-Mart, to [Confidential Client], Nebraska Resident (Confidential Date) (on file with authors) [hereinafter Asen Letter 3].

3. See Ann Zimmerman, *Big Retail Chains Dun Mere Suspects in Theft*, WALL STREET J. (Feb. 20, 2008, 12:01 AM), <http://www.wsj.com/articles/SB120347031996578719>.

4. *Id.* In the United States, civil-recovery statutes are “law[s] that allow store owners to sue a shoplifter for the value of stolen property. Recovery does not require that the defendant first be convicted of any criminal charge resulting from the incident.” *Civil-Recovery Statute*, BLACK’S LAW DICTIONARY (10th ed. 2014).

5. See *infra* subsection II.A.1.

6. See Zimmerman, *supra* note 3.

7. See *infra* subsection II.A.1.

8. NEB. REV. STAT. § 25-21,194 (Reissue 2008).

braska's law appears fairly straightforward in providing Wal-Mart the right to recover actual damage sustained, it is unclear on what basis Wal-Mart derived this suspiciously round amount of \$200—particularly where the retailer incurred no actual damage. Does the law entitle a Nebraska merchant to account for a portion of its overall expenses related to loss prevention? Can the demand letter seek *anticipated* litigation costs and attorney's fees? Can a retailer demand an amount greater than it may be entitled to under the statute? This Article concludes the answer is “no” to all of the above, and that retailers' practice of demanding arbitrary amounts from Nebraskans under section 25-21,194 is improper, unfair, and deceitful.⁹

Civil shoplifting demand letters put individuals like Samantha at a crossroads: pay it out of fear of the threatened or implied consequences, ignore it and hope it simply goes away, or take affirmative action to challenge the retailer's demand. This is a particularly daunting decision for most recipients given the criminal–civil overlap and the intimidating nature of the letter itself. The demand, after all, is printed on “official” attorney letterhead,¹⁰ and asserts the amount demanded is “in accordance” with state statute. In this way, the letter implies payment of the amount stated is required as a matter of law.¹¹

Assuming a recipient is in a position to fight the claim, on what grounds and through what mechanisms can the demand be challenged? And, considering retailers' misuse of the statute, is legislative action needed? This Article addresses these questions by exploring the origins and nature of civil shoplifting statutes generally, and the legislative history and intent of Nebraska's provision specifically. This Article is intended to serve as a practical blueprint for advising a client who has received a civil demand letter of this nature. To this end, the Article highlights the limitations on recoverable damages

9. The question of the propriety of other states' laws that permit private entities to impose what amount to “fines” without due process of law is for another piece; instead, this Article emphasizes that Nebraska's civil shoplifting statute does not provide for such penalties, and written demands by retailers seeking lump sum payments in the name of the statute are improper.

10. See *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989) (“A debt collection letter on an attorney's letterhead conveys authority and credibility.”).

11. Many notorious “scam” letters are written in a comparable fashion and with a shared intent. Scammers send official-looking letters hoping the recipient will believe the claim is lawful and will be intimidated into paying the amount demanded. Comparably, a first-time shoplifter may be led to believe the amount demanded is a “standard fee”; the tone of Asen's initial letter certainly supports such a presumption. See *Asen Letter 1*, *supra* note 2. The potency of a civil shoplifting demand letter is intensified by the fact that recipients may be too ashamed to seek advice from friends and family with whom they may not want to divulge the fact of their shoplifting incident. Furthermore, recipients may also believe their decision whether to pay will affect their criminal case (even if the letter specifically says otherwise), their credit score, or both.

under Nebraska's civil shoplifting statute and discusses potential legal claims which could be brought against those who abuse or otherwise misapply the statutory cause of action.

Part II provides essential background information on civil recovery, with section II.A discussing the general nature and utilization of civil shoplifting statutes in other jurisdictions and section II.B analyzing Nebraska's civil shoplifting statute and the limitations on recoverable damages under Nebraska law. Part III offers analysis and appraisal of the three options available to letter recipients: ignore it, pay it, or challenge it. This Article concludes that while a state-based consumer claim or a federal extortion-based claim may have merit, most recipients would be wise to simply ignore the demand and use the limitations discussed herein to defend the suit if filed. Lastly, Part IV highlights retailers' frequent misuse of Nebraska's civil shoplifting statute and the inadequacy of the legal remedies available for citizens caught in its web, and thus calls for lawmakers to repeal, amend, or otherwise make sufficiently clear the proper scope and application of the statute.

II. BACKGROUND

A. Civil Shoplifting Statutes Generally

In 2014 alone, shoplifting and other incidents of fraud cost the retail industry nearly \$44 billion.¹² To combat the problem, states impose harsh penalties for acts involving theft. In Florida, for example, shoplifting \$10 worth of merchandise can result in sixty days in jail and up to \$500 in court fines and fees.¹³ Similarly, in Nebraska, shoplifting a candy bar can lead to six months imprisonment, \$1,000 in fines, or both.¹⁴ In addition to these extreme *criminal* penalties, all fifty states have adopted *civil* shoplifting statutes, which provide retailers a special civil cause of action against individuals who shoplift from their stores.¹⁵ These statutes, which operate independently of

12. *National Retail Security Survey 2015*, NAT'L RETAIL FED'N., <https://nrf.com/resources/retail-library/national-retail-security-survey-2015> [<https://perma.unl.edu/73E6-2KBG>]. The report further provides that 34.5% of this amount is attributable to theft by employees (shoplifting comprises 38%). *Id.* Another report covering the same period puts the total loss at \$42 billion, attributing 42.9% to employee theft and 37.4% to shoplifting. *See* Marianne Wilson, *Study: Shrink Costs U.S. Retailers \$42 Billion*, CHAIN STORAGE AGE (Nov. 6, 2014), <http://www.chainstorage.com/article/study-shrink-costs-us-retailers-42-billion-employee-theft-tops-shoplifting> [<https://perma.unl.edu/3WPY-TFBJ>].

13. FLA. STAT. ANN. § 812.014(e)(3)(a) (West 2007); *id.* § 775.083(1)(e) (West 2010); *id.* § 775.082(e)(4)(b) (West 2010).

14. NEB. REV. STAT. § 28-518(4) (Reissue 2008 & Cum. Supp. 2014); *id.* § 28-106(1) (Reissue 2008 & Supp. 2015).

15. *See* Zimmerman, *supra* note 3.

and in addition to the respective state's criminal sanctions,¹⁶ have the stated intent of transferring the costs associated with stolen goods and theft-prevention measures from the retailer to the shoplifter.¹⁷ In this way, the laws operate as cost-shifting statutes, at least in theory, making the shoplifter responsible for loss-prevention costs, as opposed to the merchant (or the merchant's *paying* customers).

1. *General Authority and Amount Recoverable*

The amount of damages recoverable under each state's civil shoplifting statute varies considerably. Of particular significance with these state-by-state distinctions is whether and how much the retailer is able to recover in *additional civil penalties*—those amounts above the actual damages¹⁸—associated with a particular act of theft. In Louisiana, for example, merchants can recover “the retail value of the merchandise taken . . . *plus* damages of not less than fifty dollars nor more than five hundred dollars.”¹⁹ These additional civil penalties

16. *See, e.g.*, NEB. REV. STAT. § 25-21,194(2) (Reissue 2008) (“A conviction under any statute or ordinance shall not be a condition precedent to maintaining an action under this section.”). By not requiring a conviction, not only does civil recovery proceed with little to no judicial oversight, it makes merchants' burden of proof virtually non-existent. In this sense, civil shoplifting statutes raise the same procedural concerns decried by opponents of civil forfeiture statutes. Civil forfeiture statutes permit the government to seize property it *suspects* to be involved in criminal activity and allow law enforcement to keep the property even if no underlying offense is prosecuted, let alone a conviction obtained. *See* Timothy J. Ford, *Due Process for Cash Civil Forfeitures in Structuring Cases*, 114 MICH. L. REV. 455, 457 (2015). The government needs only probable cause to seize the involved property, and since the forfeiture action is in rem—against the property itself—the *owner* must intervene and carry the burden of proving forfeiture is improper. *Id.* at 961–62. Civil forfeiture statutes vary from state to state, but like civil shoplifting statutes, most states' laws do not require a conviction for it to take effect. However, unlike civil shoplifting statutes, most of which have been in their current form for decades, forfeiture statutes have been targeted for reform. *See* Nichole Manna, *With Nebraska Fifth in Receipts from Civil Forfeiture, ACLU Seeks Reforms*, LINCOLN J. STAR (Oct. 20, 2015), http://journalstar.com/news/local/911/with-nebraska-fifth-in-receipts-from-civil-forfeiture-aclu-seeks/article_9881358b-bd9a-5aca-bc08-cb1620bcd63b.html [<https://perma.unl.edu/BYP4-84H2>]. In April, Nebraska abolished civil forfeiture by statute and will now require a criminal conviction to take property. *See* L.B. 1106, 2016 Neb. Laws 856–67.

17. *See* Zimmerman, *supra* note 3.

18. Actual, direct damages would typically include physical damage to the item taken, the value of the item if not recovered, or the cost of repackaging the item.

19. LA. STAT. ANN. § 9:2799.1(A) (2009) (emphasis added); *see* Ourso v. Wal-Mart Stores, Inc., 998 So. 2d 295, 300 (La. Ct. App. 2008) (upholding a \$200 civil penalty even though the accused shoplifter never left the premises and the item was immediately returned in merchantable condition); *see also* 42 PA. CONS. STAT. ANN. § 8308(a)(3) (West 2007) (enabling a retailer to recover the retail value of the merchandise plus \$150); CAL. PENAL CODE § 490.5(c) (West 2010) (allowing a retailer to recover a penalty between \$50 and \$500, plus costs—on top of the

are purportedly designed to help offset the general cost of employing security personnel and maintaining other theft-prevention services.²⁰ Most states also allow for the recovery of court costs and attorney's fees.²¹

In all but one state, convicted shoplifters are subject to two monetary penalties for their crime: the criminal penalty imposed by the court²² plus the civil penalty demanded by the retailer²³ (in addition to the cost of any actual damage caused, whether paid through the civil demand or through an order of restitution). This has potential for extremely disproportionate results. For instance, a person convicted of shoplifting a \$10 item in Mississippi could be required to pay a criminal fine of \$1,000;²⁴ a civil penalty of \$200;²⁵ the retailer's reasonable attorney's fees²⁶ and court costs;²⁷ and be jailed for up to six

retail value of the merchandise, if not recovered in merchantable condition); N.Y. GEN. OBLIG. LAW § 11-105 (McKinney 2010) (bifurcating the amount recoverable by allowing a merchant to recover up to \$1,500 for the value of the item if not returned in merchantable condition, plus a "penalty not to exceed the greater of five times the retail price of the merchandise or seventy-five dollars," with an absolute cap on the penalty of \$500).

20. See Palmer, Reifler & Assocs., *Shoplifting and Civil Law*, NAT'L ASS'N FOR SHOPLIFTING PREVENTION, <http://www.shopliftingprevention.org/what-we-do/learning-resource-center/shoplifting-and-civil-law/> [https://perma.unl.edu/RG89-2CC4] ("Civil theft laws have been enacted by state legislatures to help compensate retailers for the variety of losses, costs and expenses associated with theft and shoplifting generally, and to cover any legal 'damages' associated with these incidents specifically."); Daniel Singer, *Who Is the Victim in Petty Theft?*, CHAIN STORE AGE (June 15, 2015), <http://www.chainstoreage.com/article/who-victim-petty-theft> [https://perma.unl.edu/8AXW-X6T7] ("The statutes, generally, represent a formulaic accounting of the value of the stolen good(s) as well as recoupment of the costs associated with the retailer's loss prevention program."). *But see* Zachary T. Sampson et al., *Tampa Bay Walmarts Get Thousands of Police Calls. You Paid the Bill.*, TAMPA BAY TIMES (May 11, 2016), http://www.tampabay.com/projects/2016/public-safety/walmart-police/?utm_source=fark&utm_medium=website&utm_content=link [https://perma.unl.edu/2ZV4-8UDA] (discussing how Wal-Mart keeps security costs low by overburdening local law enforcement with tasks that would typically be performed by private security).
21. Twenty-eight states' civil shoplifting statutes specifically provide for the award of costs and attorney's fees in the collection of civil remedies involving incidents of shoplifting. See NATIONAL SURVEY OF STATE LAWS (Richard A. Leiter ed., 7th ed. Interim (Online) Update 2016), <https://perma.unl.edu/YG6A-JJ57> (surveying state civil shoplifting statutes).
22. *Shoplifting Laws by State*, NAT'L ASS'N FOR SHOPLIFTING PREVENTION, <http://www.shopliftingprevention.org/category/shoplifting-laws-by-state/> [https://perma.unl.edu/6UKV-N4Y5] (listing the criminal shoplifting statutes for most states).
23. Leiter, *supra* note 21 (providing the shoplifting civil penalty amount for each state).
24. MISS. CODE ANN. § 97-23-93(5)(a) (2014).
25. *Id.* § 97-23-96(1) (2014).
26. *Id.* Mississippi's statute also limits the broad discretion trial courts typically possess in determining reasonable attorney's fees to award. Specifically, subsection (5) provides "[i]n awarding damages, attorney's fees, expenses or costs under this

months.²⁸ Adding to the absurdity, the citizen could be subject to all of this even if the item is immediately returned to the shelf without harm.²⁹

Nebraska's statute is the only state civil shoplifting statute that does not provide for additional civil penalties;³⁰ instead, its law limits the damages that can be collected to only those directly resulting from the particular incident of shoplifting.³¹ Under Nebraska's law, however, the retailer can still seek attorney's fees and litigation costs with no limit stated.³²

2. *Civil Demand Letters*

For retailers, the true value in civil shoplifting statutes lies not in the judgment to which the retailer may be entitled, but rather the threat of litigation that can be asserted or implied in a pre-suit demand letter.³³ Specifically, these statutes expressly authorize, condone, and sometimes require³⁴ retailers to send civil demand letters to alleged³⁵ shoplifters prior to or instead of filing suit.³⁶ In practice, the

section, the court shall not consider the ability of the opposing party to pay such fees and costs." *See id.* § 97-23-96(5).

27. *Id.* § 97-23-96(1).

28. *Id.* § 97-23-93(5)(a).

29. *Id.* § 97-23-96(1) ("The recovery of stolen goods regardless of condition shall not affect the right to the minimum recovery provided herein.").

30. *See Leiter, supra* note 21 (listing the additional civil penalties allowed by each state's civil shoplifting statute); *see also* David Rangaviz, *Shoplifting Punishment Doesn't Fit the Crime*, BALTIMORE SUN (Dec. 3, 2014, 12:04 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-civil-recovery-20141203-story.html> [<https://perma.unl.edu/DPE2-L2UA>] (suggesting other states should follow Nebraska's lead in limiting recovery to *actual* damages).

31. NEB. REV. STAT. § 25-21,194(1)(a) (Reissue 2008).

32. *Id.* § 25-21,194(1)(a)(iii).

33. As stated by criminal defense attorney Michael M. Wechsler in an article on this issue: "The stores hope that a good number of people who receive demand letters will pay them rather than opting for a court hearing." Michael M. Wechsler, *Civil Demand Letters, Retail Theft and Recovery*, THELAW.COM, <http://www.thelaw.com/law/civil-demand-letters-retail-theft-and-recovery.415/> [<https://perma.unl.edu/P2RC-88YQ>]; *see Singer, supra* note 20 (explaining the efficiency and profitability of pre-trial demand letters); *see also infra* notes 41–46 (comparing the volume of demand letters sent to the number of suits actually filed).

34. Under Maryland law, the retailer must send the alleged shoplifter a demand letter "specify[ing] the amount of the civil penalty sought under [the provision] . . . and explain the method of calculating that amount." *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-1303(2)(iii) (LexisNexis 2013). Similarly, retailers in Mississippi must, prior to initiating suit, send the alleged shoplifter a written demand. MISS. CODE ANN. § 97-23-96(2).

35. A criminal conviction is *not* a prerequisite to suit under most state statutes. *See Leiter, supra* note 21 (thirty-three states specifically provide that a conviction for shoplifting or theft is not a condition precedent to maintaining an action for civil recovery; only one state (New Mexico) requires a conviction for shoplifting to impose liability under its civil shoplifting statute).

letter serves the dual function of (a) notifying the alleged shoplifter that the retailer has a statutory right to file suit to collect civil penalties and (b) providing the shoplifter an opportunity to avoid suit by simply cutting a check for the amount demanded. A demand letter recently sent to a Nebraska resident reads in relevant part:

[Y]ou were involved in an incident at a Walmart Stores, Inc. [sic] location that is considered shoplifting, theft or fraud by the state in which the facility is located. As a result of this incident, you are liable for a civil demand in the amount of \$200.00. This civil demand is being made in accordance with Nebraska Rev. Stat. § 25-21,194 which allows retailers to recover a civil demand as a result of such incidents.³⁷

3. *Collection of Damages and Penalties Under Civil Shoplifting Statutes*

To harvest the civil penalties authorized by civil shoplifting statutes, retailers typically partner with law firms or collection agencies that specialize in “civil recovery.”³⁸ These firms, in turn, assume responsibility for mailing the demand letters, interacting with recipients, and seeking satisfaction of the demand. As compensation, the firm typically keeps between 10%–40% of the payments received.³⁹

Despite the fact these collection firms represent the largest retailers in the country⁴⁰ and annually send well over 1 million letters asserting or implying the threat of legal action,⁴¹ they rarely file suit.

36. See, e.g., NEB. REV. STAT. § 25-21,194(6) (“The fact that an owner of merchandise may commence an action under this section shall not limit the right of such owner to demand, in writing, that any person who is liable for damages and costs under this section remit such damages and costs prior to the commencement of an action.”).

37. Asen Letter 1, *supra* note 2.

38. See Zimmerman, *supra* note 3.

39. See *id.* (stating Palmer Reifler, a firm specializing in civil recovery, keeps somewhere between 13% and 30% of what it collects); cf. Richard Dunstan, *The End of the Road for Civil Recovery?*, JUST. GAP, <http://thejusticegap.com/2014/08/end-road-civil-recovery/> [<https://perma.unl.edu/CTF8-MPB2>] (stating civil recovery firms in Britain often take up to 40% of any payments made).

40. For example, Asen claims to serve four of the five largest retailers in the United States. See *About*, LAW OFFICES OF MICHAEL IRA ASEN, P.C., <http://www.asenlaw.com/about/> [<https://perma.unl.edu/5NSH-S9GY>]. Asen’s website does not list precisely which large chains it represents, but for context, the ten largest retailers in 2014 were: Wal-Mart, Kroger Grocery Stores, Costco, Target, The Home Depot, Walgreens, CVS Caremark, Lowe’s, Amazon.com, and Safeway. *Top 100 Retailers Chart 2014*, NAT’L RETAIL FED’N, <https://nrf.com/2014/top100-table> [<https://perma.unl.edu/Q5MZ-3SCR>]. Palmer Reifler also specializes in civil shoplifting penalty collection for major retailers. See *A Civil Recovery Law Firm*, LAW OFFICES OF PALMER REIFLER & ASSOCIATES P.C., <http://www.palmer-reiflerlaw.com/> [<https://perma.unl.edu/F44V-LGZ3>].

41. See Zimmerman, *supra* note 3 (reporting Palmer Reifler estimates it sends 1.2 million demand letters per year); *Stores Have Free Rein to Recoup Shoplifting Losses*, CRAIN’S N.Y. BUS. (Dec. 16, 2013), http://www.crainnewyork.com/article/20131216/RETAIL_APPAREL/131219905/stores-have-free-rein-to-recoup-shop-

For example, a partner at Palmer, Reifler & Associates (Palmer Reifler), one of the nation's largest civil collection firms, estimates the firm files suit under civil shoplifting statutes only ten times per year.⁴² Lord & Taylor, a popular retailer, "never follows up civil-demand letters by suing suspected shoplifters, . . . citing the cost of going to court."⁴³ Instead, retailers and their partners utilize civil shoplifting statutes, which some view as a virtual "shakedown,"⁴⁴ to intimidate unrepresented and unsophisticated recipients into paying the demand. When the initial demand letter goes unanswered, collection firms often send additional letters that escalate the threat of litigation⁴⁵ or progressively raise the amount demanded to include "pre-litigation" expenses,⁴⁶ thus suggesting the firm intends to and even is preparing for litigation (despite the fact they almost never file suit).

There is little available data indicating what percentage of the demand letters mailed result in payment of the penalty.⁴⁷ However,

lifting-losses [<https://perma.unl.edu/WU25-FXL6>] (noting Palmer Reifler sends out about 115,000 demand letters per month).

42. See Zimmerman, *supra* note 3. That means one of every 120,000 letters sent, or 0.000083%, result in suit, assuming the firm actually files ten per year. Although a number of cases were identified where Palmer Reifler had been sued by consumers and retailers, no cases were found that had been filed by Palmer Reifler on behalf of a retailer seeking damages pursuant to a civil shoplifting statute.
43. *Id.* Despite never going to court, Lord & Taylor reportedly made \$1 million in a year from its civil recovery efforts, a figure that was a 15% increase from the year prior. *Id.*
44. Walter Hanstein III, an attorney from Maine, complained about Palmer Reifler's use of civil demand letters as a "shakedown" tool to the Florida Bar; the firm maintains the letters are more properly characterized as "a first alternative dispute measure." *Id.* While the Florida Bar declined to get involved without guidance from the courts, it did chastise the firm: "[Y]our methods and professionalism in sending demand letters and subsequent collections activities are questionable." Jason Garcia & Harry Wessel, *Lawsuit Slams Practices of Law Firm Owned by Airport Board Appointee*, ORLANDO SENTINEL (July 9, 2008), http://articles.orlandosentinel.com/2008-07-09/news/palmer09_1_reifler-palmer-civil-recovery [<https://perma.unl.edu/5JUA-CLLU>].
45. Compare Asen Letter 1, *supra* note 2, with Asen Letter 2, *supra* note 2; see Zimmerman, *supra* note 3 (describing the practice of sending multiple letters with an escalating amount to account for "pre-litigation" expenses); Al Norman, *Banned from 4,540 Walmarts*, HUFFINGTON POST (June 26, 2015, 3:22 PM), http://www.huffingtonpost.com/al-norman/banned-from-4540-walmarts_b_7147414.html [<https://perma.unl.edu/8F22-NURS>] (describing the common three-letter progression).
46. See Zimmerman, *supra* note 3. Somewhat ironically, Asen does not increase the amount demanded in subsequent letters, believing that doing so would be "gouging." *Id.*; see also Singer, *supra* note 20 (discussing the implications of collection firms adding attorney's fees to pre-litigation demands).
47. See Colleen Long, *In Focus: Are Shoplifters Being Shaken Down?*, PORTLAND PRESS HERALD (Dec. 17, 2013), http://www.pressherald.com/2013/12/17/in_focus_free_rein_for_retailers_are_shoplifters_being_shaken_down/ [<https://perma.unl.edu/4GGQ-TQFD>] ("Retailers don't divulge how much money they recoup but use it in part to offset security costs, said Barbara Staib, spokeswoman for the

given the official nature and threatening tone of the letters, the risks of non-payment, and the fact that most recipients of the letters are likely under-informed and lack access to legal representation, one could assume the hit rate to be substantial. Even a moderate response rate could produce a massive revenue stream for the retailer and its attorneys—if only 10% of the demand letters sent annually by Palmer Reifler resulted in payment, the amount collected could exceed \$20 million.⁴⁸

B. An Overview of Nebraska’s Civil Shoplifting Statute

Nebraska’s civil shoplifting statute, codified at section 25-21,194, has remained unchanged since its adoption in 1987.⁴⁹ The provision allows merchants to recover three types of damages: (1) actual damages sustained as a direct result of the incident, (2) costs of maintaining the action, and (3) attorney’s fees.⁵⁰ Furthermore, it specifically provides that retailers, prior to initiating suit, may “demand, in writing, that any person who is liable for damages and costs *under this section* remit such damages and costs prior to commencement of an action.”⁵¹ Notably, Nebraska’s law permits, but does

National Association for Shoplifting Prevention.”); *but see* THE EUGENE POLICE DEP’T: CRIME PREVENTION UNIT, SHOPLIFTING MERCHANT MANUAL 14 (2012), <http://www.eugene-or.gov/DocumentCenter/Home/View/6136> [hereinafter MANUAL] [<https://perma.unl.edu/UD9L-BSFC>] (“Experience by retailers using similar laws in other states indicates that if correct procedures are followed, more than 80% of shoplifting suspects will pay the penalty upon the demand.”); Patrick Rossello, *A Retailer’s Nightmare: Shoppers and Clerks Who Steal*, BALT. SUN (Aug. 5, 1991), http://articles.baltimoresun.com/1991-08-05/business/1991217186_1_shop_lifter-retailer-theft [<https://perma.unl.edu/8UZW-AR9M>] (reporting on data received from the Maryland Retail Merchants Association that “between 35 and 60 percent of the shoplifters will simply pay the fee”).

48. This figure assumes a \$200 demand. Note that a response rate of 80%—as suggested by the Eugene Police Department—would result in revenue totaling roughly \$192 million. *See* MANUAL, *supra* note 47, at 14; *see also* Melissa G. Davis et al., *Private Corporate Justice: Store Police, Shoplifters, and Civil Recovery*, 38 SOC. PROBS. 395, 396 (1991) (“In states with statutes inviting large exemplary damages, catching shoplifters can be a profitable activity for a store and its police.”); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 122 (2004) (comparing criminal prosecution to civil recovery and noting that civil recovery can be profitable for some businesses).

49. NEB. REV. STAT. § 25-21,194 (Reissue 2008).

50. *Id.* § 25-21,194(1).

51. *Id.* § 25-21,194(6) (emphasis added). Arguably, the provision does not actually provide any *authority* to send the demand letter, given pre-suit demands are already permissible under common law (as long as the demand is not misleading or deceptive). Instead, this paragraph simply preserves such a right in this particular context, and makes clear that this section does not “limit” a retailer’s right to send such a letter. But, why did the legislature feel it necessary to include a provision that confirms the absence of a limitation? An alternate reading could be that the provision was intended to permit a retailer to demand through a pre-litigation letter *all* damages and costs for which the shoplifter would be liable if a

not require, retailers to send a demand letter prior to initiating suit.⁵²

1. *The Origins of Nebraska's Civil Shoplifting Statute*

Nebraska's civil shoplifting statute was introduced as Legislative Bill (L.B.) 536 and the Judiciary Committee held its first public hearing on the Bill on March 20, 1987.⁵³ The Bill, as originally drafted, provided retailers a civil cause of action against shoplifters to recover "[a]ctual property damage or loss sustained as a direct result of the incident of shoplifting" and "reasonable cost of security personnel" not to exceed to \$150.⁵⁴ This language aligned with legislation in other states which permits retailers to recover a "penalty" in addition to actual damages.⁵⁵

Testifying in support of L.B. 536 were Fred Stone, the President of the Retail Merchants Association; John Hanlon, a California representative from Target Brands, Inc.; Richard Laucks from Shopko Stores, Inc.; and Russell Raybould, President of the Nebraska-based B&R Stores, Inc.⁵⁶ Together, these representatives testified not only to the rising costs incurred as a result of shoplifting but also to the alleged positive results that civil shoplifting statutes produced in other juris-

suit was brought (i.e., damages, costs, and attorney's fees). Though it would be a stretch, an argument could be made that subsection (6) serves no true purpose unless it creates a special right to demand anticipated litigation expenses. The corollary to this argument would be that "damages and costs under this section" was intended to encompass anything for which a shoplifter could be liable at trial. The question, then, is whether "damages and costs under this section" includes all harm suffered by the retailer, including pre-litigation costs and attorney's fees, or is it limited to damages and costs related to the product stolen, as described in subsection (i). Or, is it intended to encompass the damages listed in subsection (i) and the costs listed in subsection (ii) but not the attorney's fees listed in subsection (iii)?

52. Cf. *supra* note 34 and accompanying text (discussing state provisions requiring demand letters be sent). Nebraska's other commonly used civil demand statute, section 25-1801, requires a written demand be made in writing no less than ninety days prior to initiating suit. See NEB. REV. STAT. § 25-1801 (Reissue 2008 & Cum. Supp. 2014).
53. *Hearing on L.B. 536 Before the Comm. on Judiciary*, 1987 Leg., 90th Sess. (Neb. 1987) [hereinafter *Hearing*].
54. L.B. 536, 1987 Leg., 90th Sess. (Neb. 1987). Another provision permitted retailers to demand civil penalties from parents or legal guardians for the tortious conduct of a minor. *Id.* The provision received a lot of interesting commentary from legislators concerned about the inevitability that the state would be liable to merchants whenever a state ward was caught shoplifting. *Floor Deb. on L.B. 536*, 1987 Leg., 90th Sess. (Neb. Apr. 15, 1987). The guardian-liability provision passed, but not until an exception precluding recovery from the state was added. *Id.*
55. See *Leiter, supra* note 21 (providing a fifty state survey of state civil shoplifting statutes).
56. *Hearing, supra* note 53.

dictions.⁵⁷ John Hanlon of Target claimed that California’s civil shoplifting statute—passed in 1984—fueled a 29% reduction in juvenile shoplifting apprehensions.⁵⁸ Similarly, according to Hanlon, California’s provision reduced juvenile recidivism—at least with respect to repeat shoplifting offenses—“to zero.”⁵⁹ Surprisingly, none in attendance challenged these seemingly implausible statistics;⁶⁰ unsurprisingly, no one testified on behalf of those accused of shoplifting.

2. *The Statute as Amended*

The Judiciary Committee, prior to advancing L.B. 536 to the floor, removed the provision that permitted retailers to collect up to \$150 in civil penalties to cover the cost of security personnel,⁶¹ noting concerns that \$150 would become the “standard cost” demanded by retailers and that such penalties would be oppressive to vulnerable classes, such as children and senior citizens.⁶² In doing so, the committee effectively limited recoverable damages to those sustained “as a *direct result*” of the incident of shoplifting.⁶³ The legislation as introduced and passed on the legislative floor read in full:

- (1)(a) Any person who **commits the crime of theft by shoplifting** as provided in section 28-511.01 or whose conduct is described by section 28-511.01 or (b) the parents of a minor who commits the crime of theft by shoplifting as provided in section 28-511.01 or whose conduct is described by section 28-511.01 shall be **liable to the owner of the merchandise in a civil action** for:
 - i. **Actual property damage or loss sustained as a direct result of the incident of shoplifting**, which may include, but shall not be limited to, full retail value, cost of repair, or cost of replacement of the merchandise;
 - ii. **Costs of maintaining the action**; and
 - iii. **Reasonable attorney’s fees** if such owner has retained the services of an attorney in maintaining the action and the action is not in the Small Claims Court.
- (2) A conviction under any statute or ordinance shall not be a condition precedent to maintaining an action under this section.
- (3) Recovery under this section may be had in addition to, and shall not be limited by, any other provision of law which limits the liability of the parents for tortious conduct of a minor. The liability of the parents and the minor shall be joint and several.
- (4) This section shall not prohibit or limit any other cause of action which the owner of merchandise may have against a person who unlawfully or wrongfully takes merchandise from the owner’s store or retail establishment.
- (5) Judgments, but not claims, arising under this section may be assigned.

57. *See id.*

58. *Id.*

59. *Id.* It is unclear what metrics Mr. Hanlon used in providing this testimony.

60. *See id.*

61. *Id.*

62. *Floor Deb. on L.B. 536*, 1987 Leg., 90th Sess. (Neb. Apr. 15, 1987).

63. NEB. REV. STAT. § 25-21,194(1)(a)(i) (Reissue 2008) (emphasis added).

- (6) The fact that an owner of merchandise may commence an action under this section **shall not limit the right of such owner to demand, in writing, that any person who is liable for damages and costs under this section remit such damages and costs prior to the commencement of an action.**
- (7) This section shall only apply to causes of action which accrue after August 30, 1987.
- (8) For purposes of this section, minor shall mean any individual under seventeen years of age.
- (9) Notwithstanding any other provision of this section, no parent shall be liable to the owner of merchandise in a civil action unless such minor is living with such parent at the time the conduct described by section 28-511.01 is committed.⁶⁴

3. *Limits on Pre-Litigation Demands Under NEB. REV. STAT. § 25-21,194*

Nebraska's civil shoplifting statute expressly preserves retailers' rights to issue demand letters prior to filing suit.⁶⁵ Presumably, the amount a retailer can demand pursuant to the statute is limited to the extent of the shoplifter's liability under such statute.⁶⁶ Thus, in determining the legality and legitimacy of a retailer's pre-litigation demand, one must first consider the amount and type of damages that are—and are not—recoverable under Nebraska's civil shoplifting statute.

Section 25-21,194(1)(a)(i) provides that retailers are entitled to “[a]ctual property damage or loss sustained *as a direct result* of the incident of shoplifting, which may include, but shall not be limited to, full retail value, cost of repair, or cost of replacement of the merchandise.”⁶⁷ Unlike civil shoplifting statutes in other states or the original language proposed in L.B. 536, Nebraska's statute does not provide authority to charge “penalties” or to seek reimbursement of “general security costs.”⁶⁸ Instead, Nebraska's statute permits only costs in-

64. *Id.* § 25-21,194 (emphasis added in bold). The law has remained unchanged since its adoption.

65. *Id.* § 25-21,194(6); *see also supra* note 51 (discussing the underlying purpose of subsection (6)).

66. A demand that exceeds what is allowed under the law may be deemed unfair or deceptive and subject to civil penalty. *See infra* subsection III.C.2 (discussing the potential applicability of the Nebraska Consumer Protection Act). An individual sending such a demand may also be found guilty of extortion. *See State v. Hynes*, 978 A.2d 264 (N.H. 2009) (holding an attorney's demand for money amounted to extortion where the statutory support cited in the demand permitted only recovery of compensatory damages (direct harm), and the attorney had suffered no direct harm). If the demand has any basis in the law, however, it may find protection as First Amendment free speech. *See Sosa v. DirectTV, Inc.*, 437 F.3d 923, 939–40 (9th Cir. 2006) (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)) (confirming pre-litigation communications are protected speech, unless objectively baseless and brought with improper motive).

67. NEB. REV. STAT. § 25-21,194(1)(a)(i) (emphasis added).

68. *See id.*; L.B. 536, 1987 Leg., 90th Sess. (Neb. 1987).

curred “as a *direct* result” of the incident.⁶⁹ It follows, then, that the maximum amount of damages recoverable under subsection (i) would be the full retail value of the merchandise, but only if the item was damaged beyond repair or was not recovered. If the item was returned in merchantable condition or the shoplifter ultimately paid for the item, there are no subsection (i) damages to recover.

Recall the hypothetical client, Samantha Smith, who was caught stealing \$20 worth of merchandise from Walmart, and later received a civil demand letter seeking \$200 in damages “in accordance with [Section] 25-21,194.”⁷⁰ Under subsection (i), Wal-Mart Stores would be entitled to \$200 only if it incurred \$200 in damages as a direct result of Samantha’s actions, which is not supported on the facts. Because the items were immediately returned to the shelf in merchantable condition, Wal-Mart could not include their \$20 value in its calculation of damages.⁷¹ What other “damages” were incurred as a direct result of her actions? Though the statute does not permit the retailer to claim general expenses related to security, it could, arguably, attempt to quantify overhead costs expended on this particular incident. For example, assume it took two security guards—making \$15 per hour—one hour each to apprehend her, complete all the paperwork, and put the item back on the shelf.⁷² Presumably, then, Wal-Mart could claim actual measurable damages resulting from this incident were roughly \$30 all in.⁷³

69. NEB. REV. STAT. § 25-21,194(1)(a)(i) (emphasis added).

70. See *supra* Part I; Asen Letter 1, *supra* note 2.

71. Even if Wal-Mart established the items were damaged, tainted, or otherwise unsellable, the total amount of damage would be \$20, not \$200.

72. Since Samantha completed the diversion program, no Wal-Mart employee was required to leave work to testify at court, nor was it necessary for Wal-Mart to conduct any further investigation, such as reviewing the video surveillance or providing a copy of the same to the county attorney.

73. Although a retailer could argue that the hourly wages of any employees forced to address the shoplifting incident are recoverable as direct damages, the argument would likely fail. First, this is not the type of “[a]ctual property damage or loss” contemplated by the legislature, as is revealed by the few examples provided therein. See NEB. REV. STAT. § 25-21,194(1)(a)(i). Moreover, the retailer would have difficulty establishing the incident resulted in the payment of a greater amount of wages than would have been paid absent the incident, where the security personnel are paid hourly and the expense would have been incurred regardless. A different result may be found, however, if the retailer paid a commission or bonus to the employee who spotted or apprehended the shoplifter. See Barbara Huber, *The Dilemma of Decriminalization: Dealing with Shoplifting in West Germany*, CRIM. L. REV. 621, 627 n.11 (1980) (contrasting an award paid to an employee for detecting a shoplifter, for which a shoplifter would be liable, with the cost of hiring additional staff to deal with theft, which cannot be recovered as damages from the thief). However, such compensation policies are rarely used, if not extinct. In fact, Wal-Mart policies now prohibit employees, other than management or asset-protection personnel, from stopping or apprehending a shoplifter caught in the act. See *It Doesn't Always Pay to Be a Shoplifter*

That said, Wal-Mart is likely not calculating its demands on a case-by-case basis; instead, Wal-Mart has perhaps determined the arbitrary amount of \$200 to be the “sweet spot”—enough to be lucrative, but not so much that a recipient is likely to consider contacting legal counsel before paying it.⁷⁴ One could imagine Wal-Mart testing out other amounts, such as \$100⁷⁵ or \$300, concluding \$200 had the best overall payout. Just as likely, Wal-Mart may demand \$200 because it thinks it’s entitled to it—after all, many state statutes permit retailers to recover at least \$200 in penalties regardless of the damage sustained.⁷⁶ Nevertheless, neither of these “justifications” authorize the

Superhero, LAWYERS.COM, <http://labor-employment-law.lawyers.com/human-resources-law/it-doesnt-always-pay-to-be-a-shoplifter-superhero.html> (last visited Jan. 15, 2016) [<https://perma.unl.edu/5CDS-W5LH>]. This follows the policy Wal-Mart unveiled in 2006, which relaxed its previous “prosecute everybody” policy, and discourages prosecution for thefts of items under \$25. See Michael Barbaro, *Wal-Mart Eases Policy on Petty Shoplifters*, N.Y. TIMES, <http://www.nytimes.com/2006/07/13/business/worldbusiness/13iht-wal-mart.2190898.html> [<https://perma.unl.edu/K84M-T7G7>].

74. A similar strategy is employed by “Patent Trolls”—companies and their attorneys who file thousands of frivolous suits claiming infringement of their patent. See *Patent Troll*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/patent-troll.asp> [<https://perma.unl.edu/Q3ML-UD64>]. For a satirical observation of the practice, see Last Week Tonight, *Last Week Tonight with John Oliver: Patents (HBO)*, YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA [<https://perma.unl.edu/Y7X9-QT6Q>]. These companies rarely follow through with litigation, but instead aim to collect an amount of money the victim perceives to be less than the cost of legal fees to defend the claim. *Id.* at 5:52 to 6:40. These companies, like those sending out civil demand letters to Nebraskans, utilize the fear of potential legal costs to extort money from those who are either not in a position to know their rights or are making a calculated decision to pay out the “moderate amount” demanded in order to avoid the cost of defending themselves in a suit—a cost which will greatly exceed the amount demanded.
75. See PALMER, REIFLER & ASSOCS., CIVIL THEFT DEMAND AMOUNTS (2006), http://www.accessgpo.com/sites/operations_lp/Case%20Forms/2015%20CIVIL%20Demand%20with%20US%20Statutes%20+%20Intl.pdf [<https://perma.unl.edu/GJ5D-PLLB>] (indicating that in 2006 Palmer Reifler identified \$100 as the typical demand amount in Nebraska).
76. See *supra* subsection II.A.1. Retailers and their legion of collection firms may also be operating under the guidance of a response letter issued by the Office of the Nebraska Attorney General in 2001, which indicated a retailer could seek in a demand letter more than just the amount of lost merchandise, e.g., “additional employee, insurance and anti-theft devices.” Letter from Don Stenberg, Nebraska Attorney General, to [Undisclosed Party], Attorney at Law (May 11, 2001) (on file with authors). The letter is not a Nebraska Attorney General Opinion Letter, but instead appears to have been sent in response to an attorney’s inquiry into the legality of a \$200 civil demand sent by a retailer (or collection firm) to his or her client, who had apparently stolen \$4 worth of merchandise. See *id.* The attorney general’s response does not reference Nebraska’s civil shoplifting statute; in fact, it does not mention shoplifting at all. See *id.* Instead, it more generally opines that a demand for money is an offer of settlement—an offer that the recipient can either accept or reject. *Id.* On that ground, it appears, the attorney general found the matter required no further inquiry. The actual contents of the

\$200 amount Wal-Mart demanded from Samantha Smith, particularly considering the unique limitations of Nebraska's statute.

Discussed in more detail below are two other possible bases for the \$200 figure. First, it is conceivable that Wal-Mart and its attorneys, in ignorance of the history of Nebraska's law, derived the \$200 figure as an amount reasonable to reimburse a portion of the millions of dollars it spends nationally on general loss-prevention efforts and shoplifting-related product shrinkage. Alternatively, perhaps the \$200 figure aims to seek *preemptive* litigation costs, e.g., the costs of filing suit and attorney's fees it *could* recover if it filed suit. The subsections below provide an argument for why these grounds also fail to support Wal-Mart's \$200 demand.

a. General Loss-Prevention Costs

Many civil shoplifting statutes have the intent of shifting the financial burden associated with stolen goods and theft-prevention measures from the retailer to the shoplifter.⁷⁷ To this end, most statutes expressly permit retailers to demand not only the full retail value of the damaged or stolen merchandise, but also a general civil penalty—in some states, up to \$500—to help offset the cost of theft-prevention measures, such as surveillance cameras and security personnel.⁷⁸ Nebraska's statute is unique, however, in that its plain text and legislative history preclude recovery of general theft-prevention costs.

Pursuant to section 25-21,194(1)(a)(i), individuals accused of shoplifting in Nebraska are civilly liable to the owner of the merchandise for “[a]ctual property damage or loss sustained as a direct result of the incident of shoplifting, which may include, but shall not be limited to, full retail value, cost of repair, or cost of replacement of the merchan-

demand letter are unknown. Arguably, if the demand letter simply sought the payment of \$200 for damages incurred, and did not cite the statute in support of the amount claimed, then the letter, as the attorney general apparently found, was merely an offer to settle a claim for conversion. Nebraska's civil shoplifting statute does not limit a retailer's right to bring a common law conversion claim, nor does it limit its right to seek settlement of such claim prior to filing suit. A plaintiff may make a demand or even seek damages in suit in an amount greater than he may be entitled as long as such claim has some objective basis. See *supra* note 66. If, on the other hand, the referenced letter demanded \$200 pursuant to section 25-21,194, considering the attorney general's expressed view on indirect damages, it is likely the attorney general's office was simply uninformed of the statute's legislative history. Were this the case, it would further support the plea for statutory amendment to clarify the limitations of the damage provision. See *infra* section IV.B.

77. See Zimmerman, *supra* note 3; see also *supra* subsection II.B.1 (discussing how Nebraska's originally proposed bill included a damage provision that accounted for “reasonable cost[s] of security personnel”).

78. See *supra* subsection II.A.1.

dise.”⁷⁹ The use of “actual” and “direct result” suggest *general* and *indirect* theft-prevention costs are not recoverable under the statute. As further evidence of this notion, the listed examples of possible “losses sustained” are narrowly restricted to acute loss: full retail value, cost of repair, or cost of replacement of the merchandise.⁸⁰ Although the provision also includes the boilerplate “which may include, but shall not be limited to” language, the examples listed thereafter all pertain to damage to “*the merchandise*” as a result of “*the incident*.”⁸¹

Whereas Nebraska’s statute provides clear authority to recover damages “as a direct result of the incident of shoplifting,”⁸² the law contains no provision permitting retailers to account for broader theft-prevention costs in calculating recoverable damages. The plain language of the statute seems to leave little room for squabble as to the intent of the legislature in this regard. Nevertheless, any conceivable uncertainty would be unmistakably resolved upon review of the statute’s legislative history.⁸³ Most notably, the Judiciary Committee, prior to advancing L.B. 536 to the floor, amended the Bill to remove the provision that would have allowed retailers to recover the “reasonable cost of security personnel” not to exceed \$150.⁸⁴

Senator Gerald Chizek, a sponsor of Nebraska’s civil shoplifting statute, provided several reasons for removing the \$150 penalty provision when he introduced the Bill on the floor of the legislature.⁸⁵ Senator Chizek noted the Judiciary Committee’s concern “that the \$150

79. NEB. REV. STAT. § 25-21,194(1)(a)(i) (Reissue 2008) (emphasis added).

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.*

83. Nebraska courts may look to legislative history to resolve issues of statutory interpretation when the text is unclear or ambiguous. *See Synergy4 Enters. v. Pinnacle Bank*, 290 Neb. 241, 244–45, 859 N.W.2d 552, 556 (2015) (“In order for a court to inquire into a statute’s legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.”). It is hard to imagine how the relevant language of section 25-21,194 could be open to construction, but even if it were, the law permits a court to browse the legislative history to verify the lawmakers’ intent. *See Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 28–29, 430 N.W.2d 34, 39 (1988) (“When asked to interpret a statute, the Supreme Court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is our duty to discover, if possible, legislative intent from the statute itself. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.” (citations omitted)).

84. *Hearing, supra* note 53.

85. *See Floor Deb. on L.B. 536*, 1987 Leg., 90th Sess. (Neb. Apr. 15, 1987).

maximum cost would probably become the standard.”⁸⁶ Further, charging \$150 beyond the actual damages sustained, the committee reasoned, “would be oppressive to the [sic] two of the most vulnerable groups, children and perhaps senior citizens.”⁸⁷ To illustrate these potentially “oppressive” results, Senator Chizek described a situation in which a child could shoplift \$10 worth of merchandise and be saddled with a \$150 civil penalty.⁸⁸ Similarly a senior citizen could absentmindedly place a small item in his or her purse or pocket: “This senior citizen would not only suffer the destruction of their good name but could have been taxed with costs up to \$150.”⁸⁹ Notably, this \$150 civil penalty would be in addition to whatever fine or penalty was imposed in the criminal proceeding.

The plain text of section 25-21,194 and the relevant legislative history make clear the civil shoplifting statute provides no authority for merchants to claim or attempt to recover damages for general theft-prevention costs. Applying this reasoning and conclusion to Samantha Smith’s case, Wal-Mart’s demand for \$200 “in accordance with Nebraska Rev. Stat. § 25-21,194”⁹⁰ is unsupported by the statute if any portion of the amount is attributed to general security expenses incurred by Wal-Mart.

b. Anticipated Litigation Expenses

The collection of preemptive litigation costs is likewise not authorized by Nebraska’s civil shoplifting statute. First, section 25-21,194(a)(1)(iii) provides for attorney’s fees *only* “if such owner has retained the services of an attorney *in maintaining the action . . .*”⁹¹ Without any action having been maintained, there can be no attorney’s fees to claim or court costs to recover. Moreover, the provision allowing demand letters (section 25-21,194(6)) mentions pre-litigation recovery of “damages” and “costs”—noticeably absent is any reference to attorney’s fees.⁹²

The statute permits retailers to send a letter to the alleged shoplifter demanding that “damages and costs” relating to the incident be

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Asen Letter 1, *supra* note 2.

91. NEB. REV. STAT. § 25-21,194(a)(1)(iii) (Reissue 2008) (emphasis added). The term “maintain” imports the existence of a cause of action. *Maintain*, BLACK’S LAW DICTIONARY (6th ed. 1990); *see also infra* note 281 (discussing the term further).

92. NEB. REV. STAT. § 25-21,194(a)(6) (“The fact that an owner of merchandise may commence an action under this section shall not limit the right of such owner to demand, in writing, that any person who is liable for *damages and costs* under this section remit such *damages and costs* prior to the commencement of an action.” (emphasis added)).

paid “prior to commencement of an action.”⁹³ It is unclear to what “costs” this subsection refers. Subsection (1) discusses “costs” only twice: in (i) it describes the “cost of repair, or cost of replacement of the merchandise”;⁹⁴ and in (ii) it lists “[c]osts of maintaining the action.”⁹⁵ Arguably, if there is no action filed, there can be no “costs of maintaining the action,” so the only costs to which subsection (6) could refer is the “costs” listed in subsection (i), which describe the potential loss sustained as it pertained to “the merchandise” stolen.⁹⁶

Even if “costs” was interpreted more broadly, it certainly would not include attorney’s fees. First, attorney’s fees are not identified by the statute as a “cost,” but are instead listed entirely separate from the provisions addressing damages and costs.⁹⁷ Moreover, the imposition of or demand for preemptive attorney’s fees, or even those fees actually incurred in making the demand, would be improper prior to the commencement of suit. In Nebraska, the award of attorney’s fees is generally inappropriate except where provided by statute,⁹⁸ and even then, only if pleaded and proven in a civil action.⁹⁹

Illustrative of this point is section 25-1801,¹⁰⁰ a general civil demand statute, which provides for the recovery of attorney’s fees in certain civil actions where damages do not exceed \$4,000, and only when specific conditions are satisfied. The statute expressly sets forth when attorney’s fees are recoverable: when the defendant refuses to pay a demand for payment within the time proscribed by statute, *and* the plaintiff thereafter secures a judgment on the claim.¹⁰¹ Under this

93. *Id.*

94. *Id.* § 25-21,194(a)(1)(i).

95. *Id.* § 25-21,194(a)(1)(ii).

96. *Id.* § 25-21,194(a)(1)(i).

97. *See id.* § 25-21,194(a)(1)(iii); *see also* *Wetovick v. Cty. of Nance*, 279 Neb. 773, 797, 782 N.W.2d 298, 318 (2010) (“The term ‘costs’ in a statute is not generally understood to include ‘attorney fees.’”).

98. *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N.W. 836, 838 (1937) (“The general rule in this state as to the allowance of attorneys’ fees has been stated by this court as follows: ‘It is the practice in this state to allow the recovery of attorneys’ fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery.’” (quoting *Higgins v. Case Threshing Mach. Co.*, 95 Neb. 3, 144 N.W. 1037, 1039 (1914))).

99. *Haley v. Fleming*, 148 Neb. 407, 27 N.W.2d 626 (1947) (finding a party must plead and prove conditions precedent to be entitled to allowance of an attorney’s fee).

100. NEB. REV. STAT. § 25-1801 (Reissue 2008 & Cum. Supp. 2014); *see infra* section IV.A (discussing section 25-1801).

101. NEB. REV. STAT. § 25-1801; *see also* *Powers v. Credit Mgmt. Servs., Inc.*, No. 8:11-cv-00436-JFB-TDT, at *21 (D. Neb. Feb. 2, 2016) (“Nebraska law does not authorize collection of interest or attorney fees absent a judgment.”); *cf.* *Hage v. Gen. Serv. Bureau*, 306 F. Supp. 2d 883, 888 (D. Neb. 2003) (“[The defendant] admits that it recovered attorney fees, costs and interest without obtaining a judgment. The court finds as a matter of law that Neb.Rev.Stat. § 25-1801 does not permit collection of amounts in excess of the debt without first obtaining a judgment.”).

statute, even if the claimant files suit, attorney's fees are not recoverable if the defendant pays the demand (and costs) prior to the judgment being entered.¹⁰²

Conversely, the civil shoplifting statute specifically permits "[r]easonable attorney's fees if such owner has retained the services of an attorney *in maintaining the action . . .*"¹⁰³ Thus, although a favorable "judgment" is not an expressly identified prerequisite to an award of attorney's fees under section 25-21,194, both section 25-21,194 and section 25-1801 require, at the least, the filing of a civil action before attorney's fees are recoverable.¹⁰⁴ The deliberate action taken by the legislature in identifying when attorney's fees are recoverable under sections 25-1801 and 25-21,194 demonstrates its intent that attorney's fees not be recoverable prior to "maintaining the action,"¹⁰⁵ and thus inclusion of such fees in a pre-suit demand is inappropriate, misleading, and unconscionable.¹⁰⁶

III. ADVISING THE CLIENT

As discussed, a recipient of a civil demand letter of the type received by Samantha Smith has three options: pay the amount demanded, ignore the letter entirely, or preemptively file suit. Paying the demand may provide peace of mind, but doing so will cost them \$200 and reward the retailer for its abuse of the civil shoplifting statute. Ignoring the letter is the no-cost and low-risk option, but if the retailer does file suit, the recipient of the letter could incur costs that far exceed the original \$200 demanded (namely, liability for the retailer's attorney's fees). If the particular circumstances call for preemptive action, the Nebraska Consumer Protection Act or a declaratory action (or both) may provide relief. The following sections

[The defendant's] practice of routinely collecting these amounts in reliance on the statutory grant contained in Neb.Rev.Stat. § 25-1801 is a violation of the FDCPA."].

102. See NEB. REV. STAT. § 25-1801.

103. *Id.* § 25-21,194(a)(1)(iii) (Reissue 2008).

104. Once suit is filed, attorney's fees can certainly be accounted for in any settlement negotiations; that is a matter for the parties to decide. For a court to order attorney's fees, however, the retailer would have to be deemed a "prevailing party." See *infra* subsection III.B.2.

105. NEB. REV. STAT. § 25-21,194(a)(1)(iii).

106. In the context of the Fair Debt Collections Practices Act, the "collection of any amount (including any interest, fee, charge, or expense incidental to the principle obligation)" amounts to an unconscionable or unfair means of collecting a debt "unless such amount is expressly authorized by the agreement creating the debt or permitted by law." See 15 U.S.C § 1692f(1) (2012). It follows then that where Nebraska's civil shoplifting statute does not permit pre-suit attorney's fees, an attempt to collect such fees prior to filing suit would be similarly unconscionable if not more so.

analyze these options and conclude ignoring the letter and defending the claim if filed is the best choice in most scenarios.

A. Pay the Demand

The easy option is to simply pay the demand, despite the fact that the amount likely exceeds what is allowed under the law.¹⁰⁷ In exchange for \$200, the client purchases peace of mind—the threat of civil litigation and additional liability is reduced to zero. Furthermore, as noted below, \$200 is a fraction of what the merchant could *potentially* recover were it to actually file suit, win, and be awarded costs and attorney’s fees on top of any actual damages. Settlement offers the ability to cap damages at \$200; but, to many people accused of shoplifting, if not most, acquiring \$200 within the window prescribed would require major sacrifice (it could even encourage further criminal activity). Additionally, paying \$200 to a retailer who is not entitled to it, when the chances of actually being sued are infinitesimal,¹⁰⁸ may be a relatively high price to pay for peace of mind.¹⁰⁹

B. Ignore the Demand

The pros and cons of ignoring the demand letter are virtually opposite of those listed above: if the client ignores the letter and refuses to

107. See *supra* subsection II.B.3.

108. See *supra* note 42.

109. If paying the full \$200 is not feasible or agreeable, one could propose settlement in an amount greater than \$0 but less than \$200. See Wechsler, *supra* note 33 (“It is not uncommon for the store and shoplifter to settle for less than the amount demanded. The store may also agree upon a payment plan.”). However, the authors could find no record of demand letter recipients making such an offer, nor could there be found any indication of whether retailers or their agents would be receptive to offers in amounts below what was demanded. Simply “lawyering-up” may also be a path to achieving peace of mind short of paying the demand. Matthew C. Hug, a New York criminal defense attorney, suggests an alternative approach:

[C]ontact an attorney . . . and alert them that you have received this letter. When I have represented individuals that have received one of these letters, I contact Michael Ira Asen, and tell him that my client will not be paying, to send all further correspondence directly to my office and that if they wish to proceed to collection, that they can commence a legal action. I have NEVER received a summons notifying me that my client was going to be sued for not paying this civil penalty. Nor have I ever been contacted again by his office (or any other law firm doing the same type of work).

Matthew C. Hug, *Convicted of Petit Larceny and Received Letter*, HUG LAW, PLLC, <https://www.huglaw.com/convicted-petit-larceny-received-letter-attorney-walmart-demanding-pay-civil-penalty-must-pay/> [https://perma.unl.edu/KC36-GW45]. Both of these options should be considered as possible alternatives. Each has the potential to provide increased peace of mind but also runs the risk of poking the proverbial sleeping bear. Given the unpredictability of each, neither option will be discussed further in this Article.

pay, the merchant could sue at any point within the four-year statute of limitations,¹¹⁰ and, if it did so, the client may be liable for damages, costs, and attorney's fees—an amount that could justify seeking bankruptcy protection.¹¹¹ The odds of a retailer filing suit, however, are extraordinarily slim considering retailers almost never do so.¹¹² In fact, a search of available Nebraska electronic court filings spanning from 1996 through 2015 produced zero actions filed by Wal-Mart (or any major retailer) pursuant to section 25-21,194.¹¹³ Suit is also unlikely given the practical and economic considerations. First, the cost of taking the matter to judgment is certain to exceed the damage amount claimed. Because entities typically cannot file in small claims court,¹¹⁴ the action would need to be filed in county or district court

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110. NEB. REV. STAT. § 25-212 (Reissue 2008) (noting Nebraska's statute of limitations for unspecified claims).
111. Under most circumstances, a debt associated with a shoplifting civil demand could be discharged through bankruptcy proceedings. See 11 U.S.C. § 523 (2012) (describing debts which are non-dischargeable). Typically, an award of attorney's fees is dischargeable where the judgment associated with such attorney's fees is dischargeable unless the conduct warranting attorney's fees violates one of the provisions of 11 U.S.C. § 523(a). See *Kaplan v. Wasko*, No. CC-12-1118-PaMkBe (B.A.P. 9th Cir. Mar. 6, 2013); see also KEVIN RUSER & DEANNA LUBKEN, NEBRASKA CHAPTER 7 CONSUMER BANKRUPTCY PRACTICE MANUAL § 3 (2012) (discussing generally when bankruptcy may be appropriate, as well as what debts may be dischargeable).
112. See *supra* subsection II.A.3; Cory Hurley, *Civil Recovery Rarely Leads to Court: Lawyer*, W. STAR (Mar. 30, 2012), <http://www.thewesternstar.com/News/Local/2012-03-30/article-2943091/Civil-recovery-rarely-leads-to-court%3A-lawyer/1> [<https://perma.unl.edu/X9HZ-KN89>] (describing why suit is rarely filed in the context of Canada's civil shoplifting statutes); Kylie McGivern, *Local Lawsuit Filed Against Home Depot for Accusing Woman of Shoplifting*, KXAN (Nov. 24, 2015, 9:01 PM), <http://kxan.com/2015/11/24/local-lawsuit-filed-against-home-depot-for-accusing-woman-of-shoplifting/> [<https://perma.unl.edu/T3L8-EW6L>] (reporting on a civil claim filed by an alleged shoplifter against Home Depot and discussing why retailers rarely file suit to recover shoplifting civil penalties).
113. A search performed between January 26, 2016 and March 6, 2016, using the Nebraska.gov "Trial Case by Name" subscription-based search platform querying all civil cases filed between 1996 and present revealed no suit filed pursuant to section 25-21,194 by any of the following major retailers: Wal-Mart, Target, Shopko, CVS Pharmacy, Walgreens, J.C. Penney, Sears, Kohl's, Home Depot, Lowe's, Menards, and Hobby Lobby. See *JUSTICE Case Search*, NEBRASKA.GOV, <https://www.nebraska.gov/justice/> (last visited Feb. 11, 2016).
114. State statutes creating "small claims" courts most often disallow attorney representation. See, e.g., NEB. REV. STAT. § 25-2803(2) (Reissue 2008 & Cum. Supp. 2014) ("No party shall be represented by an attorney in the Small Claims Court . . ."). Nebraska law further provides that self-representation by an entity is an unauthorized practice of law. See *Back Acres Pure Tr. v. Fahlander*, 233 Neb. 28, 443 N.W.2d 604 (1989). Although Nebraska's small claims statute appears to provide an exception to this rule, it is not clear how such an exception can be reconciled with laws prohibiting such practice. Compare NEB. REV. STAT. § 25-2803(3) (Nebraska's small claims statute) ("A corporation shall be represented by one of its employees."), with NEB. CT. R. § 3-1003 (2015) ("No nonlawyer shall engage in the practice of law in Nebraska . . ."), and NEB. REV. STAT.

(incurring up to \$82 in filing fees)¹¹⁵ in the county where the shoplifting occurred or where the shoplifter can be found.¹¹⁶ The retailer must retain local counsel, carrying a potential price tag in the hundreds, if not thousands. Moreover, the defendant would need to be located and served, costing another \$25 to \$50,¹¹⁷ assuming he or she can be served by the sheriff. After accomplishing all this, the retailer must then prove it is actually owed the amount claimed, which, as this Article provides, would be difficult if not impossible.¹¹⁸

Even if the retailer obtains an all-out victory, either through default or on the facts, the costs of obtaining that victory will have certainly exceeded the amount claimed. Although the statute provides for attorney's fees to be tacked on to the judgment, courts are often hesitant to award significant attorney's fees in matters such as these.¹¹⁹ Even assuming *arguendo* that a court would enter a judgment for the entire amount claimed (\$200 in Samantha Smith's case), plus costs and attorney's fees, what is gained by the retailer? The retailer would incur substantial internal expense (well beyond the \$200 claimed) to investigate the matter and bring it to judgment, including paying employees to review security footage and to testify in court. Plus, any amount collected beyond the \$200 would be absorbed by the actual litigation costs and attorney's fees incurred. Therefore, in Samantha Smith's case, Wal-Mart's best-case scenario, if it filed suit, would undoubtedly be a net loss. Further, any judgment obtained could be discharged in bankruptcy before a cent was collected,¹²⁰ leaving the retailer with significant legal fees¹²¹ and nothing to show for it. Other factors likely to deter retailers from filing suit are the bad publicity it could create as well as the possibility of exposing to the

§ 7-101 (Reissue 2012) (prohibiting the unlicensed practice of law) (“[N]o person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party . . . in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.”).

115. *Filing Fees and Court Costs*, NEBRASKA.GOV, <https://supremecourt.nebraska.gov/4800/filing-fees-and-court-costs> [https://perma.unl.edu/6YTR-E27F].

116. NEB. REV. STAT. § 25-403.01 (Reissue 2008).

117. See, e.g., County Sheriff, *Service Fees and Mileage*, LANCASTER CTY., <http://lancaster.ne.gov/sheriff/civil/fees.pdf> (last visited Mar. 23, 2016) [https://perma.unl.edu/G5LH-UXSQ]; *Civil Fees*, DOUGLAS CTY. SHERIFF'S OFFICE, <http://www.douglascountysheriff.org/civil/fees.htm> [https://perma.unl.edu/L9L8-E6GV].

118. See *supra* subsection II.B.3.

119. For a more extensive discussion on attorney's fees, see *infra* subsection III.B.2.

120. See *supra* note 111.

121. A firm representing the retailer is likely to earn a fee regardless of the outcome, unless the matter is taken on contingency. Thus, it is possible a firm could suggest litigation if it favored its own interests to the detriment of its clients. Though one should not proceed on a strong assumption that a firm would act in this manner, it should not be ruled out when calculating the probability of a retailer following through on its threat of suit.

courts and legislature the lucrative practice of abusing Nebraska's civil shoplifting statute.

Although it is highly unlikely a retailer would follow through on the threat of suit, it remains a possibility. For this reason, subsection III.B.1 provides strategic considerations and available mechanisms for an attorney tasked with defending a civil shoplifting claim, and subsection III.B.2 addresses concerns related to potential liability for attorney's fees. Subsection III.B.3 includes a brief discussion on the potential impacts to one's credit rating.

1. *Defending a Claim*

As previously noted, it is doubtful a retailer will file suit under section 25-21,194. In the event of the improbable, the strongest and most straightforward defense would be the statute's limitation on what damages are recoverable.¹²² As previously discussed, the plain language of the statute read in conjunction with the legislative history should provide ample support for an argument that, on facts similar to those in the Samantha Smith hypothetical, the retailer suffered no actual damage under the statute.¹²³ Depending on the pleadings, the claim could be disposed of on a motion to dismiss¹²⁴ or motion for summary judgment.¹²⁵ A partial summary judgment or declaratory judgment on the issue of what damages are permitted under the statute could resolve the matter without the need for significant discovery. If damage to the merchandise was sustained, and such amount had not already been recovered by the retailer through direct payment or restitution, one might consider making an offer of judgment for the full retail value of the item(s).¹²⁶ This may reduce the likelihood or amount of attorney's fees being awarded. A counterclaim under one of the state or federal causes of action discussed below should also be

122. *See supra* subsection II.B.3.

123. *See supra* subsection II.B.3.

124. If the complaint asserts a claim pursuant to section 25-21,194, and does not allege damage to the merchandise taken or loss sustained as a direct result of the incident, the complaint should be dismissed. *See* NEB. CT. R. PLDG. § 6-1112 (2015).

125. Summary judgment would be proper where Wal-Mart pleaded actionable damage but failed to produce evidence exhibiting the damage or loss set forth in section 25-21,194.

126. *See* NEB. REV. STAT. § 25-901 (Reissue 2008) ("The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein. . . . If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's cost from the time of the offer.").

considered.¹²⁷ To limit both the costs of litigation and the amount of attorney's fees for which the client may be liable, however unlikely, efforts should be made to expedite the trial process and limit discovery.

2. *Liability for Attorney's Fees*

It may seem counterintuitive or perhaps even offensive, but a retailer could be awarded attorney's fees under the statute even if it obtained a judgment for only a portion of the total amount claimed in the demand. For instance, if the retailer convinced a court to award it \$10 for the cost of relabeling the stolen item, or \$30 in damages for the wages paid to security personnel involved in the arrest,¹²⁸ this could warrant an award of the entirety of attorney's fees incurred in obtaining such judgment.¹²⁹ For this reason, exposure to liability for paying the retailer's attorney's fees may be the most significant factor to be considered when weighing the risks of ignoring the letter.

Under Nebraska law, when a statute provides for reasonable attorney's fees, "the amount of the fee is addressed to the discretion of the trial court"¹³⁰ When exercising its discretion in awarding attorney's fees, trial courts consider two primary factors: (1) the time and labor spent on the case; and (2) the customary charges for such ser-

127. *See infra* section III.C. Many of the risks associated with affirmatively challenging the demand are not present in a counterclaim because litigation has already been initiated at this point.

128. *See supra* subsection II.B.3 (discussing how a retailer may attempt to attribute the hourly wage paid to a security guard for the time spent on the apprehension of a shoplifter to damages, and concluding such an attempt would be unsuccessful under section 25-21,194).

129. Any judgment—no matter how small—could entitle a retailer to attorney's fees as the "prevailing party." *See, e.g.,* *Twin Towers Condo. Ass'n v. Bel Fury Inv. Grp.*, 290 Neb. 329, 340, 860 N.W.2d 147, 160 (2015) (defining "prevailing party" as one who "receive[s] a judgment in its favor"); *In re Estate of Stuchlik*, 289 Neb. 673, 691–92, 857 N.W.2d 57, 72 (2014) (noting one need not be "100 percent successful," but rather "substantially successful" in order to be entitled to attorney fees); *cf. DocMagic, Inc. v. Mortg. P'ship of Am.*, 729 F.3d 808, 812 (8th Cir. 2013) (applying Missouri law) ("A 'prevailing party' is one who obtains a judgment from the court, regardless of the amount of damages."). *But see supra* subsection II.B.3 (discussing the difficulty in proving actual damages when the product is returned to the shelf unharmed). Moreover, despite the availability and lawfulness of attorney's fees under the statute, an award of attorney's fees in an amount sufficient to motivate a retailer or a law firm to pursue the matter remains unlikely. Courts in Nebraska are reluctant to award attorney's fees even when provided for by statute; and even when attorney's fees are awarded, it is often in an amount significantly less than what was sought.

130. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005). The trial court utilized the Lodestar Method in determining reasonable attorney's fees; on appeal, the Nebraska Supreme Court found the trial court had not abused its discretion in doing so. *Id.* ("[The trial court's] ruling will not be disturbed on appeal in the absence of an abuse of discretion.").

vices.¹³¹ This is known as the “Lodestar Multiplier” or the “Lodestar Method,” and although not expressly adopted by the Nebraska Supreme Court,¹³² it is the common measure. This method is only a general framework, however, and other factors may be considered to increase or decrease the amount owed. These factors include: “the nature of the litigation, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, and the character and standing of the attorney.”¹³³ Although the civil shoplifting statute provides no limitation on the amount of attorney’s fees that can be awarded, courts would likely take into consideration the amount of the judgment in determining the reasonableness of the fee.¹³⁴ As a guidepost, a court could look to section 25-1801, which provides for attorney’s fees in certain claims involving disputes not exceeding \$4,000 and proscribes specific limits on what can be awarded (capped at \$10 plus 10% of the judgment).¹³⁵

3. *Impact on Credit Rating*

There is often fear that non-payment of a civil demand may negatively impact the recipient’s credit report.¹³⁶ It would be improper, however, for a merchant or collection firm to report the claim to a credit reporting agency. Negative credit reports stem from outstand-

131. *Id.* at 383, 702 N.W.2d at 807.

132. *See id.* at 383, 702 N.W.2d at 806–07 (acknowledging that the Nebraska Supreme Court has never expressly adopted the Lodestar Method but nonetheless accepting them as the primary factors under Nebraska case law for determining attorney’s fees).

133. *Id.* at 383–84, 702 N.W.2d at 807. *Eicher* involved a case where the Nebraska Supreme Court affirmed the trial court’s award of attorney’s fees at a level 30% above the Lodestar amount based on these extraneous factors. *Id.* It follows that if a trial court may use its discretion to *increase* fees for a complex case that is admirably performed by respected attorneys, it may *decrease* fees for a simple case where it believes the prevailing party acted undesirably.

134. There would also be a persuasive argument for a reduction in attorney’s fees given the simplicity of the suit and the low level of skill required to litigate the matter, as well as the disparity between the amount demanded and the judgment obtained (e.g., if the retailer demanded payment of \$200, and obtained a judgment for only \$30 in actual damages).

135. *See* NEB. REV. STAT. § 25-1801 (Reissue 2008 & Cum. Supp. 2014) (“Attorney’s fees shall be assessed by the court in a reasonable amount but shall in no event be less than [\$10] when the judgment is [\$50] or less and when the judgment is over [\$50] up to [\$4,000] the attorney’s fees shall be [\$10] plus [10%] of the judgment in excess of [\$50].”).

136. Some collection firms contribute to this fear by alluding to the impact on one’s credit score in the demand letter itself. *See Zimmerman, supra* note 3 (describing a “final notice” one recipient received that included language that her “credit rating may be adversely impacted” if she did not pay).

ing debt,¹³⁷ and these demand letters—often by their own terms¹³⁸—are not an attempt to collect a debt.¹³⁹ If a claim based on a shoplifting civil demand were to be discovered on a credit report, further investigation should be performed into whether the conduct was in compliance with the Fair Credit Reporting Act.¹⁴⁰

C. Affirmative Legal Challenges

In light of the demand letter’s facially deceptive and misleading reference to Nebraska’s civil shoplifting statute, recipients of civil demands like that received by Samantha Smith should evaluate possible claims against the retailer. From a societal perspective, a judicial ruling may be the only way to get large retailers and collection firms to stop abusing and misusing Section 25-21,194.

This section provides a practical overview of possible affirmative actions and legal challenges that can be brought against retailers, their counsel, or both; namely claims under the Fair Debt Collection Practices Act (FDCPA),¹⁴¹ the Racketeering Influenced and Corrupt Organization Act (RICO),¹⁴² and the Nebraska Consumer Protection Act (NCPA).¹⁴³ This section also analyzes the viability and usefulness of seeking a declaratory judgment clarifying the amount of damages recoverable under Nebraska’s civil shoplifting statute.

137. Margaret Reiter, *Getting Debt Collectors to Remove Negative Information from Your Credit Report*, NOLO, <http://www.nolo.com/legal-encyclopedia/getting-debt-collectors-remove-negative-information-from-your-credit-report.html> [https://perma.unl.edu/NBE5-UXA3].

138. Although not probative, let alone determinative, collection firms attempt to dissuade Fair Debt Collection Practices Act claims by including language in demand letters—often capitalized, in bold print, or both—that the letter is not an attempt to collect a debt. *See, e.g.*, Asen Letter 1, *supra* note 2; Asen Letter 2, *supra* note 2; Asen Letter 3, *supra* note 2.

139. *See infra* subsection III.C.1.i (discussing the inapplicability of the Fair Debt Collection Practices Act to matters involving the collection of civil penalties).

140. 15 U.S.C. § 1681 (2012). Negative entries on consumer credit reports are premised on the existence of a debt. Thus, claiming demand letters are not a “debt” for Fair Debt Collection Practices Act purposes, but are for credit report purposes, is an attempt by merchants and collection firms to have their cake and eat it too. *See* Matthew J. Ruff, *What to Do with the “Civil Demand Letter” in a Shoplifting Case*, TORRANCE ATT’Y (May 11, 2012), <http://thetorranceattorney.com/2012/05/11/what-to-do-with-the-civil-demand-letter-in-a-shoplifting-case/> [https://perma.unl.edu/7XUH-PLMX] (“There have been instances where the store will go so far as to place a negative entry on the accused[’s] credit report, though this is rare and probably illegal unless you agreed to pay the amount or conceded the debt in some other manner.”).

141. 15 U.S.C. § 1692 (2012).

142. 18 U.S.C. § 1961 (2012).

143. NEB. REV. STAT. § 59-1609 (Reissue 2010).

1. Federal Challenges

Recipients of civil demand letters have brought federal challenges under both the FDCPA¹⁴⁴ and RICO.¹⁴⁵ While these claims have been decisively unsuccessful to date, and a claim under FDCPA is likely foreclosed, analysis of these federal challenges provides some insight into what set of facts could provide relief under federal law.

a. Fair Debt Collections Practices Act

The FDCPA provides legal remedies for consumers subjected to abusive debt collection practices.¹⁴⁶ A cause of action under the FDCPA must be premised on the existence of a “debt,” which the statute defines as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes.”¹⁴⁷ The FDCPA itself is silent on whether an attempt to collect a civil penalty for damages allegedly sustained from shoplifting or theft amounts to a “debt,” but current law suggests that it does not.¹⁴⁸

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144. 15 U.S.C. § 1692; *see* *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322, 1326 (7th Cir. 1997); *Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163 (3d Cir. 1987); *DirecTV v. Milliman*, No. 02-74829, 2003 WL 23892683 (E.D. Mich. Aug. 26, 2003); *Coretti v. Lefkowitz*, 965 F. Supp. 3 (D. Conn. 1997); *Riebe v. Juergensmeyer & Assocs.*, 979 F. Supp. 1218 (N.D. Ill. 1997); *Shorts v. Palmer*, 155 F.R.D. 172 (S.D. Ohio 1994).
145. 18 U.S.C. § 1961; *see* *Kelly v. Palmer, Reifler & Assocs.*, 681 F. Supp. 2d 1356 (S.D. Fla. 2010).
146. 15 U.S.C. § 1692.
147. *Id.* § 1692a(5).
148. *See, e.g., Zimmerman*, 834 F.2d at 1167–69 (holding that the defendant’s offer to settle a civil claim arising from an alleged theft of services is not a “debt” for purposes of the FDCPA); *see also Bass*, 111 F.3d at 1326 (holding that the FDCPA is limited to obligations arising from consensual transactions); *Coretti*, 965 F. Supp. 3 (same); *DirecTV*, 2003 WL 23892683 (holding the FDCPA does not apply to incidents arising from alleged shoplifting incidents); *Shorts*, 155 F.R.D. at 175 (same); *Riebe*, 979 F. Supp. 1218 (same); ROBERT J. HOBBS, NAT’L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 4.4.2.3, at 165 n.689 (8th ed. 2014) (describing the Federal Trade Commission’s narrow view of the word debt, opining that civil shoplifting claims are not a “debt”). *But cf.* *Hansen v. Ticket Track, Inc.*, 280 F. Supp. 2d 1196, 1202 (W.D. Wash. 2003) (involving a demand by parking lot owner claiming “violation fees” resulting from theft of services considered a “debt” within the meaning of the FDCPA); *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604, 607 (S.D. Cal. 1997) (expressing the Ninth Circuit’s rejection of *Zimmerman* to the extent it construes a FDCPA-invoking transaction to require “an offer or extension of credit”); H.R. Rep. No. 95-131, at 4 (1977) (providing FDCPA drafters’ intent that “the term ‘debt’ include consumer obligations paid by check or other non-credit consumer obligations”). In some instances, retailers have been known to require alleged shoplifters, while detained, to sign a document agreeing to pay the civil penalty. Although it would seem such promise to pay would turn the tort-based penalty into a consumer debt,

The Third Circuit considered the application of the FDCPA to civil penalties in *Zimmerman v. HBO Affiliate Group*.¹⁴⁹ In *Zimmerman*, cable network providers sent civil demand letters to approximately 5,600 Philadelphia residents who, according to the providers, were unlawfully pirating microwave television signals.¹⁵⁰ The letters informed the recipients they were in violation of the law, and pursuant to section 705 of the Federal Communications Act of 1984, potentially liable for \$10,000 in civil damages.¹⁵¹ The letter threatened litigation will follow unless the recipients: (1) removed the unauthorized equipment, (2) signed an agreement to cease illegal reception, and (3) paid the network's non-negotiable \$300 civil demand.¹⁵² A recipient of the civil demand letter filed suit alleging, among other claims, that the cable network providers violated the FDCPA by sending a letter that contained "numerous false or misleading representations."¹⁵³ Affirming the trial court's dismissal, the Third Circuit held that penalties arising from alleged torts are not debts under the FDCPA, and are therefore not covered by the Act's restrictions on debt collection practices.¹⁵⁴ In reaching its decision, the court concluded that Congress intended to protect consumers from debt collectors, not to protect alleged tortfeasors from claimants.¹⁵⁵ The court also noted that, to be actionable under the FDCPA, the plaintiff must show that the alleged debt arose out of a "transaction" between the consumer and the collector.¹⁵⁶ Although the FDCPA does not explicitly define "transaction," the court interpreted the word as "involving the offer or extension of credit to a consumer."¹⁵⁷ This definition—coupled with the Third Circuit's interpretation of "debt"—necessarily foreclosed the plaintiff's claim under the Act.¹⁵⁸

courts have been reluctant to view it that way. See *Grimard v. Palmer, Reifler & Assocs.*, No. 07-CV-12128, 2007 WL 2287831, at *2 (E.D. Mich. July 31, 2007) (finding a settlement agreement arising from an alleged tort (shoplifting) does not create a consumer "debt" for purposes of the FDCPA).

149. 834 F.2d 1163.

150. *Id.* at 1166.

151. *Id.* at 1165–66.

152. *Id.* at 1166.

153. *Id.* at 1167.

154. *Id.* at 1168–69 ("We find that the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire 'money, property, insurance, or services' which are 'primarily for household purposes' and to defer payment.").

155. *Id.* at 1167.

156. *Id.*

157. *Id.* at 1168.

158. Notably, the Seventh Circuit in *Bass* limited its adoption of *Zimmerman* by distinguishing traditional acts of theft (*i.e.*, stealing cable or shoplifting) from the

Several federal district courts have reached a similar conclusion.¹⁵⁹ In *Shorts v. Palmer*,¹⁶⁰ for example, a federal district court in Ohio rejected an FDCPA complaint alleging unfair debt collection practices by an attorney for Rite Aid Pharmacy.¹⁶¹ There, the plaintiff received a civil demand letter after he attempted to shoplift two boxes of cigars—valued at \$1.74—from an Ohio Rite Aid.¹⁶² The demand letter, citing Ohio’s civil shoplifting statute, threatened litigation unless the plaintiff paid \$106.59.¹⁶³ The plaintiff filed suit, alleging that Rite Aid’s counsel failed to provide information or otherwise advise him of his right to dispute the debt or obtain verification as is required under the FDCPA.¹⁶⁴ In rejecting this claim, the trial court—citing the Third Circuit’s holding in *Zimmerman*—noted, “[A]n obligation to pay money is not a debt unless it is incurred by a ‘consumer’ and it ‘aris[es] out of a transaction’”¹⁶⁵ Because the plaintiff-shoplifter was not a “consumer” and the shoplifting incident was not a “transaction,” the court granted the defendant’s motion to dismiss.¹⁶⁶

consensual transaction of providing a check in exchange for goods or services. *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322, 1326 (7th Cir. 1997). Similarly distinguishing the two acts, the Tenth Circuit found FDCPA violations where a law firm attempted to collect civil shoplifting penalties from consumers who had written bad checks. *Johnson v. Riddle*, 305 F.3d 1107, 1120 (10th Cir. 2002) (“By seeking to collect a shoplifting penalty where no shoplifting (as the term is defined by Utah statute) occurred, Riddle sought to collect an amount not permitted by law in violation of the FDCPA.”). Putting aside the technical limitations of the FDCPA, it is questionable as a matter of policy why an individual who steals by writing a bad check should receive protection, while an individual who takes merchandise without writing a check is not. In both scenarios, the “theft” could be inadvertent (forgetting how much money was in the checking account or accidentally forgetting an item of merchandise in the bottom of the shopping cart) or intentional (knowing there was no money in the account or intentionally stealing an item), yet only recovery for the “white collar” theft is subject to the limitations of the FDCPA.

159. See *Coretti v. Lefkowitz*, 965 F. Supp. 3 (D. Conn. 1997); see also *DirectTV v. Milliman*, No. 02-74829, 2003 WL 23892683 (E.D. Mich. Aug. 26, 2003) (holding that the FDCPA does not apply to claims arising from alleged shoplifting incidents); *Shorts v. Palmer*, 155 F.R.D. 172 (S.D. Ohio 1994) (same); *Riebe v. Juergensmeyer & Assocs.*, 979 F. Supp. 1218 (N.D. Ill. 1997) (holding that an obligation to pay a fine arising from an overdue library book is not a debt for purposes of the FDCPA).

160. 155 F.R.D. 172.

161. *Id.* at 176–77.

162. *Id.* at 173.

163. *Id.*

164. *Id.* at 174.

165. *Id.*

166. *Id.* at 176.

b. Racketeering Influenced and Corrupt Organization Act

RICO makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”¹⁶⁷ To prevail under RICO, the plaintiff must establish: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.¹⁶⁸ On the right set of facts, recipients of civil demand letters in Nebraska could have a valid claim under RICO.

The strength of a RICO claim turns largely on the fact-specific allegations in the plaintiff’s complaint, including the injuries sustained¹⁶⁹ and the named defendant’s role and relationship with other entities of the RICO enterprise. To prevail under RICO a plaintiff must prove, among other elements, the defendant engaged in at least two acts of prohibited conduct, or “racketeering activity,”¹⁷⁰ which range from wire and mail fraud to bribery and extortion.¹⁷¹ In addition to racketeering activity, there must be an “enterprise,” which in the context of civil recovery requires a factual examination into the relationship between the retailer, its counsel, and other third parties.¹⁷² The highly

167. 18 U.S.C. § 1962(c) (2012).

168. *Williams v. Mohawk Indus.*, 465 F.3d 1277, 1282 (11th Cir. 2006).

169. Injury itself is a prerequisite to RICO liability. *See* 18 U.S.C. § 1964(c) (2012). Section 1964(c) provides that such injury must be to “business or property,” which at least one federal circuit court has interpreted as excluding mental anguish. *Id.*; *Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163 (3d Cir. 1987) (“The named plaintiff has alleged only injury in the nature of mental distress, not an injury ‘in his business or property.’ Therefore he has no cause of action on a RICO claim . . .”).

170. To sustain RICO liability, the plaintiff must prove a *pattern of racketeering activity*. A pattern of unlawful racketeering activity requires “at least two acts of racketeering activity” as enumerated in Section 1961(1) of the Act. *See* 18 U.S.C. § 1961(1), (5) (2012). It should be noted, however, that although the Act explicitly permits the “pattern” to be premised on two acts of racketeering activity, the Supreme Court has cautioned that two isolated acts may not be sufficient for liability to attach. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (“As many commentators have pointed out, the definition of a ‘pattern of racketeering activity’ differs from the other provisions in § 1961 in that it states that a pattern ‘requires at least two acts of racketeering activity,’ § 1961(5) (emphasis added), not that it ‘means’ two such acts. The implication is that while two acts are necessary, they may not be sufficient.”).

171. *See* 18 U.S.C. § 1961(1); *see also Elliott v. First Sec. Bank*, 249 Neb. 597, 608, 544 N.W.2d 823, 832 (1996) (noting that, with respect to racketeering activity, RICO requires that the defendant’s state of mind be the same as that required in a criminal prosecution).

172. An “enterprise” under the Act includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). For liability purposes, the defendant in a RICO claim is not the entity itself, but rather a “person” employed with or associated with that enterprise. *Id.* § 1962(c). Thus, to establish

factual nature of these inquiries makes it difficult to assess a potential claim in broad terms.

Only one federal court has addressed the substantive elements of a RICO claim in a challenge to a law firm's issuance of civil shoplifting demands. In *Kelly v. Palmer, Reifler & Associates*,¹⁷³ the plaintiff-class alleged the law firm, in partnership with retailers, local co-counsel, and a web-based fee collection company, "use[d] a system that allow[ed] it to manipulate and control civil theft collection threats to consumers and conceal the true facts about the collection."¹⁷⁴ Plaintiffs further alleged that the law firm controlled and operated a RICO enterprise by: (1) collecting consumer information from retailers, (2) providing that information to a web-based management company for processing, (3) engaging local attorneys who affixed their names on the form demand letters without attorney review, (4) sending out millions of demand letters through the U.S. mail, and (5) engaging online databases to create automated systems for collecting money.¹⁷⁵

The district court granted summary judgment for the defendants, holding the plaintiffs failed as a matter of law to prove that the defendant-law firm was "separate and distinct" from the other parties of the alleged enterprise,¹⁷⁶ and that it participated in the "operation or management" of that enterprise.¹⁷⁷ The court applied a broad agency analysis in reaching its decision, finding the law firm acted "as an agent for its retailer clients and therefore was not a separate and in-

liability under Section 1962(c), "one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions v. King*, 533 U.S. 158, 158 (2001).

173. 681 F. Supp. 2d 1356 (S.D. Fla. 2010).

174. *Id.* at 1377.

175. *Id.* at 1377–78. The court further summarized the plaintiffs' RICO allegation as follows:

Plaintiffs say the firm decided who to send demand letters to, yet it hired so few lawyers that a factual and legal analysis of the circumstances surrounding any particular demand letter was impossible. The firm charged attorneys' fees for legal work it did not perform. The firm created a network of "of counsel" attorneys in other states who signed demand letters that were generated in Florida, but those "of counsel" attorneys could not even look at the file if they wanted to before the letters were sent out. Plaintiffs cite the firm's proposal for civil recovery services sent to prospective clients as evidence that legal services took a back seat to the firm's collection services.

Id. at 1379–80.

176. *Id.* at 1378. The alleged enterprise in *Kelly* consisted of the Palmer Reifler Law Firm, the retailers that contract with the firm to collect civil penalties, local co-counsel, and web-based communication firms that facilitate the issuance of civil demand letters. *Id.* Palmer Reifler was the only RICO defendant.

177. *Id.* at 1380; *see also* *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (holding that RICO liability attaches only where the defendant plays some role—even a minimal one—in directing the affairs of the enterprise).

dependent entity.”¹⁷⁸ Similarly, with respect to the “operation and management” requirement of RICO liability, the court noted the defendant provided “traditional legal services” to its retail clients, and therefore had no role in the direction of the enterprise.¹⁷⁹

The Eighth Circuit has similarly held that a lawyer or law firm is shielded from RICO liability in the performance of traditional or “run-of-the-mill” legal services.¹⁸⁰ The court has also held, however, that “[b]ehavior prohibited by § 1962(c) will violate RICO regardless of the person to whom it may be attributed,” and that an attorney may be liable when “he crosses the line between traditional rendition of legal services and active participation in directing the enterprise.”¹⁸¹ This distinction between traditional legal services and active participation in unlawful conduct emphasizes the case-by-case nature of such analyses, and highlights the critical role of individualized fact-finding in discovery. To overcome the particular hurdles that foreclosed the RICO claim in *Kelly*, Samantha Smith, our hypothetical client, would need to show not only that the defendant-entity is separate and distinct from the other entities of the enterprise, but also that it participated in its operation or management.¹⁸²

2. *Nebraska Consumer Protection Act*

The NCPA provides a cause of action to “[a]ny person who is injured in his or her business or property”¹⁸³ as a result of “unfair or deceptive acts or practices in the conduct of any trade or commerce”¹⁸⁴ which directly affect the people of the State of Nebraska.¹⁸⁵ A number of questions emerge in considering the viability of an NCPA claim in response to a civil demand letter: Does an alleged shoplifter have standing to sue under a *consumer* protection act? Is the issuance of a letter demanding money in excess of amounts authorized by the cited statute an “unfair” or “deceptive” business practice? Does the act of sending the civil demand letter constitute “trade or commerce”? And finally, do these demand letters affect the public interest? This sec-

178. *Kelly*, 681 F. Supp. 2d at 1379.

179. *Id.* at 1380–81.

180. *Handeen v. Lemaire*, 112 F.3d 1339, 1348 (8th Cir. 1997) (“[A] growing number of courts, including our own, have held that an attorney or other professional does not conduct an enterprise’s affairs through run-of-the-mill provision of professional services.”).

181. *Id.*

182. The authors recognize that the *Kelly* court’s analysis was limited in that it addressed only one element (of many) required for a RICO claim.

183. NEB. REV. STAT. § 59-1609 (Reissue 2010).

184. *Id.* § 59-1602 (Reissue 2010).

185. *Id.* § 59-1601(2) (Reissue 2010); *see also* *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 684, 605 N.W.2d 136, 141–42 (2000) (“To be actionable under the CPA, therefore, we conclude that the unfair or deceptive act or practice must have an impact upon the public interest.”).

tion explores these questions and concludes that, on the facts present in the Samantha Smith hypothetical, an NCPA claim against a retailer or its counsel could find success.

a. Standing to Sue Under the NCPA

The purpose of the NCPA is to “provide *consumers* with protection against unlawful practices.”¹⁸⁶ Thus, an important interpretative question is whether an alleged shoplifter has standing to file suit under the Act. In other words, is the NCPA available only to those traditionally identified as “consumers,” or to anyone who suffers direct harm as a result of the business practices prohibited under the Act? Nebraska courts have yet to specifically address whether alleged shoplifters have standing under the state’s consumer protection law, but the plain language of the statute indicates they would.¹⁸⁷

The text of section 59-1609—which specifically defines the class of persons entitled to bring suit under the NCPA—provides, “*Any person* who is injured in his or her business or property by [unfair or deceptive business practices] . . . may bring a civil action in the district court.”¹⁸⁸ The term “person” is further defined by the statute as “natural persons, corporations, trusts, unincorporated associations, partnerships, and limited liability companies.”¹⁸⁹ Moreover, while the term “consumer” appears in the title of the Act and in sections that address substantive conduct, it is absent from provisions identifying or limiting who can file suit.

A Florida district court considered the issue under Florida’s consumer protection law in *Kelly v. Palmer, Reifler & Associates*.¹⁹⁰ Individuals accused of shoplifting brought suit against Palmer Reifler, alleging, among other claims, that the law firm violated Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA), which prohibits unfair methods of competition and unfair or deceptive business practices.¹⁹¹ Specifically, the plaintiffs alleged receiving civil demand letters that gave a “false impression” the firm was evaluating the matter and preparing for litigation against individual recipients and would

186. *See, e.g.*, *Arthur v. Microsoft Corp.*, 267 Neb. 586, 597, 676 N.W.2d 29, 37 (2004) (emphasis added).

187. *See, e.g.*, *Moats v. Republican Party of Neb.*, 281 Neb. 411, 420, 796 N.W.2d 584, 593 (2011) (“In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.”).

188. NEB. REV. STAT. § 59-1609 (emphasis added).

189. *Id.* § 59-1601(1).

190. 681 F. Supp. 2d 1356 (S.D. Fla. 2010).

191. *Id.* at 1371–72; *see* FLA. STAT. ANN. § 501.204(1) (West 2010).

file suit if the demand was not paid.¹⁹² Palmer Reifler moved for summary judgment, arguing in part that the plaintiff-class, as shoplifters, lacked standing under the FDUTPA because they had not purchased services or goods from the firm, and were therefore not “consumers” for the purposes of the FDUTPA.¹⁹³ The trial court rejected the defendant’s motion, citing section 501.211(2), which regulates who can bring suit under the state’s consumer protection law.¹⁹⁴ The court noted that, prior to 2001, the provision expressed that a suit could be brought “by a *consumer*.”¹⁹⁵ In 2001, however, the legislature amended the provision, replacing the term “consumer” with “person.”¹⁹⁶ This change, the court reasoned, evidenced lawmakers’ intent to expand FDUTPA claims to consumers and non-consumers alike.¹⁹⁷ The text of section 59-1609 of the NCPA—like the provision at issue in *Kelly*—provides “[a]ny person” may bring a civil action for violations of the substantive provisions of the Act.¹⁹⁸ In fact, neither “consumer” nor “transaction” can be found in section 59-1609.¹⁹⁹

Moreover, the Nebraska Supreme Court has adopted a seemingly broad interpretation of the NCPA, generally, and of section 59-1609, specifically. In *Arthur v. Microsoft Corp.*,²⁰⁰ for instance, a plaintiff-class sued Microsoft under the NCPA for allegedly monopolizing computer operating systems in Nebraska.²⁰¹ Microsoft, in its motion for summary judgment, argued that the plaintiff-class lacked standing under the NCPA because they (the plaintiffs) were “indirect purchasers” of the software—that is, they purchased the software from a third-party retailer and not from the corporation directly.²⁰²

The trial court granted Microsoft’s motion for summary judgment.²⁰³ In doing so, the court cited section 59-829, which requires

192. *Kelly*, 681 F. Supp. 2d at 1372.

193. *Id.*

194. *Id.*

195. *Id.* (emphasis added).

196. *Id.* (citing 2001 Fla. Laws. ch. 2001-39 § 6 (amending FLA. STAT. ANN. § 501.211(2) (West 2010) as described)).

197. *Id.* at 1373 (“We agree with these latter cases. Applying a liberal construction to § 501.211(2), as we are compelled to do when construing the provisions of FDUTPA . . . we see no reason not to conclude that replacing the term ‘consumer’ with ‘person’ served to broaden the reach of the statute so that more than just *consumers* could avail themselves of the protection of this statute.”).

198. NEB. REV. STAT. § 59-1609 (Reissue 2010); *see also* *Panag v. Farmers Ins.*, 204 P.3d 885, 890 (Wash. 2009) (citing the phrase “any person” in its consumer protection statute as support for its holding that plaintiffs could maintain a claim under the act since “it is not necessary to establish any consumer relationship, direct or implied, between the parties”).

199. *See* NEB. REV. STAT. § 59-1609.

200. 267 Neb. 586, 676 N.W.2d 29 (2004).

201. *Id.* at 589, 676 N.W.2d at 32.

202. *Id.* at 592, 676 N.W.2d at 34.

203. *Id.* at 591, 676 N.W.2d at 33.

courts to construe state antitrust laws that are “the same as or similar to” federal laws in a manner consistent with federal precedent.²⁰⁴ Because the provision of the NCPA at issue corresponded to federal antitrust law, the trial court looked to—and relied on—Supreme Court precedent holding that “indirect purchasers” lack standing under the Sherman Act.²⁰⁵ The Nebraska Supreme Court reversed, holding that indirect purchasers have standing to sue under the NCPA notwithstanding conflicting federal precedent.²⁰⁶ In reaching its decision, the court noted that a contrary holding—one denying standing to indirect purchasers—would defeat the purpose of the Act.²⁰⁷ “The Act describes a very broad category of persons who are permitted to maintain an action for damages resulting from monopolistic conduct in trade or commerce.”²⁰⁸ The Nebraska Supreme Court’s holding in *Arthur* reinforces not only the court’s broad construction of the NCPA, but also the plain text interpretation of section 59-1609: “Any person” injured by the substantive provisions of the NCPA can sue in Nebraska courts.

Assuming the protective scope of the NCPA is applied broadly to include shoplifters, the plaintiff-shoplifter must also establish actual injury caused by the unfair or deceptive act.²⁰⁹ The injury requirement is certainly satisfied where the individual pays the amount demanded, but such payment is not necessary to proceed under the Act.²¹⁰ Though Nebraska law provides minimal guidance on the in-

204. *Id.* Section 59-829 provides in full:

When any provision of sections 59-801 to 59-831 and sections 84-211 to 84-214 or any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing such sections or chapter shall follow the construction given to the federal law by the federal courts.

NEB. REV. STAT. § 59-829 (Reissue 2010).

205. *Arthur*, 267 Neb. at 591, 676 N.W.2d at 33 (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding indirect purchasers do have standing to sue under the Sherman Act)).

206. *Id.* at 594, 676 N.W.2d at 35.

207. *Id.*

208. *Id.*

209. NEB. REV. STAT. § 59-1609 (Reissue 2010) (requiring a plaintiff to be one “who is injured in his or her business or property by a violation of sections 59-1602 to 59-1606”). It is worth noting that at least one jurisdiction views the injury not as a separate requirement for standing, but rather as one element of a consumer protection claim. See *Panag v. Farmers Ins.*, 204 P.3d 885, 890 (Wash. 2009) (“As this court stated in *Hangman Ridge*, a ‘successful plaintiff’ is ‘one who establishes all five elements of a private CPA action.’ We will not adopt a sixth element, requiring proof of a consumer transaction between the parties, under the guise of a separate standing inquiry.” (citation omitted)).

210. See *Panag*, 204 P.3d at 902 (“To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s ‘business

jury requirement in the context of the NCPA,²¹¹ it is well accepted that a qualifying injury is sustained if “the consumer’s property interest or money is diminished because of the unlawful conduct, even if the expenses caused by the statutory violation are minimal.”²¹² Under this framework, courts in other jurisdictions have recognized cognizable injury where the plaintiff lost enjoyment in or sustained damage to property,²¹³ incurred expense in investigating the validity of a claim,²¹⁴ paid an attorney to defend the claim,²¹⁵ incurred

or property.’ If the deceptive act actually induces a person to remand payment that is not owed, that will, of course, constitute injury.”)

211. The Act provides only that the injury must be to “his or her business or property.” NEB. REV. STAT. § 59-1609.
212. 1 HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 136 (2015); *see also* *Wiginton v. Pac. Credit Corp.*, 634 P.2d 111, 118–19 (Haw. Ct. App. 1981) (“[Defendant] argues that the *de minimus* damages asserted by [plaintiff] should not qualify as the damages required to maintain an action under [the consumer protection act]. However, the legislature was aware that damages might be *de minimus* in a consumer protection action and specifically provided for the \$1,000.00 award or triple damages to cover that possibility.”); *Panag*, 204 P.3d at 899 (“[T]he injury requirement is met upon proof the plaintiff’s ‘property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.’”); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, 719 P.2d 531, 539 (Wash. 1986) (“The injury involved need not be great, but it must be established.”).
213. *Josey v. Filene’s, Inc.*, 187 F. Supp. 2d 9 (D. Conn. 2002) (claim for “ascertainable loss of money or property” was stated under Connecticut Unfair Trade Practices Act by allegation that department store security guards deprived patron of use of his validly purchased personal property for forty-five minutes); *Hall v. Walter*, 969 P.2d 224, 237 (Colo. 1998) (“For the reasons discussed above, we hold that property is a legally protected interest under the CCPA and that a plaintiff may recover under [the consumer protection act] for injury to property and property value provided that the plaintiff satisfies each element of the standard for a private CCPA cause of action announced in this opinion.”); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 605 P.2d 1275, 1278 (Wash. App. Ct. 1979) (“Although the trial judge did not award Tallmadge pecuniary damages, the record indicates that he suffered injuries for purposes of the Consumer Protection Act in that he was inconvenienced, deprived of the use and enjoyment of his property, and received an automobile with defects needing repair.”).
214. *Panag*, 204 P.3d 885 (injury established where plaintiff alleged expenses incurred in dispelling her uncertainty about the legal ramifications of the subrogation claim, which included out-of-pocket expenses for postage, parking, and consulting an attorney).
215. *St. Paul Fire & Marine Ins. v. Updegrave*, 656 P.2d 1130 (Wash. App. Ct. 1983). This case originally involved a suit by an insurance company against an insured. *Id.* at 1130. The insured filed a counterclaim under the state’s consumer protection act alleging deceptive business practices. *Id.* The insurance company contended that the insured did not suffer any specific monetary damage as a result of its business practice and was therefore not entitled to relief. The court disagreed, noting “the trial court found a reasonable amount for LAD’s attorney’s fees in defending this suit and prosecuting its counterclaim To say that LAD has not been damaged for purposes of the Consumer Protection Act is to ignore the obvious.” *Id.* at 1134.

an out-of-pocket loss,²¹⁶ or where the claim affected one's credit rating.²¹⁷

It is unlikely, however, that a Nebraska court would recognize cognizable injury if premised exclusively on mental distress, embarrassment, or inconvenience. The NCPA is construed in a manner that is consistent with analogous federal antitrust law;²¹⁸ and pursuant to section 15 of the Clayton Act²¹⁹—the NCPA's federal analog—cognizable injury is limited to the plaintiff's commercial or economic interests.²²⁰ Consequently, several jurisdictions with similar or identical consumer protection statutes to Nebraska's have dismissed or otherwise rejected claims involving non-pecuniary injury.²²¹

b. Unfair or Deceptive Business Practice

While neither the Act nor the Nebraska Supreme Court has defined “unfair” or “deceptive,” the Nebraska Court of Appeals—in *Reinbrecht v. Walgreens Co.*—defined the terms as follows:

[A]n unfair trade practice is one that is immoral, unethical, oppressive, or unscrupulous. . . . [A] deceptive practice is one which possesses the tendency or capacity to mislead, or creates the likelihood of deception, . . . fraud, misrepresentation, and similar conduct are examples of what is prohibited.²²²

It is difficult to know how—or if—a Nebraska court would apply these definitions in determining whether a particular civil shoplifting demand letter was unfair or deceptive. Similar challenges in other contexts, however, suggest that sending overreaching demand letters

216. *See Bosland v. Warnock Dodge, Inc.*, 933 A.2d 942, 948 (N.J. Super. Ct. App. Div. 2007), *aff'd and remanded*, 964 A.2d 741 (N.J. 2009).

217. *Panag*, 204 P.3d at 897. *But see Paul v. Providence Health Sys.*, 273 P.3d 106, 115 (Or. 2012) (holding that credit monitoring costs to protect against possible future harm was not covered by the state's consumer protection act because the financial expenditure was not based on any present harm to the plaintiffs' economic interest).

218. NEB. REV. STAT. § 59-829 (Reissue 2010).

219. 15 U.S.C. § 15 (2012).

220. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“We simply give the word ‘property’ the independent significance to which it is entitled in this context. A consumer whose money has been diminished by reason of an antitrust violation has been injured ‘in his . . . property’ within the meaning of § 4.”).

221. *See Krisa v. Equitable Life Assurance Soc’y*, 113 F. Supp. 2d 694 (M.D. Penn. 2000) (holding the state's consumer protection statute provides no relief for anxiety, emotional distress, depression, and aggravation of physical illness); *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. Dist. Ct. App. 2006) (holding the state's consumer protection statute does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment); *Jones v. Sportelli*, 399 A.2d 1047 (N.J. Super. Ct. Law Div. 1979) (rejecting claim for damages based on pain and suffering under consumer protection statute permitting recovery for loss of money or property); *Keyes v. Bollinger*, 640 P.2d 1077, 1085 (Wash. Ct. App. 1982).

222. *Reinbrecht v. Walgreens Co.*, 16 Neb. App. 108, 115, 742 N.W.2d 243, 249 (2007).

is deceptive in nature, particularly when there is a wide disparity in resources and legal sophistication between the parties as is often the case in this setting.

In *Raad v. Wal-Mart Stores, Inc.*,²²³ the federal district court for the District of Nebraska, in interpreting the NCPA, noted, “[W]hat is an ‘unfair [or deceptive] trade practice’ is ‘largely [left] to the courts to decide on a case-by-case basis.’”²²⁴ The court stated that one critically important factor is the posture and sophistication of the parties involved.²²⁵ That is, the NCPA should be interpreted narrowly when the underlying dispute is between two sophisticated merchants and broadly when the dispute is between an “unsophisticated retail consumer” and “unscrupulous business people.”²²⁶ It is difficult to imagine a wider disparity in party sophistication than exists in the context of civil shoplifting demands.

Rulings outside of Nebraska offer further support for this conclusion. In *Lee v. Pep Boys*,²²⁷ for example, the plaintiff brought suit under California’s Unfair Competition Law (UCL) after receiving a civil demand letter from his former employer.²²⁸ The letter accused the employee of theft (the employee had allegedly performed an oil change on his own car without paying);²²⁹ California law permits merchants to seek civil penalties from individuals committing acts of theft.²³⁰ The employer initially sought payment of \$325.²³¹ A few days later, the employer sent a second letter demanding payment of \$625,²³² which exceeded the civil penalty amount allowed under the state’s civil shoplifting statute (\$500).²³³ The plaintiff alleged this second letter violated California’s UCL,²³⁴ which prohibits “any unlawful, unfair or fraudulent business act or practice.”²³⁵ Specifically, he argued the demand letter was both “unfair” and “unlawful” because its settlement offer of \$625 exceeded the statutory maximum.²³⁶

223. 13 F. Supp. 2d 1003 (D. Neb. 1998).

224. *Id.* at 1014 n.6.

225. *Id.* at 1015.

226. *Id.* (citing *Boulevard Assocs. v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1039 n.5 (2d Cir. 1995) (distinguishing cases because they involved “defrauded individual consumers—a constituency entitled to special solicitude under [the consumer protection law]”).

227. No. C-12-05064 JSC, 2014 WL 129171 (N.D. Cal. Jan. 14, 2014).

228. *Id.* at *1.

229. *Id.*

230. CAL. PENAL CODE § 490.5(c) (West 2010).

231. *Lee*, 2014 WL 129171, at *1.

232. *Id.*

233. CAL. PENAL CODE § 490.5(c) (noting the individual accused of theft “shall be liable to the merchant or library facility for damages of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500), plus costs”).

234. *Lee*, 2014 WL 129171, at *2.

235. CAL. BUS. & PROF. CODE § 17200 (West 2008).

236. *Lee*, 2014 WL 129171, at *2–3.

As to the unlawfulness of the letter, the court ruled that nothing in California's civil shoplifting statute "makes it a violation of the law to demand more than the \$500 afforded in the law. In other words, while Defendants are not entitled to such an amount, the demand itself is not unlawful."²³⁷ The court reached a different result with respect to the "unfair" prong of the state's UCL. The court—drawing on established precedent—defined "unfair business practice" as "one that either offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."²³⁸ Furthermore, "Whether a business practice is unfair 'involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.'"²³⁹ Applying this standard to the facts of the case, the court concluded that it could not, as a matter of law, say that the \$625 settlement offer was not unfair.²⁴⁰ On similar logic, a Nebraska court could find it unfair to demand *any* amount of penalty, where Nebraska's statute does not allow for collection of a civil penalty.²⁴¹

c. *Trade or Commerce*

The NCPA makes unlawful "[u]nfair methods of competition and unfair or deceptive *acts or practices in the conduct of any trade or commerce . . .*"²⁴² Thus, to prevail on a claim under the NCPA, the plaintiff must demonstrate that the unfair or deceptive business practice—here, the issuance of civil demand letters—constitutes trade or commerce.²⁴³

237. *Id.* at *5.

238. *Id.* at *3 (quoting *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008)).

239. *Id.* There is a strong argument that these demand letters do have a significant impact on the recipients, who are disproportionately poor or otherwise disadvantaged, with little valid justifications by the alleged wrongdoer, the merchant.

240. *Id.* at *4 ("The Court cannot say this practice is not 'unfair' as a matter of law.").

241. *See supra* section II.B.

242. NEB. REV. STAT. § 59-1602 (Reissue 2010) (emphasis added).

243. In pleading a consumer protection claim, it is important to couch the act of commerce as the sending of the demand letter, as opposed to the incident of shoplifting. In *Riley v. Supervalu Holdings, Inc.*, a consumer asserted a claim under Ohio's consumer protection statute following receipt of a civil demand subsequent to an alleged act of shoplifting (plaintiff was accused but not convicted of stealing \$1.06 worth of merchandise from a local grocery store). *Riley v. Supervalu Holdings, Inc.*, No. C-050156, 2005 WL 3557399 (Ohio Ct. App. Dec. 30, 2005). The court dismissed the plaintiff's claim, finding the taking of goods without paying for them did not satisfy the "consumer transaction" requirement of Ohio's act. *Id.* at *4. Notably, Ohio's statute is much more restrictive than Nebraska's in this regard, specifically requiring a "consumer transaction," and defining such as "a sale . . . or other transfer of an item of goods" by a seller to a consumer. OHIO REV. CODE ANN. § 1345.01(A) (LexisNexis 2012).

Though Nebraska law provides scant guidance²⁴⁴ on whether sending a letter demanding money constitutes trade or commerce, a Washington case interpreting an identical statute is compelling. In *Panag v. Farmers Insurance*,²⁴⁵ a plaintiff-class brought suit under Washington's Consumer Protection Act²⁴⁶ (which is identical to Nebraska's CPA) after receiving collection letters from an agent of Farmers Insurance.²⁴⁷ In seeking summary judgment, the defendant challenged the propriety of the plaintiffs having brought suit under the guise of consumer protection, arguing the underlying claim involved an alleged tort as opposed to the "business transaction" contemplated by the statute.²⁴⁸ The defendants urged the court to adopt a rule making the state's consumer protection law applicable only to "consensual consumer or business transaction[s]."²⁴⁹ The court rejected this notion, citing the inherently broad applicability of the statute, specifically as it pertains to the "trade or commerce" requirement.²⁵⁰ The court noted:

"Trade" and "commerce" are defined terms under the CPA to "include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." An actionable violation can occur without any consumer or business relationship between the particular plaintiff bringing a private cause of action under the CPA and the actor because "trade or commerce" is not limited to such transactions.²⁵¹

A Florida court took a more narrow view in addressing the issue in the context of civil shoplifting demand letters. In *Kelly v. Palmer, Reifler & Associates*,²⁵² alleged shoplifters filed suit against a collection firm which had mailed civil demand letters on behalf of several

244. The NCPA defines trade or commerce as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." NEB. REV. STAT. § 59-1601(2) (Reissue 2010); see also *Moats v. Republican Party of Neb.*, 281 Neb. 411, 420, 796 N.W.2d 584, 593 (2011) ("Trade and commerce mean the sale of assets or services.").

245. 204 P.3d 885 (Wash. 2009).

246. See WASH. REV. CODE ANN. § 19.86.090 (LexisNexis 2013).

247. *Panag*, 204 P.3d at 888. The underlying financial dispute in *Panag* involved two insurance companies seeking to collect alleged debts from members of the plaintiff-class arising from separate car accidents. *Id.* Both insurance companies retained a collection agency, Credit Control Services, to recover the disputed amount. *Id.* at 888–89. At least one plaintiff received three letters from the collection agency, each with an increased tone of urgency and threat of litigation. *Id.* The second letter, for example, warned of pending legal activity, and advised the plaintiff to "act immediately." *Id.* at 888. The third letter reiterated these warnings, and threatened the plaintiff with additional penalties, including litigation costs and "any other method of collection allowable by law." *Id.*

248. *Id.* at 890.

249. *Id.*

250. *Id.*

251. *Id.* (citations omitted).

252. 681 F. Supp. 2d 1356 (S.D. Fla. 2010).

large retailers.²⁵³ The plaintiffs alleged, among other claims, that the law firm violated the FDUTPA, which prohibits “unfair methods of competition . . . and unfair or deceptive acts or practices in the conduct of any trade or commerce.”²⁵⁴ The plaintiffs argued the law firm had engaged in “commerce” in its issuance of a civil demand letter that offered the release of a legal claim—or a “thing of value”—in exchange for money.²⁵⁵ The *Kelly* court, in rejecting this argument, distinguished traditional trade or commerce in the “business context” from the pursuit of legal remedies. “The Palmer Law Firm’s acts—conduct ostensibly occurring during the exercise of a legal remedy—had zero connection whatsoever to any ‘trade or commerce,’” the court noted.²⁵⁶

While *Kelly* is analogous in that it involves civil shoplifting demands, a Nebraska court would likely adopt the broader interpretation employed in *Panag*. The NCPA is identical to, and derives from, the Washington statute at issue in *Panag*, and the Nebraska Supreme Court has previously looked to Washington precedent in broadly interpreting issues involving the NCPA.²⁵⁷ Additionally, Nebraska courts have allowed to proceed other NCPA claims premised upon the act or practice of issuing deceptive letters.²⁵⁸ These cases not only reflect

253. *Id.* at 1361.

254. *Id.* at 1372; FLA. STAT. ANN. § 501.204(1) (West 2010).

255. *Kelly*, 681 F. Supp. 2d at 1374 (“Plaintiffs contend that their dealings with the Palmer Law Firm constituted ‘trade or commerce’ because, through the demand letters, the firm solicited and offered them a release, a ‘thing of value,’ in exchange for money. They cite *Sweringen v. New York State Dispute Resolution Ass’n* . . . as support for the argument that ‘releasing legal claims for money constitutes a business that satisfies any trade or commerce requirement.’”).

256. *Id.* at 1375.

257. *Kuntzelman v. Avco Fin. Servs.*, 206 Neb. 130, 133–34, 291 N.W.2d 705, 707 (1980) (“[C]ertain other provisions of the Act were apparently patterned after a consumer protection act adopted by the State of Washington. In fact, our Act and the Washington Act are practically identical in scope and wording, particularly with reference to the exemption provision. Therefore, the decisions of the Washington courts interpreting that state’s exemption provisions are helpful and instructive herein.” (citations omitted)); *see also* *Powers v. Credit Mgmt. Servs., Inc.*, No. 8:11-cv-00436-JFB-TDT, at *17 (D. Neb. Feb. 2, 2016) (“[T]he NCPA is a remedial consumer protection statute that is to be liberally construed.” (citing *Kuntzelman*, 206 Neb. at 134, 291 N.W.2d at 707)).

258. *See Henggeler v. Brumbaugh & Quandahl*, No. 8:11-CV-334, 2012 WL 2855104 (D. Neb. July 5, 2012) (rejecting defendant’s motion to dismiss in a dispute involving allegedly deceptive debt collection practices, inducing the issuance of misleading letters); *Jenkins v. Pech*, No. 8:14-CV-41, 2015 WL 3658261 (D. Neb. June 21, 2015) (granting plaintiffs’ motion for class certification in their challenge to allegedly deceptive form letters issued by the defendant-debt collection firm); *Harris v. D. Scott Carruthers & Assoc.*, 270 F.R.D. 446 (D. Neb. 2010) (same). This broad interpretation has been similarly applied to other acts involving demand for payment. *See Jenkins v. Gen. Collection Co.*, 538 F. Supp. 2d 1165 (D. Neb. 2008) (rejecting defendant’s motion for summary judgment in an NCPA dispute involving the defendant’s practice of filing allegedly misleading claims against plaintiff-debtors in county court). A jurisdiction’s willingness to

courts' broad interpretation of the NCPA, they suggest the issuance of a deceptive letter is itself an act in trade or commerce.²⁵⁹

d. Affecting Public Interest

To be actionable under the NCPA, a plaintiff must demonstrate the claim seeks to redress more than a "private wrong where the public interest is unaffected."²⁶⁰ For Samantha Smith, she must establish that Wal-Mart sends similar letters to other Nebraskans and that the recipients are also likely confused, deceived, or misled by the contents.²⁶¹ She could satisfy this requirement through state-wide shoplifting figures, statistics indicating retailers' heavy reliance on civil demands, evidence of other Nebraskans having received similar letters, or discovery responses revealing the volume of similar letters distributed within the state, and the frequency in which recipients pay the demand.

consider acts that fall outside what is traditionally considered "trade or commerce" reveals a willingness to view the requirement as broadly as necessary to affect the underlying purpose of the statute.

259. As a final matter, an attorney representing a retailer may cite case law holding that the practice (i.e., counsel sending out demand letters on behalf of retailer clients) does not satisfy the "trade or commerce" requirement of a particular state's consumer protection act or, more generally, that attorney misconduct is exempt from such laws. Those exemptions, however, pertain only to disputes between a client and his or her attorney for alleged malpractice or misconduct. *See, e.g.,* *Beyers v. Richmond*, 937 A.2d 1082, 1086 n.7 (Pa. 2007) ("[The] legislature did not intend to include the furnishing of legal services to clients within the [Consumer Fraud] Act.").
260. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 684, 605 N.W.2d 136, 141–42 (2000) ("To be actionable under the CPA, therefore, we conclude that the unfair or deceptive act or practice must have an impact upon the public interest.").
261. *See, e.g.,* *Tecumseh Poultry v. Perdue Holdings, Inc.*, No. 4:12-CV-3032, 2012 WL 3018255 (D. Neb. July 24, 2012) (holding the plaintiff satisfied the NCPA's "public interest" requirement for purposes of a 12(b)(6) motion by alleging that the defendant's conduct likely caused confusion among consumers in Nebraska); *see also* *Azike v. E-Loan, Inc.*, No. 8:09-CV-37, 2009 WL1660472 (D. Neb. June 11, 2009) (granting motion to dismiss due, in part, to plaintiff's failure to provide sufficient factual allegations to establish the public interest was affected by alleged activity of the defendant); *Siegel v. Deutsche Bank Nat'l Tr. Co.*, No. 8:08-CV-517, 2009 WL 3254491, at *3 (D. Neb. Oct. 8, 2009) ("[The plaintiffs] have not alleged any conduct by defendants that involves multiple plaintiffs or multiple transactions. The gravamen of the plaintiffs' complaint is a single transaction between the plaintiffs and defendants. Plaintiffs' assertion that discovery may reveal similar conduct by defendants with respect to other mortgagees creates only a 'mere possibility of misconduct' that does not rise above the speculative level. Accordingly, the court finds the plaintiffs' complaint fails to state a claim for relief under the Nebraska Consumer Protection Act.").

3. *Declaratory Judgment*

A declaratory judgment enables a party to seek judicial direction when there is uncertainty as to the consequences of a potential future course of action—a sort of preventative adjudication.²⁶² These actions aim to clarify the rights, status, or other legal relations between the parties.²⁶³ Federal²⁶⁴ and Nebraska²⁶⁵ law provide mechanisms by which a party could request declaratory relief. The function of a declaratory action is to determine justiciable controversies that either are not yet ripe for adjudication by conventional forms of remedy or are not conveniently amendable to usual remedies.²⁶⁶ The intent is to provide a procedure for prompt determination of issues which, if not addressed immediately, would subject the party to additional injury.²⁶⁷

Not all disputes are suited for declaratory relief. The pleadings must present a justiciable controversy that is susceptible to judicial determination.²⁶⁸ Actions for declaratory relief cannot be used to determine the legal effect of a state of facts that are future, contingent, or uncertain.²⁶⁹ Declaratory relief is also improper “where another equally serviceable remedy is available,”²⁷⁰ or when the judgment sought would not wholly conclude or resolve the controversy between the parties.²⁷¹

Although no Nebraska court has ruled on a request for declaratory judgment in a matter involving a civil shoplifting demand, established precedent suggests such a request may be entertained. A seminal

262. See Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1281 (2010).

263. Bentley v. Sch. Dist. No. 025, 255 Neb. 404, 409, 583 N.W.2d 306, 307 (1998) (citing NEB. REV. STAT. § 25-21,149 (Reissue 2008)); see also Md. Casualty Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941) (resolving that declaratory relief may be sought when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality”).

264. 28 U.S.C. § 2201(a) (2012).

265. NEB. REV. STAT. § 25-21,149.

266. Ryder Truck Rental, Inc. v. Rollins, 246 Neb. 250, 257, 518 N.W.2d 124, 128 (1994).

267. Mullendore v. Sch. Dist. No. 1, 223 Neb. 28, 32–33, 338 N.W.2d 93, 97–98 (1986).

268. *Ryder*, 246 Neb. at 253, 518 N.W.2d at 126–27.

269. Boyles v. Hausmann, 246 Neb. 181, 187–88, 517 N.W.2d 610, 615 (1994) (“At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare a law as it applies to a given set of facts.”).

270. *Ryder*, 246 Neb. at 257, 518 N.W.2d at 129 (citing *Hoiengs v. Cty. of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985)).

271. *Id.* at 254, 518 N.W.2d at 127 (citing *Omaha Pub. Power Dist. v. Nuclear Elec. Ins.*, 229 Neb. 740, 428 N.W.2d 895 (1988); *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986); *Beatrice Manor v. Dep’t of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985)).

case on declaratory judgment in Nebraska is *Ryder Truck Rental, Inc. v. Rollins*.²⁷² There, Ryder sought a judicial determination as to its liability before any action had been filed following a vehicular accident involving one of its trucks.²⁷³ On appeal, the Supreme Court of Nebraska ruled the pleadings were void of a justiciable controversy ripe for declaratory relief: it found entirely speculative whether the injured driver would even bring a claim against Ryder (it had not even sued the lessee at this point), what claims the driver would assert, and on what legal theories those claims would be based.²⁷⁴

In contrast to the facts in *Ryder*, the receipt of a civil shoplifting demand letter seeking a specified amount, identifying section 25-21,194 as legal authority for the demand, and implying further action will be taken, establishes a threat of suit that is beyond speculative. The court in *Ryder* noted, however, that “[m]ere apprehension or the mere threat of an action or a suit is not enough”²⁷⁵ and that “it is necessary that litigation appear unavoidable.”²⁷⁶ Thus, it may be necessary that the demand letter be worded in such a way that indicates

272. 246 Neb. 250, 518 N.W.2d 124.

273. *Id.* at 254, 518 N.W.2d at 127. Ryder had leased a vehicle to an individual who was thereafter involved in an accident causing injury to another driver. *Id.* at 251, 518 N.W.2d at 125–26. In its complaint for declaratory relief Ryder sought, in part, a finding that it had no vicarious liability to the injured driver under the relevant statute. *Id.* at 251, 518 N.W.2d at 126. The trial court declared Ryder jointly and severally liable to the injured driver, and Ryder appealed. *Id.* at 250, 518 N.W.2d at 125.

274. *Id.* at 254, 518 N.W.2d at 127. The court also ruled the action improper, as it would not conclusively resolve the controversy between the parties. *Id.* at 254–55, 518 N.W.2d at 127. The court found that where the pleadings lacked a claim for damages by the injured party, another action or proceeding would need to be brought to settle the controversy. *Id.* The court further found the declaratory judgment action inappropriate where a conventional form of remedy was available and adequate: Ryder could defend the claim, if brought. *Id.* at 257, 518 N.W.2d at 128. The court determined that “declaratory relief is not necessary to protect Ryder from the accrual of further damages or to guide it in some future act. Any of Ryder’s defenses to liability can be presented without any consequential harm to Ryder if and when [the injured driver] brings suit against it.” *Id.* at 257, 518 N.W.2d at 129.

275. *Id.* at 253, 518 N.W. 2d at 127. The court further ruled that a declaratory action cannot “be used to adjudicate hypothetical or speculative situations which may never come to pass.” *Id.* at 254, 518 N.W.2d at 127.

276. *Id.* at 253, 518 N.W. 2d at 127.

suit is imminent²⁷⁷ or the facts indicate efforts to collect the debt would continue or escalate.²⁷⁸

Establishing an actual controversy, however, is not enough—the facts must demonstrate the party would be exposed to additional harm. Citing the Seventh Circuit’s ruling in *Cunningham Bros. v. Bail*, the *Ryder* court declared that “the primary purpose of declaratory judgment proceedings is to prevent the accrual of avoidable damages to those not certain of their rights and to afford them an early adjudication without waiting until their adversaries should see fit to begin suit after damages had accrued.”²⁷⁹ In *Ryder*, the court found there was no present controversy because no additional harm would be suffered by delay.²⁸⁰ An inquiry must be made, then, into whether and what facts may exist that establish a recipient of a civil shoplifting demand letter would suffer additional harm by waiting for the retailer to file suit. Presumably, delay could result in the imposition of statutorily imposed costs and attorney’s fees that the retailer may seek if it files first.²⁸¹ Alternatively or additionally, immediate declar-

277. Even if the letter was overtly threatening, considering suit is rarely filed in these matters, it may be difficult to establish a true threat of litigation. Similarly, if a substantial amount of time has passed since the making of the demand, a court could find the threat of suit speculative. Of course, an average citizen may have no way of knowing the retailer’s history of pursuing the demands or how quickly it files suit, so any threat of suit could be reasonably interpreted to mean a lawsuit was imminent. Another factor that may be considered is whether the demand included a deadline in which to pay, and what consequences would result if the recipient failed to pay. One could infer an imminent threat from a letter that referenced a statutory right to sue and included a deadline by which to “settle” the matter. It could also be argued that mere reference to the statute is sufficient to create a controversy, as the statute’s primary purpose is to create a cause of action for bringing a suit.

278. *See* Order on Motion to Certify Class, *Lee v. Pep Boys*, No. 12-CV-05064-JSC (N.D. Cal. Dec. 23, 2015), <http://www.leagle.com/decision/In%20FDCO%2020151228751/Lee%20v.%20The%20Pep%20Boys-Manny%20Moe%20&%20Jack> [<https://perma.unl.edu/AKL3-6B3R>] (refusing to entertain an action seeking a declaratory judgment that the language of a civil demand letter sent to all members of a proposed class violated the FDCPA; the court’s determination was premised in part on the plaintiff’s failure to allege or produce any evidence that members of the proposed class were likely to receive the demand from the defendants again, and thus the facts portrayed no risk of additional injury absent declaratory relief).

279. *Ryder*, 246 Neb. at 256, 518 N.W.2d at 128 (citing *Cunningham Bros. v. Bail*, 407 F.2d 1165, 1167–68 (7th Cir. 1969)).

280. *See supra* note 274.

281. *See* NEB. REV. STAT. § 25-21,194(1) (Reissue 2008) (“[A shoplifter] shall be liable to the owner of the merchandise in a civil action for: . . . (ii) Costs of maintaining the action; and (iii) Reasonable attorney’s fees if such owner has retained the services of an attorney in maintaining the action and the action is not in the Small Claims Court.”). A question remains, however, as to whether a retailer can seek attorney’s fees under the statute even when it did not *initiate* the action. Nebraska law does not define what “maintaining the action” entails, but there is

atory relief may be necessary to prevent the continuation of attempts to collect on the demand, and in turn, prevent the harm that could result (e.g., anxiety, embarrassment, costs of obtaining legal advice, time).²⁸² Even if collection attempts subsided, the individual may still suffer indefinite fear of an “impending” lawsuit unless affirmative action is taken. The law in Nebraska remains unsettled as to whether the aforementioned injuries present the type of harm contemplated in the adoption of section 25-21,149; but, considering the principal purpose of the law,²⁸³ a reasonable argument could be made that the prospect of such continued damage could justify preventative adjudication.

Upon facts similar to Samantha Smith’s, a recipient of a civil demand letter could seek a declaratory judgment as to the extent of her liability under Nebraska’s shoplifting civil demand statute. The goal would be to obtain a ruling on the scope of damages Wal-Mart could claim under the statute, without which she cannot know the full risk of ignoring the letter. As previously noted, any request for declaratory relief must resolve the entire controversy between the parties. To accomplish this, Samantha Smith could seek a judgment that “because the items taken were returned in a merchantable condition and Wal-Mart suffered no actual property damage or loss sustained as a direct

at least some risk the phrase could be interpreted to encompass both initiation *and* continuation of a lawsuit. *See Maintain*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“To maintain an action or suit may mean to commence or institute it Maintain, however is usually applied to actions already brought, but not yet reduced to judgment.”). Viewed in context, it appears the legislators intended to provide reimbursement for costs and attorney’s fees to a retailer burdened by having to file a lawsuit to recover its damages (because, arguably, if decriminalization was realized, the retailer wouldn’t be relying on the state’s prosecutor to do this for them). When viewed comparatively to other Nebraska statutes incorporating similar language, it appears the legislature in this instance may have simply utilized the wrong term to signify its intent—it used “maintain” when it should have used “commence.” *See Rigid Component Sys. v. Neb. Component Sys., Inc.*, 202 Neb. 658, 659, 276 N.W.2d 659, 660 (1979) (expressing that the term “maintain” means to continue a lawsuit that has already begun, as distinguished from the terms “to institute” or “to commence”). If the same interpretation was applied to the attorney’s fees provision in section 25-21,194, a retailer could recover attorney’s fees only if the *shoplifter* filed first. Because this conclusion is preposterous, the only reasonable interpretation is that “maintain” in this instance means “commence,” and thus a merchant may seek attorney’s fees only if it initiated suit to recover its damages.

282. *See supra* subsection III.C.2.i (discussing generally the injuries suffered by demand letter recipients). Additionally, a recipient of a civil demand is arguably denied free use of her assets on the presumption that she would need to hold the amount demanded in reserve while awaiting resolution.

283. *See supra* note 267 and accompanying text; *see also* *Mullendore v. Sch. Dist. No. 1*, 223 Neb. 28, 33, 338 N.W.2d 93, 98 (1986) (discussing the purpose of Nebraska’s Declaratory Judgment Act, and proscribing that “[t]he provisions of the declaratory judgments act . . . are to be liberally construed and administered”).

result of the incident of shoplifting, she is not liable to Wal-Mart for any damages under Section 25-21,194.”²⁸⁴ Nebraska courts have adopted the general rule that declaratory relief is not available to a prospective tort defendant seeking a declaration of nonliability;²⁸⁵ the Nebraska Supreme Court, however, acknowledged that the primary rationale for the rule is specific to the unique circumstances present in traditional personal injury matters.²⁸⁶

While an action for declaratory judgment may be appropriate under the law, most letter recipients may be better advised to simply ignore the letter due to the improbability of the retailer actually filing suit. Even if the client has pro bono counsel, the matter would still be time consuming and stressful; and then there is the risk of “waking the sleeping bear.” Though this particular bear is known more for its growl than its bite, the results of provocation may be debilitating, even if the client is victorious.

284. For additional sample language, see Complaint, *Renn v. Sephora USA, Inc.*, No. BC551523, 2014 WL 3540591 (Cal. Super. Ct. July 14, 2014). *Renn* involved a class action suit wherein recipients of civil shoplifting demand letters requested a declaratory ruling as to the liability of the class members for the civil damages asserted by the retailer, and further requested the retailer be enjoined from continuing its alleged unlawful practices. See also 5 JOHN P. LENICH, NEBRASKA PRACTICE SERIES: NEBRASKA CIVIL PROCEDURE § 7:11 (2008) (discussing what parties may be necessarily joined in the action). An action for declaratory relief could be brought on its own, or coupled with an action for monetary damages and an injunction. See *Bray*, *supra* note 262 (describing a number of claim combinations involving declaratory relief). For instance, a plaintiff could bring an action for a declaratory ruling on whether she owed the amount claimed, a request to enjoin the retailer from sending further demands for payment, and a claim seeking monetary damages under the NCPA. An individual without sufficient funds to pay the costs of filing may proceed in forma pauperis. NEB. REV. STAT. § 25-2301.02 (Reissue 2008); see also *Tyler v. Neb. Dep’t of Corr. Servs.*, 13 Neb. App. 795, 798, 701 N.W.2d 847, 850 (2005) (confirming a non-frivolous action for declaratory relief may proceed in forma pauperis).

285. *Ryder Truck Rental, Inc. v. Rollins*, 246 Neb. 250, 255, 518 N.W.2d 124, 127–28 (1994) (“[W]e note that federal case law clearly establishes the rule that a declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant.”).

286. Courts adopting this general rule have concluded a declaratory judgment action would in effect permit the tort defendant to choose the time and forum for trial by beating the potential plaintiff to the punch. *Id.* at 255, 518 N.W.2d at 128 (citing *Cunningham Bros. v. Bail*, 407 F.2d 1165 (7th Cir. 1969); *Frito-Lay, Inc. v. Dent*, 373 F. Supp. 771 (N.D. Miss. 1974)). This general rule also presumes the potential defendant would suffer no intermediate harm while waiting for the plaintiff to bring the action.

IV. A CALL TO ACTION

The misapplication of Nebraska law by large national retailers and collection firms is an abusive practice²⁸⁷ and a problem in need of a solution. The Nebraska legislature can and should exercise its legislative powers to effect change by repealing or amending the statute; alternatively, the Attorney General has the ability to curb the practice by educating state citizens and informing involved parties about the limitations of section 25-21,194.²⁸⁸ This Part analyzes and explains how each option—repeal, amendment, or education—could benefit Nebraskans and encourage proper application of Nebraska law.

A. Legislative Repeal

A number of factors support an argument for outright repeal. First, section 25-21,194 is duplicative of other available state-based statutory remedies. Most analogous is Nebraska's criminal restitution statute—section 29-2280—which already provides merchants an avenue for reimbursement for any actual damage incurred as a result of the incident.²⁸⁹ The statute provides in relevant part: “A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted.”²⁹⁰ Notably, the language in the damage provision of the resti-

287. To be clear, this Article does not claim it is illegal or undesirable to hold a shoplifter accountable for the damage resulting from her act of theft; rather, it asserts retailers' civil claims should be limited to the actual direct damage resulting from the incident of theft and that any demand for money that exceeds the statute's authority is an abuse of the statute.

288. Though not prescribed by this Article, avenues exist for trial court judges to play an active role in reducing misuse of civil remedy statutes. For example, a trial court judge in Florida, Donald W. Hafele, wrote a complaint to the Florida Bar after a criminal defendant claimed he was unable to pay court costs given a \$700 demand sent by Palmer Reifler stemming from the same incident. See Zimmerman, *supra* note 3. Judge Hafele noted the letter failed to itemize any injury or damage. *Id.* The Florida Bar dismissed the grievance for lack of jurisdiction because it would require statutory interpretation. *Id.* In Pennsylvania, a judge issued a permanent injunction against Macy's and its in-person collection of civil shoplifting penalties, arguing such demands are coercive. See Debra Cassens Weiss, *Judge Plans to Go Into 'Uncharted Legal Territory' to Stop Macy's from Collecting Shoplifting Fines*, A.B.A. J. (June 11, 2015, 5:45 AM), http://www.abajournal.com/news/article/judge_plans_to_go_into_uncharted_legal_territory_to_stop_macys_from_collect/ [<https://perma.unl.edu/EBY7-M72K>]. Judge Stoddart claimed he expects Macy's to ignore the injunction—as the store has done before—and said he will then venture even “deeper into uncharted legal territory” and order sheriffs to take the money from Macy's registers, at which point Macy's will certainly appeal and the legality of such practices can be adjudicated by a state appellate court with binding authority. *Id.*

289. See NEB. REV. STAT. § 29-2280 (Reissue 2008).

290. *Id.*

tution statute, “actual damage” and “direct result,” mirrors that found in Nebraska’s civil shoplifting statute.²⁹¹ Despite the matching statutory text, retailers in Nebraska regularly seek through civil demand letters amounts to which they know they would not be entitled through restitution. This is likely the consequence of the significant distinction between the two statutes: oversight.²⁹² Whereas all orders of criminal restitution undergo scrutiny from the court, a prosecutor, and possibly a defense attorney, written demands for damages sent pursuant to Nebraska’s civil shoplifting statute go entirely unchecked.

Like the civil shoplifting statute,²⁹³ the criminal restitution statute provides that a conviction is not needed for a court to order restitution.²⁹⁴ In this way, the criminal restitution statute furthers the legislature’s verbalized intent to decriminalize petty shoplifting, while maintaining the retailer’s ability to recover actual damages sustained. Thus, even in cases where the alleged shoplifter is not charged or enters a diversion program of some sort, a court retains authority to order restitution for any direct loss resulting from the act of theft.

In addition to the criminal restitution statute, a merchant can also utilize Nebraska’s small tort claims statute—section 25-1801—to seek full reimbursement of its actual loss.²⁹⁵ The provision streamlines the recovery process for tort claims under \$4,000 by allowing a person or entity to make a pre-litigation claim against an alleged wrongdoer for, among other things, lost or damaged property.²⁹⁶ Upon making such a claim, the harmed party must wait ninety days, during which time

291. Compare *id.* (“[A]ctual physical injury or property damage or loss sustained by the victim as a direct result of the offense . . .”), with *id.* § 25-21,194(1)(a)(i) (Reissue 2008) (“Actual property damage or loss sustained as a direct result of the incident of shoplifting . . .”).

292. See Davis, *supra* note 48, at 396–407 (discussing the vast power of the private justice system, specifically the concept of civil recovery). “Public systems of justice are either the targets of routine research or publicly accountable actors. Private justice systems are neither.” *Id.* at 407. Further, “Private justice systems are accountable to the wealthy corporations that sponsor them and hence escape routine public examination.” *Id.* at 396.

293. NEB. REV. STAT. § 25-21,194(2) (“A conviction under any statute or ordinance shall not be a condition precedent to maintaining an action under this section.”).

294. *Id.* § 29-2280 (“With the consent of the parties, the court may order restitution for the actual physical injury or property damage or loss sustained by the victim of an uncharged offense or an offense dismissed pursuant to plea negotiations.”). Also worth noting is that although the criminal restitution statute does not provide for reimbursement of attorney’s fees (and the corresponding civil remedy statute does), this is of no consequence where criminal restitution would be made through the courts and the use of the state’s attorney at no cost to the retailer.

295. *Id.* § 25-1801 (Reissue 2008 & Cum. Supp. 2014).

296. *Id.* The provision reads:
[A party] . . . in this state having a claim which amounts to four thousand dollars or less against any [party] . . . for . . . (5) lost or damaged personal property . . . may present the same to such person, partnership, limited liability company, association, or corporation, or to any agent

the other party may voluntarily satisfy the claim.²⁹⁷ If the claim is not satisfied, the harmed party may initiate suit; if it obtains a judgment, the defendant is liable for both costs and attorney's fees incurred in obtaining the judgment.²⁹⁸ This statute, coupled with the criminal restitution statute, provides sufficient means for retailers to recover damage sustained as a result of an incident of shoplifting. Moreover, these laws are less prone to abuse than Nebraska's civil shoplifting statute because they include specific limitations on damages that can be claimed and are subject to judicial oversight.

In addition to being duplicitous, section 25-21,194 undesirably creates a victim-class that the law treats differently than other victims of theft (at least in practice). As its name implies, the statute authorizes a civil action only for incidents of shoplifting, not general theft.²⁹⁹ While non-merchants are confined to the remedies described above to recover for any damage or loss sustained as a result of theft, merchants are afforded special treatment. For instance, an elderly woman who has her purse stolen will, at best, recover the value of the purse and the items therein,³⁰⁰ whereas a retailer could recover its actual loss, plus costs and reasonable attorney's fees³⁰¹ (and in most states, also recover indirect costs and added penalties). Considering

thereof, for payment in any county where suit may be instituted for the collection of the same.

Id. Paragraph (5) appears to already cover incidents of theft, but if the legislature deemed it prudent, it could amend the language to include "property lost or damaged through tortuous activity, including theft."

297. *Id.* ("If, at the expiration of ninety days after the presentation of such claim, the same has not been paid or satisfied, he, she, or it may institute suit thereon in the proper court."). If suit is filed, the defendant may satisfy the claim at any point before a final judgment is entered and pay the amount claimed plus costs. *See id.* ("If payment is made to the plaintiff by or on behalf of the defendant after the filing of the suit but before judgment is taken, except as otherwise agreed in writing by the plaintiff, the plaintiff shall be entitled to receive the costs of suit whether by voluntary payment or judgment.").
298. *Id.* ("If he, she, or it establishes the claim and secures judgment thereon, he, she, or it shall be entitled to recover the full amount of such judgment and all costs of suit thereon, and, in addition thereto, interest on the amount of the claim at the rate of six percent per annum from the date of presentation thereof, and, if he, she, or it has an attorney employed in the case, an amount for attorney's fees as provided in this section.").
299. *See id.* § 25-21,194 (Reissue 2008).
300. This assumes she is able to recover through restitution, and is at the mercy of the government to accomplish this. Arguably, she could bring a suit under section 25-1801, but this is highly unlikely. The attorney's fees provision is simply inadequate to persuade a civil attorney to take the one-off case. Played out, if the value of the woman's purse and contents was \$100, the most she could recover is \$100 plus \$15 in attorney's fees (ten dollars plus ten percent of fifty dollars). *Id.* § 25-1801.
301. Conversely, the merchant seeking compensation via section 25-21,194, could recover the \$100 plus whatever amount of attorney's fees a court found reasonable—an amount most likely to exceed \$15.

most retailers' ability to absorb (or pass on to consumers) the costs of bringing a civil action against a shoplifter, as compared to the individual victim of theft who may have limited capacity to bring suit, why is it the retailer who is afforded the special treatment? While addressing merchant theft is undoubtedly an important issue,³⁰² the legislature's decision to supplement avenues for relief already available to retailers is most likely a result of the significant (largely unopposed) lobbying efforts by national retail chains.³⁰³

Lastly, Nebraska's civil shoplifting statute has failed to accomplish what it was enacted to do. In 1987, the legislature identified two primary rationales for ceding to lobbying pressure and following the national trend of civil shoplifting statute adoption: (1) to provide retailers with a cause of action against shoplifters and (2) to decriminalize shoplifting.³⁰⁴ After thirty years, it has failed to accomplish either. As noted throughout this Article, the statute is misused or misapplied through overly broad interpretations by merchants and collection firms; furthermore, as discussed above, the cause of action the statute provides is unnecessary given other available mechanisms. As for the legislature's purported intent to "decriminalize" petty shoplifting and ease the burden on the criminal justice system, the statute has failed.³⁰⁵ The law serves as a supplement to criminal prosecution,³⁰⁶ as opposed to an alternative.³⁰⁷

302. See *supra* note 12 and accompanying text.

303. See *supra* notes 56–57 and accompanying text; see also HOBBS, *supra* note 148, § 1.5.12, at 21 ("In the 1980s all or nearly all states enacted shoplifting penalty statutes at the behest of local retail merchants' associations.").

304. *Floor Deb. on L.B. 536*, 1987 Leg., 90th Sess. (Neb. 1987) (statement of Sen. Brad Ashford); *Hearing, supra* note 53.

305. There is no evidence available that the statute has resulted in a reduction in the criminal prosecution of shoplifting in the State of Nebraska. In fact, reported incidents of theft in Nebraska jumped sharply in 1987, the year the statute was adopted, and continued to increase steadily over the next five years. *Nebraska Crime Rates 1960–2014*, DISASTER CTR., <http://www.disastercenter.com/crime/necrimn.htm> [<https://perma.unl.edu/YMD7-YXBZ>] (providing crime statistics reported from law enforcement agencies; the report provides statistics on theft generally, but does not partition out shoplifting offenses). Practically speaking, the only truly effective way to decriminalize an act is to remove it from the criminal code entirely; the legislature's failure to do so upon adoption of section 25-21,194 made the ambitious (yet misguided) goal of decriminalization virtually impossible to achieve.

306. Norman, *supra* note 45 (describing Wal-Mart's practice of pursuing both criminal prosecution and civil penalties); see also MANUAL, *supra* note 47, at 13 (encouraging merchants to vigorously pursue criminal prosecution *in addition to* civil recovery). Even the text of many states' shoplifting statutes reveals intent to supplement the criminal sanctions, as opposed to replace them. See, e.g., ME. REV. STAT. ANN. tit. 14, § 8302(5) (2003) ("An action under this chapter does not bar a criminal prosecution under Title 17-A, chapter 15."); OKLA. STAT. ANN. tit. 21, § 1731.1(F) (West 2015) ("The provisions of this section are in addition to criminal penalties and other civil remedies and shall not limit merchants or other

B. Legislative Amendment

Unfortunately, given the strength of the retail lobby and the fact all fifty states have civil shoplifting statutes, it is unlikely the legislature will fully repeal section 25-21,194. Legislative amendment would be an intermediate option that could effectively remedy the problem while preserving merchants' interest in recovering damages resulting from theft. Insight gleaned from other states' statutes and lessons learned from how the civil recovery system has developed suggest five noteworthy changes.

First, section (1), which establishes what damages a merchant may recover, should explicitly state general theft-prevention costs are not recoverable, and that certain conditions must be met before attorney's fees may be awarded. It is important to note these proposed amendments would not reduce the damages currently available; it simply makes the provision clearer. With these changes implemented, section 25-21,194(1) would read:

- (1) (a) Any person who commits the crime of theft by shoplifting as provided in section 28-511.01 or whose conduct is described by section 28-511.01 or (b) the parents of a minor who commits the crime of theft by shoplifting as provided in section 28-511.01 or whose conduct is described by section 28-511.01 shall be liable to the owner of the merchandise in a civil action for:

persons from electing to pursue criminal penalties and other civil remedies, so long as a double recovery does not result.”). *But see* TENN. CODE ANN. § 39-14-144(a) (2014) (providing that upon consent of the district attorney, a civil penalty may be sought in lieu of the criminal penalties imposed).

307. Because the civil penalty scheme results in little to no criminal deterrence, it could never be a viable alternative to criminal prosecution. *See* Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 152 (1994) (“[C]ivil process does not generate as much deterrence as criminal prosecutions.”); Stephanie Strom, *States Act to Combat Shoplifting*, N.Y. TIMES (Sept. 19, 1991), <http://www.nytimes.com/1991/09/19/business/states-act-to-combat-shoplifting.html?pagewanted=all> (providing conflicting view points on the deterring effect of civil shoplifting statutes). There is also evidence that retailers who have implemented civil recovery as an alternative to criminal prosecution have done so in a highly discriminatory manner. Davis, *supra* note 48, at 396–407. In this study, spanning 1986 to 1988, researchers analyzed the use and impact of a newly enacted civil recovery statute as applied by a large national retailer. *Id.* The study revealed the retailers’ security personnel disproportionately chose not to pursue criminal charges against those evidencing membership in a social class that would have less ability to pay the civil penalty (e.g., people without an address or phone number, who had little connections to the community, or lived in a particular ZIP code). *Id.* The researchers found that “[s]tore police skim the affluent for civil recovery and ship the less affluent to the public criminal justice system.” *Id.* at 406. The practice of selective prosecution is supported by current statistics indicating retailers turn over to police approximately half of those caught shoplifting. *See Shoplifting Statistics*, NAT’L ASS’N FOR SHOPLIFTING PREVENTION, <http://www.shopliftingprevention.org/what-we-do/learning-resource-center/statistics/> [<https://perma.unl.edu/6VRV-UULU>] (“[Shoplifters] are turned over to the police 50 percent of the time.”).

- (i) Actual property damage or loss sustained as a direct result of the incident of shoplifting, which may include the full retail value, cost of repair, or cost of replacement of the merchandise, but shall not include expenses related to general theft-prevention measures;³⁰⁸
- (ii) Costs of maintaining the action; and
- (iii) Reasonable attorney's fees if such owner has retained the services of an attorney in maintaining the action and the action is not in the Small Claims Court incurred subsequent to the merchant filing suit and only if the following conditions are satisfied:
 - (1) The owner of the merchandise retained an attorney in maintaining the action;
 - (2) The action was not brought in Small Claims Court; and
 - (3) The owner of the involved merchandise obtained a judgment for the highest amount claimed in any demand letters sent pursuant to subsection (6) of this section.

Subsection (6), which contains the demand letter provision to which the above subsection refers, would also benefit from revision. To reduce abusive practices in making demands under the statute, the law should be modified to require two written demands be sent prior to initiation of suit, and further set forth with specificity what information the demand letters must contain.³⁰⁹ This modification would guarantee an opportunity to forego suit by paying the amount claimed, and would also ensure the recipient was fully informed on the matter. The proposed language would also eliminate ambiguity as to the amount that can be demanded under the statute.³¹⁰ Maryland's

308. This provision could also incorporate language specifically excluding "loss of time or wages incurred by the merchant in connection with the apprehension of the defendant." See N.J. STAT. ANN. § 2A:61C-1 (West 2015); see also 42 PA. CONS. STAT. ANN. § 8308(a)(2)(ii) (West 2007) ("Damages under this subparagraph do not include the loss of time or wages incurred by the plaintiff in connection with the apprehension and prosecution of the defendant.").

309. Presently, eleven states require retailers to send a demand notice as a prerequisite to filing suit to recover damages (Alaska, Arkansas, Florida, Georgia, Kansas, Maryland, Mississippi, New Jersey, Pennsylvania, Utah, Washington), and in six of those states (Florida, Georgia, Maryland, Mississippi, Utah, Washington) the statutes further specify the form and content of the demand letter. See Jan E. Simonsen & Alexander M. Gormley, *Demand with a Plan*, CARR MALONEY P.C., <http://www.carrmaloney.com/index.php/news-resources/articles/demand-with-a-plan-the-need-for-retailers-to-be-aware-of-the-variations-in-civil-demand-statutes-across-the-country/> [https://perma.unl.edu/M4CP-FN8P] (providing a useful summary of state civil shoplifting statutes categorized according to demand letter provisions); see also Leiter, *supra* note 21 (comparing states' civil shoplifting statutes). Ohio's statute takes a different approach; it incentivizes the practice of sending demand letters rather than outright requiring it. In Ohio, a retailer may choose to file suit to collect damages and penalties without first having sent a demand, but if it sends a demand and certain notice requirements are satisfied, then the retailer may also seek administrative costs, costs in maintaining the action, and reasonable attorney's fees. OHIO REV. CODE ANN. § 2307.61(C) (LexisNexis 2010).

310. In its present form, the demand letter provision permits merchants to demand damages and costs available "under this section," and while this Article asserts that meaning is rather straightforward, it is often misunderstood or misapplied

civil shoplifting statute is illustrative in this regard.³¹¹ The following proposed language is adapted from Maryland's statute:

- (6) Prior to the commencement of any action brought under this section, the owner of merchandise must cause two demand letters to be sent via certified mail to the responsible person at that person's last known address. The initial letter must be mailed at least thirty (30) days prior to any action, and the second letter must be mailed at least fifteen (15) days prior to any action. Each letter shall contain the following:
 - (i) Information regarding the alleged act of shoplifting, including the date, item(s) involved, the price for each item, and whether the item was recovered in a merchantable condition;
 - (ii) The amount of damages sought, which shall be limited to those allowed under subsection (1)(a)(i) of this section;
 - (iii) How the demand may be satisfied either in person, via mail, or through a website operated by the owner of the merchandise or its counsel;
 - (iv) The date by which the alleged shoplifter may make the requested payment to avoid suit being filed;
 - (v) Conspicuous notice advising the alleged shoplifter that payment of the damages and civil penalty does not preclude the possibility of criminal prosecution, and that payment of the demand would not be admissible in any criminal proceeding as an admission or evidence of guilt; and
 - (vi) A copy of this Section.³¹²

Thirdly, a new provision should be added to ensure that merchants do not improperly coerce confessions or payments from suspected shoplifters.³¹³ It is believed some retailers coerce detained shoplifters into signing confessions, or executing agreements to pay a specified amount in civil damages.³¹⁴ Such confessions and agreements may be

in practice: to wit, Wal-Mart's demand of \$200 despite the language appearing to limit damages to only those incurred as a direct result of the incident. *See also supra* note 76 (discussing a misinformed letter from the Nebraska Office of the Attorney General).

- 311. MD. CODE ANN., CTS. & JUD. PROC. § 3-1303 (LexisNexis 2013). Per statute, the initial letter must contain information on the act giving rise to the letter, the amount of damages sought, the amount of civil penalty sought and the method of calculating such sum, how the demand may be satisfied, how the demand does not affect any potential criminal charges, and the date of required satisfaction. *Id.*
- 312. Minnesota, Maine, and Vermont similarly require that all demands sent pursuant to their respective civil shoplifting statute include a copy of such statute. *See* ME. REV. STAT. ANN. tit. 14, § 8302 (2003); MINN. STAT. § 604.14 (2014); VT. STAT. ANN. tit. 13, § 2579 (2009).
- 313. Such a provision would be novel, though at least one state has by statute prohibited merchants from requesting a minor "sign an admission of theft or other similar declaration unless the minor's parent, guardian, or attorney is present." *See* N.D. CENT. CODE § 51-21-05(2) (2007).
- 314. *See* Jonathan Berr, *Judge Says Macy's Shoplifting Policy Is Unethical*, CBS (June 15, 2015, 7:32 PM), <http://www.cbsnews.com/news/judge-says-macys-shoplifting-policy-is-unethical/> [<https://perma.unl.edu/3V35-ZKG2>]; *see also* Rossello, *supra* note 47 (advising merchants to create a confession sheet that is designed so the shoplifter can fill in the blanks at the time the person is caught and agrees to pay

made in fear; specifically, the fear that refusing to sign the document would subject him or her to additional criminal penalty. It appears retailers may also prey on non-English speaking suspects who do not know their rights or understand the legal consequences of signing the agreement.³¹⁵ To protect against this risk, the legislature could include language such as:

- (10) In no event shall any merchant cause or allow to be signed any agreement or admission involving the suspected shoplifter immediately following the incident. Any pre-litigation settlement must comply with the notice and demand requirements set forth in subsection (6).

Another provision could be added to eliminate the risk of redundant monetary penalties. As discussed in subsection II.A.1, alleged shoplifters are potentially subject to an onslaught of monetary penalties under the current system: an individual like Samantha Smith may face a stiff criminal fine and criminal restitution on top of any civil claim. The universally accepted one-satisfaction rule³¹⁶ likely already precludes a merchant from maintaining suit if it already recovered via criminal restitution, but an added provision to explicitly affirm this principle would do no harm. For example:

- (11) No cause of action shall be brought under this section, and any cause of action already brought shall be extinguished, upon the owner having recovered for the actual property damage or loss sustained as a direct result of the incident of shoplifting through criminal restitution as provided in section 25-1801, a common law claim, or any other mechanism.

Lastly, the legislature should consider going so far as to include a hand-slapping provision to ensure compliance with the statute. Without such a provision, retailers and collection firms will likely continue the practice of misusing the statute to the detriment of Nebraskans. Such penalty provision may look like this:

- (12) If any owner of merchandise seeks recovery in a way inconsistent with the statutory requirements and/or limitations provided herein, such owner shall be liable for an amount equal to three times the highest amount sought by the owner, or five-hundred dollars (\$500), whichever is greater. Recovery under this subsection may be had in addition to, and

the charges). Shockingly, New Hampshire law permits retailers to coercively recover civil damages from alleged shoplifters by agreeing to not file a police report or criminal complaint if the alleged shoplifter pays the amount demanded in full (including penalties of up to \$400) within sixty days. N.H. REV. STAT. ANN. §§ 507:8-f, 544-C:1 (2010). Illinois is considering similar legislation. See H.R. 2496, 99th Leg., Reg. Sess. (Ill. 2016).

315. See Berr, *supra* note 314.

316. The one-satisfaction rule is “[t]he principle that a plaintiff is only entitled to only one recovery for a particular harm, and that the plaintiff must elect a single remedy if the jury has awarded more than one.” *One-Satisfaction Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014). Thus, presumably, the dual-penalty threat would be non-existent since the merchant could not recover under the civil shoplifting statute if it already was reimbursed under criminal restitution.

shall not be limited by, any other remedies available. Such action may be brought by any party in interest, or by the Attorney General.³¹⁷

Read together, these proposed amendments would better signal to recipients, retailers, collection firms, and courts what damages are recoverable, and how to properly utilize demand letters as a tool to avoid litigation. These improvements would enhance the civil recovery system within Nebraska and help effectuate what the legislature intended when it enacted Section 25-21,194 almost thirty years ago.

C. Education and Enforcement

Ideally the legislature would involve itself and fix the problem through legislative action, but all is not lost if it declines to do so—the Attorney General could exercise its role as “the State’s law firm”³¹⁸ and curb the problem through its consumer protection division. The Attorney General could act through educational outreach and, if necessary, enforcement.

As stated by the Office of the Nebraska Attorney General: “An important way the Consumer Protection Division can protect consumers is to help them protect themselves.”³¹⁹ To protect against known fraudulent practices affecting citizens, the Attorney General’s Office should alert consumers to the issue by utilizing statewide and local media sources, issuing press releases or alerts, or referring individuals to other agencies or governmental organizations.

Additionally, efforts could be aimed at educating those sending the letters. For example, a manual published by the Eugene Police Department of Eugene, Oregon attempts to provide a blueprint for merchants to combat shoplifting.³²⁰ Most relevant here is the manual’s guidance on how a merchant should exercise its statutory right to civil recovery; in particular, it describes Oregon’s civil shoplifting statutes in general terms, outlines the procedure to follow, and even details how to draft a proper demand letter.³²¹ The Attorney General’s Office could create a similar manual for retailers operating

317. Maine’s civil shoplifting statute includes a similar provision aimed at penalizing misuse of the statute; the relevant provision reads: “Fraudulent prosecution. Any person who knowingly uses provisions of this chapter to demand or extract money from a person who is not legally obligated to pay a penalty may be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year or by both.” ME. REV. STAT. ANN. tit. 14, § 8302(7). There is no doubt that retailers and collection agents will oppose inclusion of this provision with all of their collective might; this is evidenced by the lack of such penalty language in civil shoplifting statutes nationwide (only Maine’s statute contains such a provision).

318. NEB. ATT’Y GENERAL’S OFF., <https://ago.nebraska.gov/> [<https://perma.unl.edu/3ZCM-7Q4K>].

319. *Consumer Protection*, NEB. ATT’Y GENERAL’S OFF., https://ago.nebraska.gov/consumer_protection [<https://perma.unl.edu/XM23-H2L6>].

320. MANUAL, *supra* note 47.

321. *Id.* at 13–16.

within Nebraska, and those firms known to engage in civil recovery practices within Nebraska's borders.

If education does not resolve the problem, the Attorney General's Office may go so far as to use its enforcement powers to stop the misuse of section 25-21,194. At first, this may be rather informal—perhaps the Attorney General's Office could contact those who are misusing the statute, inform them of the *correct* interpretation and limitations of Nebraska's statute, and threaten legal action if they do not take corrective measures.³²² If the misuse continues, the Consumer Protection Division could bring an action against the merchant, law firm, or both "to protect Nebraskans and show that violations will not be tolerated."³²³

V. CONCLUSION

Nebraska's civil shoplifting statute was developed to decriminalize shoplifting and provide a mechanism for Nebraska retailers to recover actual loss incurred as a result of a particular shoplifting incident. There is no evidence the statute has accomplished either of these goals. Prosecutors continue to prosecute shoplifting as they would any other form of theft, and there appears to be no program in Nebraska intended to shift the burden of prosecuting these claims from law enforcement to the retailer. Instead of creating an avenue for recovery of actual damages incurred by the retailer, it has inadvertently created a revenue stream for retailers and collection firms demanding payment of arbitrary, excessive amounts in the name of the statute. Unless and until affirmative action is taken, retailers and their cohorts will continue this practice of abusing the statute and extorting money from Nebraskans. Individuals in receipt of a demand letter should ignore it, or take affirmative action. Nebraska attorneys should volunteer their time to assist citizens in seeking judicial determination as to the legality of the practice of those firms seeking amounts beyond what the statute provides. The most fruitful, far reaching action, however, could be taken by the Nebraska legislature by either repealing or amending the statute.

322. Although the focus of this Article is on the deceptive nature of civil demand letters, the Attorney General should also consider whether the letters rise to the level of prosecutable fraud.

323. *Consumer Protection*, *supra* note 319.