Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions—The Ohio Consumer Sales Practices Act

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I. INTRODUCTION

In the past two decades, a variety of consumer protection statutes have been adopted on both the federal and state levels.[1] These laws are legislative attempts to regulate the business relationship between sellers and consumers. In this relationship:

> Deception is the classic consumer problem. From an early time the law has provided remedies for the buyer who has been deceived. As marketing and consumer services have become more complex, the private remedies of the common law, and traditional criminal actions, have become relatively ineffective as a means by which the consumer may protect himself, and government has intervened.[2]

The Ohio Consumer Sales Practices Act[3] is such an intervention. The Act is modeled after the Uniform Consumer Sales Practices Act,[4] promulgated by the National Conference on Uniform State Laws and approved by the American Bar Association, and is "an effort to crystallize the best elements of contemporary federal and state regulation of consumer sales practices in or-

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1. Some examples include the Truth In Lending Act, 15 U.S.C. § 1601 *et seq.* (1976), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (1976 & Supp. II 1978), the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (1976), the New Jersey Consumer Fraud Act, N.J. STAT. ANN. § 56:8-1 *et seq.* (West 1964), the Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.01 *et seq.* (Page 1979), the Pennsylvania Unfair Trade Practices and Consumer Protection Law, PA. STAT. ANN. tit. 73 § 201-1 *et seq.* (Purdon 1971), and the Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. tit. 2 § 17.41 *et seq.* (Vernon 1968 & Supp. July 1981).

2. Thomas v. Sun Furniture and Appliance Co., 61 Ohio App. 2d 78, 81, 399 N.E.2d 567, 569 (1978).

3. OHIO REV. CODE ANN. § 1345.01 *et seq.* (Page 1979).

4. UNIFORM CONSUMER SALES PRACTICES ACT.

der to effectuate harmonization and coordination of federal and state regulation."[5] One of the main purposes of both the Uniform and the Ohio acts is to compensate for the inadequacy of traditional consumer remedies by simplifying, clarifying, and modernizing the law governing consumer sales practices.[6] The Ohio Act prohibits unfair or deceptive and unconscionable acts or practices by suppliers in consumer transactions.[7] Consumers are provided with a variety of remedies,[8] and the Ohio Attorney General has the power to "adopt, amend and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 [unfair or deceptive conduct] and 1345.03 [unconscionable conduct] of the Revised Code,"[9] to investigate,[10] and to take legal action[11] to enforce the Act. This Article discusses the scope of the Act, prohibited acts or practices, the relation of the Act to other consumer legislation, and the private remedies provided by the Act.[12]

II. Scope

A. *The Act in General*

The Consumer Sales Practices Act is a remedial law designed to compensate for the inadequacies of traditional consumer remedies and must therefore

5. Toledo Metro Fed. Credit Union v. Ted Papenhagen Oldsmobile, 56 Ohio App. 2d 218, 220, 381 N.E.2d 1337, 1339 (1978).

6. *See* UNIFORM CONSUMER SALES PRACTICES ACT § 1(1).

7. Unfair or deceptive acts or practices are defined in OHIO REV. CODE ANN. § 1345.02 (Page 1979). Unconscionable acts or practices are defined in OHIO REV. CODE ANN. § 1345.03 (Page 1979).

8. Private remedies are listed under OHIO REV. CODE ANN. § 1345.09 (Page 1979). Merchants dealing with consumers are provided with only two defenses to civil liability under the Act. If the supplier can show, by a preponderance of the evidence, that the "violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error . . . no party shall be awarded attorney's fees and monetary recovery shall not exceed the amount of actual damages resulting from the violation." OHIO REV. CODE ANN. § 1345.11(A) (Page 1979). While this language has rarely been used as a defense in Ohio, similar language in the Federal Truth In Lending Act, 15 U.S.C. § 1640(C) (1976), has been construed to exclude liability only for clerical errors, provided there was a system in place to detect such errors. Ellis v. Hensley, No. 39126 (Cuyahoga County Ct. App. Aug. 16, 1979) at 7-8. *See* Mirabel v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976).

The second defense allows the supplier to escape liability only if he shows that he acted in reliance on Federal Trade Commission orders, trade regulations, rules and guides, or certain federal court interpretations of the same. OHIO REV. CODE ANN. § 1345.11(B) (Page 1979). Because of the narrowness of this defense, it is not likely to be used with any frequency.

The constitutionality of both sections 1345.02 and 1345.03 of the Ohio Revised Code has been challenged in Ohio courts. *See, e.g.*, Brown v. Lawyer's Tax Service, No. 70-2410 (Lucas County C.P. August 5, 1980) (overbreadth); Brown v. Barnum, No. 79-2410 (Lucas County C.P. August 5, 1979) (vagueness). These arguments have been dismissed. Typically, the *Barnum* court said that "[g]iven the body of rapidly developing consumer protection law defining 'deceptive' and 'unconscionable' this court cannot, within the context of the statute, find the meaning of these two terms any more indefinite, vague or uncertain in their application" than the phrase "unfair methods of competition" which was upheld in Sears Roebuck and Co. v. F.T.C., 258 F. 307, 311 (7th Cir. 1919). Brown v. Barnum, No. 79-2410 (Lucas County C.P. August 5, 1979) at 8. These phrases are established legal terminology that depend on a process of judicial inclusion and exclusion for their meaning. The courts must be free to pass on a wide range of conduct rather than be limited to working with a specific statutorily defined list of prohibited behavior that could be circumvented by suppliers. *Id.* at 9.

9. OHIO REV. CODE ANN. § 1345.05(B)(2) (Page 1979). These powers, originally conferred upon the Director of Commerce, were transferred to the Attorney General by Amended Substitute Senate Bill 221 of the 112th General Assembly (effective Nov. 23, 1977).

10. OHIO REV. CODE ANN. § 1345.06 (Page 1979).

11. OHIO REV. CODE ANN. § 1345.07 (Page 1979).

12. For a discussion of the powers of the Attorney General under the Consumer Sales Practices Act, *see* Tongren & Samuels, *The Development of Consumer Protection Activities in the Ohio Attorney General's Office*, 37 OHIO ST. L.J. 581 (1976).

be liberally construed.[13] However, the Act specifically excludes "[a] publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter insofar as the information or matter has been disseminated or reproduced on behalf of others without knowledge that it violated sections 1345.01 to 1345.13 of the Revised Code."[14] Thus, for example, the Act would not apply to radio or television stations that broadcast deceptive advertisements for others unless that station was actually aware that the advertisement violated the Act. Nor does the Act apply to "[c]laims for personal injury or death."[15]

Finance companies and banks are specifically exempted from the Ohio Act.[16] This exemption extends to finance companies and banks that receive discounted promissory notes generated by such consumer contracts as health spa memberships.[17] Transactions between public utilities, insurance companies, attorneys, physicians, or dentists and their clients are also specifically excepted from the Act.[18] The Ohio Consumer Sales Practices Act does not apply to the sale or purchase of real estate.[19] However, the Act does apply to those who render services in the construction or repair of single family dwellings[20] or those who render other services to dwelling units.[21]

B. *Consumer Transactions*

Before a consumer can seek the protection provided by Ohio's Consumer Sales Practices Act, he or she must first engage in a consumer transaction. The Act defines a consumer transaction as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, . . . to an individual for purposes that are primarily personal,

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13. "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws." OHIO REV. CODE ANN. § 1.11 (Page 1979). *Accord* Brown v. Market Development Inc., 41 Ohio Misc. 57, 63, 322 N.E.2d 367, 371 (1974). *See also* UNIFORM CONSUMER SALES PRACTICES ACT § 1, which states "this Act shall be construed liberally."

14. OHIO REV. CODE ANN. § 1345.12(B) (Page 1979).

15. OHIO REV. CODE ANN. § 1345.12(C) (Page 1979).

16. OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1980) (financial institutions as defined in § 5725.01 are specifically exempted).

17. Brown v. Willard, 5 Ohio Op. 3d 195 (Ct. App. 1977).

18. OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1980).

19. In Neveroski v. Blair, 141 N.J. Super. 365, 358 A.2d 473 (Super. Ct. App. Div. 1976), the court refused to construe the New Jersey Deceptive Practices Act, N.J. STAT. ANN. § 56:8-1 (West 1964), to apply to a real estate sale because the statute focused on the sale of personal, as opposed to real, property and because real estate brokers are subject to testing, licensing, regulations and other penalties. The Ohio Act is similar to the New Jersey Deceptive Practices Act, and using the *Neveroski* rationale, Ohio courts will most likely limit the scope of the Act to transactions involving personal property or services.

20. OHIO AD. CODE § 109:4-3-01(C) (1979). *See also* MacDonald v. Mobley, 555 S.W.2d 916 (Tex. Civ. App. 1977). The court rejected a home builder's arguments that his failure to honor promises to remedy defects in the construction of a house and to replace nonconforming carpeting was not covered by the state deceptive practices act, which is similar to the Ohio Act. *See* TEX. BUS. & COMM. CODE ANN. tit. 2, § 17.01 (Vernon 1968). The builder's obligations under his warranty to repair defects were considered to be the sale of a service as distinct from his sale of the real estate.

21. *See* Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977) (Texas deceptive practices act applies to repairs to the sewer system), and Neveroski v. Blair, 141 N.J. Super. 365, 358 A.2d 473 (Super. Ct. App. Div. 1976) (termite treatment and guarantee contract on a house sold is within the coverage of the New Jersey deceptive practices statute).

family, or household, or a solicitation to supply any of these things.''[22] The scope is limited to individuals who acquire items from suppliers primarily for personal use, but, apart from the exclusions, it encompasses all who deal directly or indirectly with consumers. A consumer transaction includes solicitations to supply goods or services,[23] and the Act further states that an unfair or deceptive and unconscionable act or practice can occur before, during, or after the transaction.[24]

It is not necessary that a sale actually take place before liability can be imposed under the Consumer Sales Practices Act. In *Weaver v. J.C. Penney Co.*,[25] the supplier violated a substantive rule promulgated under section 1345.05(B)(2) of the Revised Code, which at that time prohibited refusal to issue rainchecks or take orders for advertised goods or services after the original quantities were exhausted unless the supplier clearly and adequately disclosed that a specific quantity was available.[26] This is one example of a pre-sale solicitation that violated the Act even though there was no subsequent sale. In some situations then, a consumer could be in a store, not intending to make a purchase, and still recover under the Act should the supplier commit an unfair, deceptive, or unconscionable act in making the sales pitch.[27]

The Consumer Sales Practices Act extends to periods after the sale and includes assurances given to consumers who complain and threats made to stifle such complaints.[28] The consumer-supplier relationship—the transaction—exists from the time of the sale until a debt is completely paid off.[29] The Act thus expands existing consumer remedies under the federal Fair Debt Collection Practices Act,[30] which exempts creditors who collect their own debts[31] (as opposed to those who use a debt collection agency). For example, in *Santiago v. S. S. Kresge Co.*,[32] the defendant-supplier's practice of suing consumers in distant and inconvenient forums to collect its own debts was held an unconscionable practice and a violation of the Ohio Act. The assignment of a debt is also part of the consumer transaction, and the person

22. OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1980).

23. *Id.*

24. OHIO REV. CODE ANN. §§ 1345.02(A), 1345.03(A) (Page 1979).

25. 53 Ohio App. 2d 165, 372 N.E.2d 633 (1977).

26. *Id.* at 168, 372 N.E.2d at 635. A consumer need not prove actual reliance to recover under the Consumer Sales Practices Act. *See* text accompanying notes 60–65 *infra*. *Cf.* OHIO AD. CODE § 109:4-3-03 (1977) as amended June 8, 1981 (four exceptions are proposed to the "raincheck" requirement).

27. Under § 1345.09(B) of the Revised Code a consumer may recover the greater of two hundred dollars or treble actual damages where the violation is an act or practice declared to be deceptive or unconscionable by rule or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection in the Public Inspection File in the Attorney General's office. Thus, damages may be available even where a sale does not take place.

28. Buckley, *Recent Consumer Protection Legislation in Ohio*, 22 CLEV. ST. L. REV. 393, 397 (1973).

29. *See* Liggins v. May Co., 53 Ohio Misc. 21, 23, 373 N.E.2d 404, 406 (Cuyahoga County C.P. 1977).

30. 15 U.S.C. § 1692 *et seq.* (1976 & Supp. II 1978).

31. *Id.* at § 1692a(6).

32. 2 Ohio Op. 3d 54 (Cuyahoga County C.P. 1976).

attempting to enforce the payment of the debt is covered under the Act as a supplier.[33]

C. *"Consumer"*

A consumer is broadly defined as "a *person* who engages in a consumer transaction with a supplier."[34] However, consumer transaction is defined as the transfer of a good, service, franchise, or intangible "to an *individual*" for primarily personal, household, or family purposes.[35] In *Toledo Metro Federal Credit Union v. Ted Papenhagen Oldsmobile*,[36] an Ohio court, relying on the comment to section 2(1) of the Uniform Consumer Sales Practices Act, held that "individual" as used in the Ohio Act meant a natural person only and did not include a corporate entity—in this case a credit union for Toledo municipal employees.[37] This suggests that a corporate entity can never engage in a consumer transaction and cannot be a consumer under the Act. Therefore, if the transaction involves a titled vehicle such as an automobile, truck, or boat and the title is in the name of a corporation or partnership, the Ohio Act does not apply.

It is not clear exactly what a "primarily personal, family or household" purpose is and how it is determined. In *Brown v. Howe Motor Co.*,[38] the alleged consumers were employees of the Ohio Attorney General's Office who presented a specially fixed car to the supplier's automotive repair shop for service. The supplier argued that there was no bona fide consumer transaction because the "dealings between plaintiff's agents were never conceived or carried out primarily for such personal, family or household purposes."[39] The court dismissed this argument stating, "In so far as the defendant was concerned, the plaintiffs' agents who brought the cars to defendants for repairs were consumers."[40] This seems to shift the focus from the actual intentions of the consumer in acquiring an item to what the supplier believes the consumer's intent to be. The court's interpretation was necessary to allow the Attorney General to fulfill his statutory duty to prosecute violations of the Act discovered in an official investigation.[41] However, there is no support in the

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33. Liggins v. May Co., 53 Ohio Misc. 21, 23, 373 N.E.2d 404, 406 (Cuyahoga County C.P. 1977).

34. OHIO REV. CODE ANN. § 1345.01(D) (Page Supp. 1980) (emphasis added).

35. OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1980) (emphasis added).

36. 56 Ohio App. 2d 218, 381 N.E.2d 1337 (1978).

37. *Id.* at 220, 381 N.E.2d at 1339. This should not be surprising. The Act itself differentiates between individuals and corporations. Section 1345.01(B) of the Revised Code defines *person* as including an "individual, corporation"—distinguishing the two. A consumer transaction can only be engaged in by an *individual*, a narrower class than *person*.

38. No. CV 74-10-0719 (Butler County C.P. August 10, 1977).

39. *Id.* at 3.

40. *Id.* at 4.

41. The Act provides for Attorney General investigations in section 1345.05 of the Revised Code. These investigations often lead to an Attorney General action under section 1345.07 against the supplier. This is an integral part of the Act's enforcement. Section 1345.10(A) states: "[A] final judgment against a supplier under section 1345.07 of the Revised Code is admissible as prima-facie evidence of the facts on which it is based in subsequent proceedings under section 1345.09 of the Revised Code against the same supplier."

Act for such an interpretation, and it seems unlikely that the legislature would have intended such an interpretation given the statute's remedial purpose.

A better rule that would preserve the Attorney General's investigative authority as well as protect consumers is to make persons conducting such investigations constructive consumers rather than inquiring into what the supplier believed the individual's purpose was in acquiring an item.[42] In situations not involving Attorney General investigations, the general rule should be to look at the person's primary purpose in acquiring the item. For example, in *Toledo Metro Federal Credit Union*,[43] the court held that an attempt to repossess a good for the business-related purpose of protecting one's collateral was not a transaction entered into primarily for personal, family, or household purposes. In reaching its decision, the court inquired into the plaintiff's primary purpose for repossession rather than into what the defendant believed the plaintiff's purpose was in acquiring the item.[44]

Some transactions may be entered into for both personal and business reasons. A transaction need only be entered into *primarily* for a personal purpose—not exclusively personal—to be within the scope of the Act. The amount of overlap permitted between personal and business purposes has not been dealt with but, since the Act is to be liberally construed, a primarily personal transaction may contain a significant degree of business purpose as well.[45]

D. *"Supplier"*

A supplier is "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer."[46] A person is broadly defined as including an individual or other legal entity.[47] This, plus the Act's liberal interpretation, means that almost anyone dealing with a consumer is a supplier. Since the supplier need not deal directly with the consumer, the Act has been applied to wholesalers,[48] assignees collecting debts (including debt collection agencies),[49] manufacturers, dealers, and advertising agencies.[50] Furthermore, there is probably no requirement of a direct contractual relationship between the consumer and the supplier. A third-party beneficiary of a

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42. This rule would be better because under the *Howe* rationale a consumer could be "penalized" (not able to bring suit under the Act) by the supplier's incorrect belief of the consumer's purpose in entering the transaction.

43. 56 Ohio App. 2d 218, 381 N.E.2d 1337 (1978).

44. *Id.* at 221–22, 381 N.E.2d at 1339.

45. Additional guidance for interpreting primarily personal, family, or household purposes may be found in U.C.C. § 9-109 (OHIO REV. CODE ANN. § 1309.07 (Page 1979)) and accompanying case law construing the definition of "consumer goods."

46. OHIO REV. CODE ANN. § 1345.01(C) (Page Supp. 1980).

47. OHIO REV. CODE ANN. § 1345.01(B) (Page Supp. 1980).

48. Brown v. Lancaster Chrysler Plymouth, No. 76 CV-05-2077 (Franklin County C.P. 1976).

49. *See* Liggins v. May Co., 53 Ohio Misc. 21, 23, 373 N.E.2d 404, 405 (Cuyahoga County C.P. 1977). *See also* text accompanying notes 30–31 *supra*.

50. *See* UNIFORM CONSUMER SALES PRACTICES ACT 2(5) (Commissioner's Comment).

contract is entitled to the remedies available under at least one state's deceptive practice statute and there is no reason why this would not be true in Ohio.[51]

The Act covers all Ohio suppliers engaged in consumer transactions regardless of whether the consumer is located inside or outside of Ohio.[52] The application of the Act to consumers living beyond Ohio's boundaries has been held to be a constitutional exercise of the state's police power on several grounds. Among other arguments used by the courts in supporting the constitutionality of the Act's scope, it has been said that fraud is a state law matter and therefore not subject to federal preemption; that such consumer legislation does not unduly burden interstate commerce; that fraudulent conduct does not require national uniformity of law; and that because deceptive and unconscionable acts are not lawful in interstate commerce they are therefore subject to state regulation.[53]

The Act does not purport to change the existing common law of tort, and its definition of supplier as anyone who engages in effecting or soliciting consumer transactions, whether or not they deal directly with the consumer, would appear to include corporate officers. Corporate officers are presumably personally liable for violations of the Consumer Sales Practices Act performed by them in their corporate capacities[54] because the commission of an unfair and deceptive act has been deemed to be a tort. Otherwise, individual corporate officers could engage in proscribed activities with impunity and thus frustrate the purposes of the Act. A corporate entity may be disregarded when the entity is an implement for avoiding a clear legislative purpose and when not to do so will defeat public convenience, justify a wrong, or protect against fraud.[55] Also, under the common law of agency, a principal is liable for those actions of an agent which are within the agent's scope of authority and which violate the Consumer Sales Practices Act.[56]

III. PROHIBITED ACTS AND PRACTICES

In determining what is unfair or deceptive conduct, it is important to understand that the Act creates new substantive rights and remedies that have previously not been available to an aggrieved consumer in a consumer transaction. This being so, a supplier can commit an unfair or deceptive act even

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51. Neveroski v. Blair, 141 N.J. Super. 365, 358 A.2d 473 (Super. Ct. App. Div. 1976). The court found that New Jersey's deceptive practice statute, N.J. STAT. ANN. § 56:8-1 *et seq.* (West 1964), which is similar to the Ohio Act, applied to purchasers of a house with recent termite damage. Characterizing the purchasers as third-party beneficiaries, the court awarded treble damages against the exterminator who had contracted with the previous owners and certified to the realtor that there was no termite infestation.

52. Brown v. Market Development Inc., 41 Ohio Misc. 57, 64–65, 322 N.E.2d 367, 372 (Hamilton County C.P. 1974).

53. *Id.* at 66–68, 322 N.E.2d at 372–74.

54. Quality Carpet Co. v. Brown, 6 Ohio Op. 3d 185 (1977).

55. *Id.*

56. *See* Brown v. Lyons, 43 Ohio Misc. 14, 332 N.E.2d 380 (Hamilton County C.P. 1974) (sales persons, repairman, and employees of appliance sales and service business were agents of owner for whose acts and practices owner was held liable).

though he might be innocent of fraud, negligence, or breach of contract.[57] For example, a seller can commit an unfair or deceptive act even though he might not have intended to deceive the consumer. Since much unfair or deceptive conduct often enables the seller to achieve a greater profit, his state of mind or good faith is not exculpatory when the consumer seeks to recover for an overcharge. According to the court in *Brown v. Bredenbeck*,[58] an act is deceptive if it "has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts."[59] Knowledge or intent at the time the representation is made is immaterial. The place to look to determine the presence of deception is the state of mind of the consumer and not the intent of the supplier.[60]

Although not an issue in *Brown v. Bredenbeck*, it is likewise apparent that a seller can commit an unfair or deceptive act even though no buyer is, in fact, duped or deceived by the act. Under the case law of other jurisdictions[61] and of the Federal Trade Commission Act,[62] an act is unfair or deceptive if it merely has the tendency or capacity to mislead or deceive the unthinking consumer, including those that are ignorant, credulous, or just plain dumb.[63]

Under the Act, a seller can commit an unfair or deceptive act even if no sale takes place because the prohibition of the Act applies to the solicitation to supply, as well as the sale, of consumer goods. A seller can also violate the Act even if the buyer has not been injured.[64] An unfair or deceptive act allows a buyer to rescind the sale if the condition of the good has not substantially changed since the date of the purchase, or to sue for the greater of $200 or treble his actual damages provided the supplier commits an unfair or deceptive act which has been previously declared unlawful by substantive rule or by a judicial decision available in the public inspection file.[65]

A. *What is Unfair or Deceptive Conduct?*

Unfair and deceptive conduct is defined by the Act, by administrative rules promulgated under section 1345.05(B)(2) of the Revised Code, and by judicial interpretation of the Act. Thus, the Act provides a three-pronged weapon for consumer protection. Each of these sources varies in scope and must be consulted independently.

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57. OHIO REV. CODE ANN. § 1345.02(A) (Page 1979).

58. 2 Ohio Op. 3d 286 (Franklin County C.P. 1975).

59. *Id.* at 287.

60. Beneficial Corp. v. F.T.C., 542 F.2d 611 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Chrysler Corp. v. F.T.C., 561 F.2d 357 (D.C. Cir. 1977); Doherty, Clifford, Steers, and Sheffield, Inc. v. F.T.C., 392 F.2d 921 (6th Cir. 1968). These cases were all cited by the court in Thomas v. Sun Furniture and Appliance Co., 61 Ohio App. 2d 78, 399 N.E.2d 567 (1978), in its finding that proof of common law intent was not necessary under the Ohio Consumer Sales Practices Act. One of the purposes of this Act was to avoid common law fraud proof of intent requirements. Brown v. Bredenbeck, 2 Ohio Op. 3d 286, 287 (Franklin County C.P. 1975).

61. *See, e.g.*, Lefkowitz v. Volkswagon of America, Inc., 47 App. Div. 868, 366 N.Y.S.2d 157 (1975).

62. 15 U.S.C. § 45(a) (1914). *See, e.g.*, Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676 (2d Cir. 1944).

63. UNIFORM CONSUMER SALES PRACTICES ACT § 3(a) (Commissioner's Comment).

64. *See, e.g.*, Weaver v. J.C. Penney, Inc., 53 Ohio App. 2d 165, 372 N.E.2d 633 (1977).

65. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979).

1. *Statutory Definitions*

The first prong of the consumer's weapon is the language of the Act itself, which prohibits all unfair or deceptive conduct in connection with a consumer transaction. Although the Act does not define the meaning of unfairness,[66] it does give ten illustrations of deceptive conduct. Because the following list is non-exhaustive [67] it does not provide a comprehensive definition of deceptive acts.

> (B) Without limiting the scope . . . of this section, the act or practice of a supplier in representing any of the following is deceptive:
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> (1) That the subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits that it does not have;
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> (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
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> (3) That the subject of a consumer transaction is new, or unused, if it is not;
>
> (4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
>
> (5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;
>
> (6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
>
> (7) That replacement or repair is needed, if it is not;
>
> (8) That a specific price advantage exists, if it does not;
>
> (9) That the supplier has a sponsorship, approval, or affiliation that he does not have;
>
> (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.[68]

While the above illustrations are largely self-explanatory, a few comments are necessary. The intent mentioned in the sixth illustration is not intent to deceive but refers instead to the amount of goods the supplier intends to have in stock.[69] The supplier's intent can be inferred from the amount of

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66. Although the word "unfairness" cannot be precisely defined, the Court in FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972), adopted three tests to determine if a supplier has committed an unfair act in violation of the FTC Act. A court must decide whether the particular act or practice

> (1) without necessarily having been considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers.

Id. at 234 n.5. For a list of state courts that have adopted these tests *see* Leaffer and Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of FTC Jurisprudence*, 48 GEO. WASH. L. REV. 521, 537 n.100 (1980).

67. OHIO REV. CODE ANN. § 1345.02(B) (Page 1979).

68. *Id.*

69. UNIFORM CONSUMER SALES PRACTICES ACT § 3(b)(6) (Commissioner's Comment).

stock on hand and his outstanding delivery orders. The prohibition includes bait advertising.[70] Cases decided prior to the amendment of the administrative rules on bait advertising[71] hold that the failure to give a raincheck after the original quantity of goods is exhausted or the refusal to take orders for delivery at the advertised price violates the Act, unless the supplier clearly discloses the specific quantity of goods or services available.[72] The words "while they last" are not specific enough to constitute a disclosure of the quantity of goods available under this rule, and it is an unfair or deceptive act or practice to fail to offer a raincheck or take an order when the stock is exhausted in such circumstances.[73]

The tenth illustration prohibits the supplier from misrepresenting any rights, remedies, or obligations of either the consumer or the supplier. This would include stating that a consumer must pay for unsolicited goods or services or that a supplier can garnish exempt wages.[74] A supplier who accepts a deposit must provide written notice to the consumer stating whether the deposit is refundable and under what circumstances. The failure to do so is a deceptive act.[75] Also, a supplier who takes money from consumers for goods or services and allows an unreasonable length of time to pass without either making delivery, making a full refund, notifying the consumer of the delay and offering a refund, or offering goods of an equal or greater value as a good faith substitute, commits an unfair or deceptive act.[76]

The tenth illustration also makes the failure of a supplier to honor express and implied warranties of merchantability an unfair or deceptive act or practice.[77] This is particularly significant because the Act offers remedies that are unavailable under the Uniform Commercial Code for breach of warranty. By way of example, assume a consumer has purchased a new automobile from a dealer because of some representations made to him by the car salesman at the time of the sale of the car. The consumer receives a limited written warranty from the manufacturer which gives an express and implied warranty but which limits the consumer's remedies to the repair and replacement of parts if the warranties are breached. The written warranty further disclaims any liability for consequential damages. The consumer also receives a purchase order from the dealer disclaiming all warranties from the sale, save those made by the manufacturer of the vehicle. The purchase order likewise excludes from the contract all oral representations made by the salesman about the vehicle. Assume further that the car is defective and shortly after

70. *Id.*

71. OHIO AD. CODE § 109:4-3-03 (1977).

72. Weaver v. J.C. Penney Co., 53 Ohio App. 2d 165, 168, 373 N.E.2d 633, 636 (1977).

73. Katz v. Sears Roebuck Co., No. 78 Ca. 152 (Mahoning County Ct. App. Jan. 25, 1979).

74. UNIFORM CONSUMER SALES PRACTICES ACT § 3(b)(10) (Commissioner's Comment).

75. Riley v. Enterprise Furniture Co., 54 Ohio Misc. 1, 375 N.E.2d 821 (Sylvania Mun. Ct. 1977). *See* OHIO AD. CODE § 109:4-3-07 (1977).

76. Brown v. Lyons, 43 Ohio Misc. 14, 20, 332 N.E.2d 380, 385–86 (Hamilton County C.P. 1974).

77. Brown v. Lyons, 43 Ohio Misc. 14, 332 N.E.2d 380 (Hamilton County C.P. 1974). *See* Potter v. Dangler, 61 Ohio Misc. 14, 15 Ohio Op. 3d 329 (Paulding County C.P. 1977).

the purchase fails to conform to the oral representations made by the salesman.

In this example, if the consumer seeks to sue in contract or in tort he will have a difficult time. In contract, he will be faced with a multitude of problems: a small amount of damages with no provision for the recovery of attorney's fees, disclaimers of warranties and limitations regarding any liability for consequential damages, evidentiary problems regarding the admissibility of the oral statements not contained in the purchase order, and the contract clause limiting his remedies to the repair and replacement of defects.[78] In order to recover damages or rescind the purchase, the consumer must establish that the clause limiting his remedies has failed of its essential purpose under U.C.C. section 2–719(2). To do this, he must keep the car and document the seller's repeated failure to repair problems with the vehicle. If the consumer seeks rescission, such actions place him in a difficult position because the more he uses the car to document continued defects and the inability of the car dealer to repair such defects, the more the condition of the vehicle changes and, under U.C.C. section 2-608(2), revocation of acceptance is not possible if the condition of the vehicle is substantially changed from the date of the purchase. If the consumer seeks to avoid these problems by suing in fraud and claiming punitive damages and attorney's fees, he is faced with the difficulty of proving actual malice and that the seller knowingly lied.

If, however, a consumer seeks rescission or damages by alleging the commission of unfair or deceptive acts, he will have a much easier time obtaining his requested relief. As said before, the Consumer Sales Practices Act operates independently of contract and tort principles and is therefore not limited by the common-law rules of disclaimers, waivers, privity, and scienter. Under the Act, it is unfair and deceptive in connection with a consumer transaction to breach express or implied warranties, to make any statement in a sales presentation that could create in the mind of a reasonable consumer a false impression as to any feature of the car, and to fail to integrate into any written sales contract or offer all material statements, representations, or promises, oral or written, made prior to the written contract by the dealer.[79] An actionable representation need not rise to the level of an express warranty and can include statements of opinion.[80] If a seller makes oral statements about a car to the consumer which are not true, even if they are innocently made, and if such statements are not integrated into the contract, the consumer can rescind the sale or sue for treble damages plus attorney's fees, notwithstanding the problems of disclaimers of warranties, parol

78. Another potential problem is that the consumer cannot revoke his acceptance against the dealer because it gave no warranties and cannot revoke his acceptance against the manufacturer because it is not the seller of the vehicle. Generally, this argument has not been successful in Ohio. *See* Eckstein v. Cummins, 41 Ohio App. 2d 1 (1974). *See also* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977). *But see* Clark v. Ford Motor Co., 46 Or. App. 521, 612 P.2d 316 (1980).

79. OHIO AD. CODE § 109:4-3-16(b)(22) (1980).

80. OHIO REV. CODE ANN. § 1345.03(A)(6) (Page 1979).

evidence, disclaimers of consequential damages, and scienter—all of which plague actions where the complaint is styled under breach of contract or fraud.

This expansion of rights and remedies contained in the Act is not limited to the conduct illustrated in section 1345.02(B). The scope of unfair and deceptive conduct is also defined by administrative rules.

2. *Administrative Regulations*

Section 1345.05(B) authorizes the Attorney General to promulgate substantive rules to implement the Consumer Sales Practices Act,[81] thereby creating the second prong of the consumer's weapon. The substantive rules adopted to date[82] establish definitions of deceptive or unfair conduct that are far more detailed than the per se violations illustrated in section 1345.02(B) of the statute. Since the scope of rule making power is not limited to the activities illustrated in section 1345.02(B), the Attorney General is free to extend the protection of the Consumer Sales Practices Act to specific situations likely to involve unfair or deceptive conduct. For example, Ohio Administrative Code section 109:4-3-13 presents extensive guidelines for consumer transactions involving motor vehicle repairs or services. These guidelines go far beyond the statutory prohibition against representations "[t]hat replace-

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81. OHIO REV. CODE ANN. § 1345.05(B) (Page 1979) provides:

(B) The director may:

. . . .

(2) Adopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 and 1345.03 of the Revised Code. In adopting, amending, or repealing substantive rules defining acts or practices that violate section 1345.02 of the Revised Code, due consideration and great weight shall be given to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(The powers originally conferred upon the Director of Commerce were transferred to the Attorney General by Amended Substitute Senate Bill 221 of the 112th General Assembly (effective Nov. 23, 1977)). *See also* Weaver v. J.C. Penney Co., 53 Ohio App. 2d 165, 372 N.E.2d 633 (1977), approving this rule making authority.

82. Substantive rules address the following:

(2) Exclusions and Limitations in Advertisements, OHIO AD. CODE § 109:4-3-02 (1977).

(3) Bait Advertising, OHIO AD. CODE § 109:4-3-03 (1981). *See* Weaver v. J.C. Penney, Inc., 53 Ohio App. 2d 165, 373 N.E.2d 633 (1977).

(4) Use of the word "Free" etc., OHIO AD. CODE § 109:4-3-04 (1977).

(5) Repairs and Services, OHIO AD. CODE § 109:4-3-05 (1978).

(6) Prizes, OHIO AD. CODE § 109:4-3-06 (1977). *See* Brown v. Market Development Inc., 41 Ohio Misc. 57, 322 N.E.2d 367 (Hamilton County C.P. 1974).

(7) Deposits, OHIO AD. CODE § 109:4-3-07 (1977). *See* Riley v. Enterprise Furniture Co., 54 Ohio Misc. 1 (Sylvania County Mun. Ct. 1977).

(8) New for Used, OHIO AD. CODE § 109:4-3-08 (1977).

(9) Failure to Deliver—Substitution of Goods, OHIO AD. CODE § 109:4-3-09 (1977).

(10) Sale of Motor Vehicles, OHIO AD. CODE § 109:4-3-10 (1977). Effective August 28, 1981, this rule was replaced by § 109:4-3-16 (1981) (Advertisement and Sale of Motor Vehicles).

(11) Direct Solicitations, OHIO AD. CODE § 109:4-3-11 (1977).

(12) Price Comparisons, OHIO AD. CODE § 109:4-3-12 (1977).

(13) Motor Vehicle Repairs or Services, OHIO AD. CODE § 109:4-3-13 (1978).

(14) Insulation, OHIO AD. CODE § 109:4-3-14 (1978).

(15) Motor Vehicle Rust Inhibitors, OHIO AD. CODE § 109:4-3-15 (1980).

(16) Advertisement and Sale of Motor Vehicles, OHIO AD. CODE § 109:4-3-16 (1981).

(17) Distress Sales, OHIO AD. CODE § 109:4-3-17 (1981).

ment or repair is needed, if it is not."[83] In addition to prohibited acts or practices, affirmative duties and disclosure requirements are created by the rule.[84]

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83. OHIO REV. CODE ANN. § 1345.02(B)(7) (Page 1979).

84. Motor Vehicle Repairs or Services, OHIO AD. CODE § 109:4-3-13 (1978). Subsections (A) and (B) set out the written and oral disclosure requirements regarding the consumer's right to an estimate if the expected cost of any repair or service is more than 25 dollars. Subsection (C) provides:

(C) In any consumer transaction involving the performance of any repair or service upon a motor vehicle it shall be a deceptive act or practice for a supplier to:

(1) Make the performance of any repair or service contingent upon a consumer's waiver of any rights provided for in this rule;

(2) Fail, where an estimate has been requested by a consumer, to obtain oral or written authorization from the consumer for the anticipated cost of any additional, unforeseen, but necessary repairs or services when the cost of those repairs or services amounts to ten per cent or more (excluding tax) of the original estimate;

(3) Fail, where the anticipated cost of a repair or service is less than twenty-five dollars and an estimate has not been given to the consumer, to obtain oral or written authorization from the consumer for the anticipated cost of any additional, unforeseen, but necessary repairs or services when the total cost of the repairs or services, if performed, will exceed twenty-five dollars;

(4) Fail to disclose prior to acceptance of any motor vehicle for inspection, repair, or service, that in the event the consumer authorizes commencement but does not authorize completion of a repair or service, that a charge will be imposed for disassembly, reassembly, or partially completed work. Any charge so imposed must be directly related to the actual amount of labor or parts involved in the inspection, repair, or service;

(5) Charge for any repair or service which has not been authorized by the consumer;

(6) Fail to disclose upon the first contact with the consumer than any charge not directly related to the actual performance of the repair or service will be imposed by the supplier whether or not repairs or services are performed;

(7) Fail to disclose upon the first contact with a consumer the basis upon which a charge will be imposed for towing the motor vehicle if that service will be performed;

(8) Represent that repairs or services are necessary when such is not the fact;

(9) Represent that repairs have been made or services have been performed when such is not the fact;

(10) Represent that a motor vehicle or any part thereof which is being inspected or diagnosed for a repair or service is in a dangerous condition, or that the consumer's continued use of it may be harmful, when such is not the fact;

(11) Materially understate or misstate the estimated cost of the repair or service;

(12) Fail to provide the consumer with an itemized list of repairs performed or services rendered, including a list of parts or materials and a statement of whether they are used, remanufactured or rebuilt, if not new, and the cost thereof to the consumer, the amount charged for labor, and the identity of the individual performing the repair or service;

(13) Fail to tender to the consumer any replaced parts, unless the parts are to be rebuilt or sold by the supplier, or returned to the manufacturer in connection with warranted repairs or services, and such intended reuse or return is made known to the consumer prior to commencing any repair or service;

(14) Fail to provide to the consumer upon his request a written, itemized receipt for any motor vehicle or part thereof that is left with, or turned over to, the supplier for repair or service. Such receipt shall include:

(a) The identity of the supplier which will perform the repair or service;

(b) The name and signature of the supplier or a representative who actually accepts the motor vehicle or any part thereof;

(c) A description including make and model number or such other features as will reasonably identify the motor vehicle or any part thereof to be repaired or serviced;

(d) The date on which the motor vehicle or any part thereof was left with or turned over to the supplier;

(15) Fail, at the time of the signing or initialing of any document by a consumer, to provide the consumer with a copy of the document;

(16) Fail to disclose to the consumer prior to the commencement of any repair or service, that any part of the repair or service will be performed by a person other than the supplier or his employees, if the supplier disclaims any warranty of the repair or service performed by that person, in addition the supplier shall disclose the nature of the repair or service which that person will perform, and if requested by the consumer, the identity of that person.

Because new substantive rules appear in the Administrative Code rather than as amendments to the Act, and because extensive regulations may address unfair or deceptive acts or practices not specified in the Act, the administrative regulations should be considered an independent source in defining unfair or deceptive conduct.

3. *Case Law*

The third prong of the weapon made available to consumers by the Act is case law. Section 1345.09(B) implicitly provides that declarations by Ohio courts that certain conduct is unfair or deceptive are to be incorporated into the Act itself upon filing of the opinion with the Attorney General's office.[85] However, the courts are not limited to the language of the Consumer Sales Practices Act in deciding that conduct is unfair or deceptive. They are also empowered to look to the language of other Ohio statutes and, more importantly, to the federal consumer protection laws.[86]

a. *Federal Law*

One federal remedial law providing consumer protection is the Federal Trade Commission Act. Deceptive practices affecting commerce are prohibited by section 5 of this Act.[87] Under this section the Federal Trade Commission (FTC) issues guidelines on prohibited practices as well as trade regulation rulings having the force of federal law.[88] The FTC has taken the lead in consumer protection over the years,[89] but it was not until 1976 that it had jurisdiction over purely intrastate transactions. Its prior jurisdiction was limited to practices in interstate commerce.[90]

The effectiveness of the Commission in protecting consumers is questionable. The FTC alone is responsible for enforcing the Federal Trade Commission Act and the guidelines and rules promulgated thereunder. Courts have historically found no private cause of action implied from the Act.[91] The FTC receives over 9,000 complaints a year, is able to investigate only 1,000, and only 100 result in a cease and desist order.[92] Moreover, these orders are prospective in effect and provide no redress for injured consumers.

Section 1345.02(C) of the Ohio Consumer Sales Practices Act provides that in determining unfair or deceptive acts "the court shall give due consi-

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85. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979).
86. OHIO REV. CODE ANN. § 1345.02(C) (Page 1979).
87. 15 U.S.C. § 45(a)(1) (1976).
88. 15 U.S.C. § 57(a) (1976).
89. Tongren & Samuels, *The Development of Consumer Protection in the Attorney General's Office*, 37 OHIO ST. L.J. 581, 581 (1976).
90. *Id.* at 581–82. *See* F.T.C. v. Bunte, Inc., 312 U.S. 349 (1941).
91. Holloway v. Bristol-Meyers Corp., 485 F.2d 986 (D.C. Cir. 1973). *Contra*, Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Indiana 1976) (in which the court implied a private right of action for a violation of an FTC cease and desist order).
92. Eckhard, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663, 670 (1970), *citing* COX, FELLMETH & SCHULTZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 58–59 (1969).

deration and great weight to Federal Trade Commission orders, trade regulation rules and guides, and federal courts' interpretations of" deceptive acts in violation of section 5 of the Federal Trade Commission Act.[93] The Uniform Act, after which the Ohio Act is modeled, also has as one of its purposes "to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection."[94] In *Santiago v. S. S. Kresge Co.*,[95] an Ohio court recognized the significance of section 1345.02(C) stating: "Where a practice has been declared unfair by the commission charged with enforcing national standards in consumer transactions, this Court has no difficulty finding that it also violates the Ohio Consumer Sales Practices Act."[96] The phrase "due consideration and great weight" in the Ohio Act does not mean that all Federal Trade Commission orders, rules, and guides are per se incorporated into Ohio law. Although *Santiago* stated that the court had no difficulty finding that acts and practices prohibited by the Federal Trade Commission were also prohibited by the Consumer Sales Practices Act, a judge may exercise discretion in determining when Federal Trade Commission requirements should be applied through the Consumer Sales Practices Act in the context of a specific case.

Deceptive nondisclosures may also violate the Consumer Sales Practices Act. Although the Federal Trade Commission has never posited an affirmative duty of a seller to "tell all" about his goods or services, it has required the seller to make certain disclosures where the goods may be dangerous to use without proper instructions, or where the goods are used, rebuilt, or defective. At least one state has said the failure to disclose a defective car engine at the time of the car's sale is actionable under its deceptive practices statute.[97]

In addition to the Federal Trade Commission Act, the Consumer Sales Practices Act appears to incorporate violations of the Magnuson-Moss

93. OHIO REV. CODE ANN. § 1345.02(C) (Page 1979).

94. UNIFORM CONSUMER SALES PRACTICES ACT § 1(4).

95. 2 Ohio Op. 3d 54 (Cuyahoga County C.P. 1976).

96. *Id.* at 55. *See also* Leaffer and Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of FTC Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980), for a comprehensive survey of the role of the FTC Act in state consumer actions. For a list of state decisions incorporating FTC standards of unfair and deceptive conduct *see id.* at 534 n.85.

97. Slaney v. Westwood Auto Inc., 366 Mass. 688, 322 N.E.2d 768 (1975). A number of other courts have held the failure to disclose material facts in connection with a consumer transaction to be an unfair or deceptive act. *See, e.g.*, Gour v. Daray Motor Co., 373 So. 2d 571 (La. App. 1979).

On August 14, 1981, the FTC adopted a trade regulation rule concerning the sale of used motor vehicles. 16 C.F.R. § 455 (1981). The rule requires dealers to post a window sticker ("Used Car Buyer's Guide") on used cars offered for sale to consumers. The window sticker explains to consumers that spoken promises are difficult to enforce, and that consumers should ask that all promises be put in writing. The sticker also lists 14 systems of the car (for example, "frame and body," "engine," "transmission drive and shaft"). Dealers are required to disclose any defects in these systems which are known to them. Additionally, the sticker informs consumers whether or not a warranty or service contract is offered with the car and how the warranty, service contract, or the lack of such protection, affects the consumer's right to have the dealer make repairs on the car after sale. This trade regulation rule should be used in defining unfair or deceptive conduct under OHIO REV. CODE ANN. § 1345.02(C) (Page 1979). *See* text accompanying notes 93-96 *supra*.

Warranty Act,[98] which deals with consumer product warranties. Section 110(b) of the Magnuson-Moss Warranty Act states that any violation of that Act is also a violation of section 5 of the Federal Trade Commission Act prohibiting unfair or deceptive acts or practices.[99] The language in section 5 of the Federal Trade Commission Act is identical to that used in section 1345.02(A) of the Ohio Revised Code. This would make a violation of the Magnuson-Moss Warranty Act and the administrative rules promulgated thereunder an unfair or deceptive act under federal law and probably under Ohio law as well.

It also appears that an act or practice that violates Title VIII of the Consumer Credit Protection Act, also known as the Fair Debt Collection Practices Act,[100] can be a violation of the Consumer Sales Practices Act. In *Smith v. S.G. & B., Inc.*,[101] the court held the act of communicating with an employer of a customer for any purpose other than verifying employment and current residential address is an unfair or deceptive and unconscionable act or practice. This incorporates into Ohio law the provisions in Title VIII regulating the communications a third-party collector can legally engage in with a debtor's employer.[102]

An act or practice that violates Title I of the Consumer Credit Protection Act, known as the Truth in Lending Act,[103] can also violate the Consumer Sales Practices Act. The Truth in Lending Act applies to consumer transactions in which credit is extended by a retail seller or supplier of services. In *Ellis v. Hensley*,[104] a violation of part of Regulation Z of the Truth in Lending Act[105] was found to violate the Consumer Sales Practices Act. The court held the supplier's failure to disclose that a security interest attached under the sales contract and the failure to limit the attachment to after-acquired property acquired within ten days of the transaction violated Regulation Z and

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98. 15 U.S.C. §§ 2301–2312 (1976). This is important because a violation of the Magnuson-Moss Warranty Act gives rise to a civil cause of action only if the consumer is "damaged" by the supplier's failure to comply. *See* 15 U.S.C. § 2310(d)(1). For example, if a supplier has violated the Magnuson-Moss Warranty Act by failing to properly label his warranty, *see* 15 U.S.C. § 2303, to draft the text therefore, *see* 16 C.F.R. § 700 (1981), or to disclose the terms of the warranty prior to the sale, *see* 16 C.F.R. § 702 (1981), a consumer has no actual damages and therefore has no cause of action under the Act. If he alleges such non-compliance as an unfair and deceptive act under the Consumer Sales Practices Act, however, he can rescind the transaction or possibly recover $200.00 in damages, plus attorney's fees.

99. 15 U.S.C. § 45(a)(1) (1976).

100. *See* 15 U.S.C. § 1692 *et seq.* (Supp. 1980).

101. No. A-79000178 (Hamilton County. C.P. 1979).

102. *Id.*

103. 15 U.S.C. § 1601 *et seq.* (Supp. 1980).

104. No. 39126 (Cuyahoga County Ct. App. August 16, 1979).

105. The Truth in Lending Act was enacted by Congress "to assure a meaningful disclosure of credit terms" so the consumer would be able to shop around and compare all the credit terms available to him and to "avoid the uninformed use of credit." 15 U.S.C. § 1601(a) (Supp. 1980). Section 1604 of the Truth in Lending Act empowers the Federal Reserve Board to prescribe regulations to carry out these purposes. These regulations are known as Regulation Z, 12 C.F.R. § 226.1–15 (1981), and provide the real substance of the Truth in Lending Act.

the Truth in Lending Act.[106] The court stated that the Ohio Consumer Sales Practices Act "must be read in light of the Truth in Lending Act."[107]

However, it does not appear that every violation of the Truth in Lending Act is a violation of the Consumer Sales Practices Act. In *Ellis*, the defendant-supplier also violated a part of Regulation Z requiring each component of the finance charge to be disclosed when the finance charge consists of two or more types of charges.[108] In this case, the interest charge and service charge were not separately disclosed as the components of the finance charge. This was held to violate the Truth in Lending Act and the Ohio Retail Installment Sales Act,[109] but the court did not mention any violation of the Consumer Sales Practices Act. The court failed to lay down any standard to determine which violations of Regulation Z also violate the Consumer Sales Practices Act. It apparently relied on section 1345.02 of the Ohio Revised Code, which prohibits unfair or deceptive acts or practices, to find that the failure to disclose the security interest violated the Consumer Sales Practices Act.[110]

All violations of Regulation Z, which regulates the disclosure of terms in credit sales and leases, should be found to constitute unfair or deceptive acts. The purpose of the Truth in Lending Act is to promote the informed use of credit.[111] If certain disclosures are not made or are incorrect, the consumer cannot accurately compare credit terms with those available elsewhere. Absent an accurate basis for comparison, the consumer could enter into a given transaction thinking it offers the best credit terms when it does not. This is certainly unfair and deceptive since it induces a state of mind not in accord with the facts.[112] Moreover, although Regulation Z is highly technical,[113] the Federal Reserve Board obviously felt its disclosure requirements were needed to promote the informed use of credit. Arguably then, the failure to make the required disclosures impedes a consumer seeking the best credit terms available and is unfair and deceptive. A court that finds some violations of the Truth in Lending Act not significant enough to violate the Consumer Sales Practices Act will be defining different degrees of deception—some degrees being more significant than others. This is inconsistent with the purposes of the Truth in Lending Act and the Consumer Sales Practices Act, neither of which defines a hierarchy of prohibited acts.

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106. 12 C.F.R. § 226.8(b)(5) (1980), required the description or identification of any security interest that attached in the transaction. This section had been construed to require the disclosure that a floating lien on after-acquired property was limited to property acquired within ten days of the transaction under U.C.C. § 9-204(2) (OHIO REV. CODE ANN. § 1309.15 (Page 1980). Tinsman v. Moline Beneficial Finance Co., 531 F.2d 815 (7th Cir. 1976). This section has been superceeded by 12 C.F.R. § 226.18(m) (effective April 1, 1982).

107. Ellis v. Hensley, No. 39126 (Cuyahoga County Ct. App. August 16, 1979) at 4.

108. *Id.* The portion of Regulation Z that is referred to here can be found at 12 C.F.R. § 226.8(c)(8)(i) (1981).

109. Ellis v. Hensley, No. 39126 (Cuyahoga County Ct. App. August 16, 1979) at 4. The Ohio Retail Installment Sales Act can be found at OHIO REV. CODE ANN. § 1317.01-16 (Page 1980).

110. Ellis v. Hensley No. 39126 (Cuyahoga County Ct. App. August 16, 1979) at 4.

111. *See Id.* at 4-5. *See also* note 105 *supra*.

112. *See* Brown v. Bredenbeck, 2 Ohio Op. 2d 286, 287 (C.P. Franklin County 1975).

113. *See, e.g.*, 12 C.F.R. §§ 226.1-.29 (1981).

The Consumer Sales Practices Act does not address whether remedies available under its provisions are cumulative to those available under federal law for the same conduct. In *Ellis v. Hensley*,[114] the court held that the "remedies provided under the state law are not cumulative to those provided by federal law."[115] In so holding, the court reasoned from the premise that Congress intended that consumers should receive no more than what could be recovered for violations of the Truth in Lending Act. An award of damages under the Consumer Sales Practices Act in addition to or in excess of damages under the Truth in Lending Act would be contrary to such intent and would therefore be preempted under the Supremacy Clause. By this reasoning the court was forced to construe the Consumer Sales Practices Act narrowly, saving its constitutionality by finding that the remedies for violations of the Ohio Act were not cumulative with those granted by the Truth in Lending Act.

The problem with the *Ellis* rationale is its premise: Congress did *not* intend to limit the recovery for credit disclosure violations to that authorized by the Truth in Lending Act where state law is also violated. In *Public Finance Corp. v. Riddle*,[116] the court stated:

> This holding [the decision of the court below that remedies are not cumulative] was based on *Ninth Liberty Loan Corp. v. Hardy*. In that case, the final paragraph of the opinion contained a statement to the effect that the remedies afforded by the Illinois and Federal Acts were duplicitous and not cumulative. However, no authority was cited for this statement and we believe that it does not accurately state the law. If *Ninth Liberty* were to be followed, then consumers would be forced to elect between state and federal remedies. There is nothing to indicate that Congress intended to force consumers to elect their remedy. In fact, section 111 of TILA, 15 U.S.C. sec. 1610, specifically states that TILA "does not annul, alter, or effect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions . . . ." This, and subsequent sections, clearly show an intent to create parallel remedies, federal and state. Other jurisdictions have held that provisions of a contract can violate both state law and TILA and have permitted the sanctions of both Acts to be applied. For example, in *Ballew v. Associates Financial Services Co.*, the court held that provisions of a contract violated both state and federal law and awarded damages under TILA and barred the lender from collecting or receiving interest as provided for in the Nebraska Small Loan Act.
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> Further, in *Hernandez v. Kerry Buick, Inc.*, the court held that a customer could recover under both TILA and the Illinois Motor Vehicle Retail Installment Sales Act for the same failure to disclose financing terms. We believe the Illinois . . . Act is similar enough to the Large Loan Act to apply *Hernandez*. In view of the purpose of the statute, its wording, and resulting case law, we believe that a consumer may recover under both TILA and the Large Loan Act.[117]

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114. No. 39126 (Cuyahoga County Ct. App. August 16, 1979).
115. *Id.* at 9–10.
116. 83 Ill. App. 3d 417, 403 N.E.2d 1316 (1980).
117. *Id.* at 422, 403 N.E.2d at 1320 (citations omitted).

This rationale exists for all the federal laws that are designed to protect the consumer. State legislation that is more protective of the consumer is not inconsistent with federal statutes, but is merely complementary. Cumulative remedies should therefore be available under both state and federal statutes.[118]

Other jurisdictions have split on the issue of state and federal cumulative recoveries. In Texas, recovery is allowed under both the Truth in Lending Act and the Texas Deceptive Trade Practices—Consumer Protection Act.[119] In *Cantrell v. First National Bank of Euless*, the Texas Court of Civil Appeals said "[w]hile we doubt that provision for imposition of penalties by both the federal and state laws were intended by either the Congress or Texas legislature, yet the rules of construction compel that we hold in accord" with precedent and allow a cumulative recovery.[120] On the other hand, an Illinois Court of Appeals found the remedies provided by the Truth in Lending Act and the Illinois Consumer Finance Act[121] as "duplicitous, not cumulative."[122]

b. *Ohio Legislation*

No Ohio court has squarely confronted the issue whether a violation of the State's Retail Installment Sales Act (RISA)[123] also violates the Consumer Sales Practices Act. RISA is the rough equivalent of the Truth in Lending Act on the state level and regulates every consumer transaction payable in installments.[124] As a logical matter, at least some violations of RISA could also be found to constitute unfair or deceptive acts under the Consumer Sales Practices Act. Because many violations of the Truth in Lending Act are also violations of RISA[125] and the failure to make certain disclosures required by Regulation Z has been held to be a deceptive act under the Consumer Sales Practices Act,[126] it is possible that some acts or practices could violate all three Acts.

In *Brown v. Maidstone*,[127] the court seemed to imply that, at least in certain instances, a violation of RISA is also a violation of the Consumer

118. Another problem that arises in connection with the cumulation of remedies is whether a consumer can pursue a violation of a federal consumer law, such as the Truth in Lending Act, by pleading such violation as an unfair and deceptive act where the statute of limitations has passed on the federal law (one year for the Truth in Lending Act) but has not passed on the state law claim (two years for the Consumer Sales Practices Act). The few cases on point are split. *See* Conrad v. Homes & Auto Loan Co., Inc., 53 App. Div. 2d 48, 385 N.Y.S.2d 979 (1976) (state limitation period applied); Manzina v. Publishers Guild, Inc., 386 F. Supp. 241, 245 (S.D.N.Y. 1974) (state statute of limitations was repealed because of conflict with limitation period of the Truth in Lending Act).

119. 2 TEX. BUS. & COMM. CODE ANN. tit. 2 § 17.41 *et seq.* (Vernon 1968 & Supp. July 1981). This Act resembles the Ohio Consumer Sales Practices Act in purpose and content.

120. 560 S.W.2d 721, 729–30 (Tex. Civ. App. 1977). The court relied on McDonald v. Savoy, 501 S.W.2d 400, 408 (Tex. Civ. App. 1973), as precedent.

121. ILL. ANN. STAT. ch. 74, § 19 *et seq.* (Smith-Hurd 1966).

122. Ninth Liberty Loan Corp. v. Hardy, 53 Ill. App. 3d 601, 607, 368 N.E.2d 971, 975 (1977).

123. OHIO REV. CODE ANN. § 1317.01 *et seq.* (Page 1979).

124. OHIO REV. CODE ANN. § 1317.01(A) (Page 1979).

125. *See* text accompanying note 109 *supra*.

126. Ellis v. Hensley, No. 39126 (Cuyahoga County Ct. App. August 16, 1979) at 5.

127. No. 75-12-3026 (Summit County C.P. Nov. 5, 1976).

Sales Practices Act. The case was brought by the Ohio Attorney General to enjoin the defendant-supplier from certain illegal actions in its attempts to enforce payment of claims arising from consumer transactions. The list of violations included falsely threatening legal action, threatening attachment or garnishment of wages when there was no judgment against the consumer, and communicating with the consumer by false legal documents.[128] In none of these instances did the court specifically refer to any statute to justify the issuance of a permanent injunction. At the end of the opinion, the court simply enjoined the defendant's practices because they failed to comply with the Consumer Sales Practices Act.[129] The implication of the decision is that these acts violate the Consumer Sales Practices Act.

The court also included in the list of enjoined acts those statements made by the defendant that violated section 1317.031 of the Ohio Revised Code. This section is part of RISA and, prior to the August 1980 amendments, stated that a consumer who executes an installment note in a consumer transaction can assert any defense he or she has against the supplier as a defense against a holder in due course. The holder can nullify any of the consumer's claims or defenses by sending a notice to the consumer containing the name and address of the holder and retail seller, the amount due, the statutory deadline date for a reply by the consumer, and a paragraph warning the consumer that the note has been transferred and all claims and defenses must be asserted before the deadline or payment in full will be required.[130] The supplier in *Brown* did not send this notice, but instead indicated to the consumer that he was legally liable to the supplier and that it would be useless for the consumer to assert any claims or defenses against the supplier. The court stated this was a violation of RISA and included it in the list of enjoined acts.[131] Although it was not expressly stated, this may indicate that the court felt this violation of RISA also violated the Consumer Sales Practices Act.

The expansion of the Consumer Sales Practices Act to include violations of other consumer legislation is of great benefit to the consumer. For example, RISA provides no remedy for violations of section 1317.031 of the Revised Code. The Consumer Sales Practices Act overcomes the deficiency when a violation of this section of RISA is found to also violate the Consumer Sales Practices Act.

The remedies provided by the Act are in addition or cumulative to those remedies available for the same conduct under other state and local laws.[132] This allows the consumer to recover any damages available under RISA (should a court find that a violation of RISA also violates the Consumer Sales

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128. *Id.* at 2–3.
129. *Id.* at 3.
130. OHIO REV. CODE ANN. § 1317.03.1(A) and (B) (Page 1980). Pursuant to the 1980 Amendments to this section, it is no longer possible for a holder to nullify a consumer's claims or defenses by giving notice.
131. No. 75-12-3026 (Summit County C.P. Nov. 5, 1976) at 2.
132. OHIO REV. CODE ANN. § 1345.13 (Page 1979).

Practices Act) in addition to those available under the Consumer Sales Practices Act. Consumers can also recover damages, and possible treble damages, under the Home Solicitation Sales Act[133] and the Prepaid Entertainment Act.[134]

Because any conduct that violates public policy, federal or state law, administrative rule or regulation, or municipal ordinance may be unfair or deceptive under the Consumer Sales Practices Act, the consumer is not limited to federal or state consumer law in establishing that specific conduct is unfair or deceptive. For example, the Ohio Administrative Code prescribes license standards and requirements for many professional trades within the state.[135] A detailed list of prohibited state practices is contained in the Appendix to this Article. In addition, local ordinances may also offer a source of authority in defining the meaning and application of the Consumer Sales Practices Act. The city of Columbus, for example, has enacted consumer legislation for Home Improvement Contractors[136] and for Home Solicitation (Door-to-Door) Sales.[137]

c. *Public Inspection File*

The substantive rules promulgated under section 1345.05(B)(2) of the Revised Code are published in the Ohio Administrative Code,[138] but the judicial decisions interpreting the Act are found only in the Attorney General's office. The Attorney General is required to:

> Make available for public inspection . . . all judgments, including supporting opinions, by courts of this state that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate section 1345.02 or 1345.03 of the Revised Code.[139]

This is referred to as the Public Inspection File and "[t]he purpose of [this file] is to make such decisions and judgments have the effect of substantive law."[140] In particular, if an act committed by a supplier has been previously declared unlawful by a judicial decision available in the File, the consumer

133. OHIO REV. CODE ANN. § 1345.21 *et seq.* (Page 1979).

134. OHIO REV. CODE ANN. § 1345.41 *et seq.* (Page 1979).

135. The Ohio Administrative Code contains licensing and other requirements for the following professions: Architecture (ch. 4703), barbers (ch. 4709), chiropractic (ch. 4734), cosmetology (ch. 4713), dentistry (ch. 4715), engineering (ch. 4733), medicine (ch. 4731), nursing (ch. 4723), nursing home administration (ch. 4751), occupational therapy (ch. 4755), optometry (chs. 4725, 4726), pharmacy (ch. 4729), psychology (ch. 4732), and speech pathology and audiology (ch. 4753).

136. COLUMBUS, OHIO CODES ch. 4114 (1981).

137. COLUMBUS, OHIO CODES ch. 2937 (1952).

138. *See* OHIO AD. CODE. § 109:4-3 *et seq.* (1978 & Supps.).

139. OHIO REV. CODE ANN. § 1345.05(A)(3) (Page 1979).

140. Hawkins v. Inland Marina, Inc., No. 79-CV-09-4500 at 1 (Franklin County C.P. Sept. 8, 1980). A court cannot take judicial notice of the content of the public inspection file. Consequently, in order to get a case which is on file into the record to recover treble damages, a party should obtain a certification from the Consumer Fraud Division of the Office of the Attorney General. The case would then be admissible as a certified public record under Rule 902 of the Ohio Rules of Evidence.

may sue for treble "actual damages or two hundred dollars, whichever is greater."[141]

Prior to September 8, 1980, the Public Inspection File was indexed only by the defendant's name and not by subject matter. This made it difficult and time consuming to research any single matter. There was nothing in the files that indicated the right to appeal had been lost by exhaustion of appellate remedies or the expiration of time. Furthermore, prior to November 5, 1979, no record was kept of the date a case was filed. To determine this, the general practice was to call the attorney who filed the case. In *Hawkins v. Inland Marina, Inc.*,[142] the defendant challenged the sufficiency of these arrangements. The court held that the file must contain only those judgments or decisions for which all appellate remedies were exhausted or lost by the expiration of time. Only then could the cases in the file have the effect of substantive law and be the basis of a treble actual damages recovery by a consumer, and "anything less would certainly fail constitutional muster."[143] The court also felt that a subject matter index would be a *sine qua non* for this Public Inspection File since "[t]he purpose is to let all persons know what is and is not an unfair or deceptive consumer sales practice when the same has not been spelled out in full by the Code itself."[144]

The Attorney General's office has since complied with the *Hawkins* court's guidelines. From a policy standpoint, however, more should be done. A great number of the cases in the Public Inspection File are unreported decisions and the only way to discover what is contained in the File is to go to the File itself. The Attorney General is required to "[i]nform consumers and suppliers on a continuing basis of acts or practices which violate section 1345.03 of the Revised Code."[145] The Attorney General has made available to the public a listing of several important decisions, entitled *Index of Significant Consumer Protection Litigation,* which contains a brief summary of court decisions through October 1, 1980. While this is helpful, something more should be required as a matter of fairness to suppliers. Suppliers should have more than token constructive notice of the judgments and decisions contained

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141. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979). The constitutionality of awarding treble damages based on cases in the Public Inspection File has not been directly addressed by any Ohio court. In Hawkins v. Inland Marina, Inc., No. 79-CV-09-4500 (Franklin County C.P. September 8, 1980), the defendant challenged the constitutionality of this arrangement but the court disposed of the case solely on the statutory grounds discussed in the text accompanying notes 142–44 *infra*. The Attorney General's subsequent compliance with the *Hawkins* court's guidelines appears to have laid to rest the issue of the constitutionality of awarding treble damages based on cases in the Public Inspection File.

142. No. 79-CV-09-4500 (Franklin County C.P. Sept. 8, 1980).

143. *Id.* at 2.

144. *Id.* at 2–3.

145. OHIO REV. CODE ANN. § 1345.05(A)(4) (Page 1979). Cases presently on file in the Public Inspection File have held a number of acts or practices to be unfair and deceptive, including the breach of express or implied warranties (Potter v. Dangler, 61 Ohio Misc. 14, 15 Ohio Op. 3d 329 (Paulding County C.P. 1977); Brown v. Lyons, 43 Ohio Misc. 14, 322 N.E.2d 380 (Hamilton County C.P. 1974)), the performance of unworkmanlike work (Gaughan v. Billingsley, No. 79–CV–05–2103 (Franklin County C.P. July 12, 1979)), the failure to make timely delivery of products (Brown v. Lyons, *supra*), and the failure to comply with provisions of the Home Solicitation Sales Act (Brown v. Rawleigh Banks, No. 944618 (Cuyahoga County C.P. 1976)).

in the Public Inspection File, especially given the harshness of a treble actual–damage award. Also, if the contents of the File were more readily available to the public, more Ohio consumers would be encouraged to bring suit under the Consumer Sales Practices Act. One of the purposes of the Act is to provide consumers with a more substantial remedy than is available at common law.[146] This goal is not fulfilled if the public is unaware of its rights and remedies. A looseleaf service published by the Attorney General's office or an exhaustive pamphlet supplemented by current court decisions that discloses the contents of the File would serve both functions and put more meaning and substance into the Consumer Sales Practices Act.

The publication of cases interpreting the Act and the contents of the Public Inspection File would also aid the courts in applying and interpreting the Act uniformly. Most of the cases dealing with the Act are unreported decisions. This sometimes leads to divergent decisions on the same issue in different parts of the state.

B. *Unconscionable Conduct as a Violation of the Act*

Unconscionable acts or practices by a supplier in connection with a consumer transaction violate the Consumer Sales Practices Act.[147] Unconscionability is a matter for the court to decide and usually involves some basic unfairness in the transaction such as terms that are too one-sided.[148] Section 1345.03(B) of the Act lists seven circumstances for courts to consider in determining whether an act or practice is unconscionable:

> (1) Whether the supplier has knowingly taken advantage of the inability of the consumer to reasonably protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;
>
> (2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;
>
> (3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
>
> (4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;
>
> (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

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146. *See* Thomas v. Sun Furniture and Appliance Co., 61 Ohio App. 2d 78, 81, 399 N.E.2d 567, 570 (1978).
147. OHIO REV. CODE ANN. § 1345.02(D) (Page 1979).
148. OHIO REV. CODE ANN. § 1345.03(A) (Page 1979).

> (6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment;
>
> (7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.[149]

Unlike the ten deceptive acts listed in section 1345.02(B) of the Ohio Revised Code, these seven circumstances are not per se violations. Instead they serve as guides for the courts.[150] In addition, no administrative rules have been promulgated to further define unconscionable acts or practices.

It is not clear whether the Act requires consumers to prove scienter to establish an unconscionable act or practice. The terms of the Ohio statute, which are far from conclusive, suggest knowledge is not an element of unconscionability. First, section 1345.03(A) of the Revised Code,[151] which sets forth the Act's general prohibition against unconscionable practices, contains no explicit knowledge element. If this section declared that no supplier shall *knowingly* commit an unconscionable act, then there would be no doubt that consumers are required to prove the supplier's knowledge or intention to act unconscionably. Second, although six of the seven circumstances listed above explicitly require the supplier to act knowingly, these are only circumstances to be considered in determining whether an act is unconscionable. Moreover, the Uniform Consumer Sales Act precedes its list of the same six circumstances with the following language: "[T]he court shall consider circumstances such as the following of which the supplier *knew or had reason to know*."[152] If the Uniform Act is used to aid interpretation where the Ohio Act is ambiguous, this language suggests that knowledge is not a prerequisite to unconscionability; that mere reason to know is sufficient.[153]

Given the ambiguities in the statutory language, it is not surprising that Ohio courts have failed to achieve a consensus on the scienter issue. At least one court appears to have adopted a reason to know standard. In *Brown v. Columbus Remodeling and Builders, Inc.*[154] the court held it unconscionable to misrepresent to consumers "that home remodeling work will be performed pursuant to a contract when defendants have *reason to know* that said work will not be completed."[155] By contrast, one of the few federal court cases decided under the Ohio Act seems to require proof of a knowing act. In *Clayton v. McCary*,[156] the district court, "[l]ooking at the [relevant] circum-

149. OHIO REV. CODE ANN. § 1345.03(B) (Page 1979).

150. *Id.*

151. OHIO REV. CODE ANN. § 1345.03(A) (Page 1979) provides: "No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."

152. UNIFORM CONSUMER SALES PRACTICES ACT § 4(c) (emphasis added).

153. The Commissioner's Comments to the Uniform Act indicate that, "Although probative, this scienter is not invariably required in order to establish unconscionability." *Id.* (Commissioner's Comments).

154. No. 77-CV-03-1107 (Franklin County C.P. June 13, 1978).

155. *Id.* at 2.

156. 426 F. Supp. 248 (N.D. Ohio 1976).

stances . . . in light of the knowledge requirement" found no unconscionable act or practice.[157] The court did recognize that there is a "paucity of case law on the Act."[158]

Finally, some cases are simply ambiguous. For example, *Brown v. Market Development, Inc.*[159] holds that the activity of the supplier, not the character of the completed transaction or the consumer's actual mental state, is pivotal in determining unconscionability.[160] The case can be read to suggest that a suppler's actual intent is not relevant in determining unconscionability, but an alternative reading is equally plausible. The court may have been referring to language in the Act's definition of knowledge. Section 1345.01(E) of the Revised Code defines knowledge as "actual awareness, *but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.*"[161]

Whether scienter or something less is required under the Ohio Act will affect the ability of consumers to prove a supplier's act was unconscionable, but this should not materially affect a consumer's ability to recover damages in a given case. If a consumer fails to prove the existence of a knowing act, he may still be able to prove that the act was unfair or deceptive. Deception does not require proof of a supplier's knowing act and includes violation of all Federal Trade Commission orders, guides, rules, and federal court interpretations of the Federal Trade Commission Act.[162] A consumer may also rely on the substantive rules promulgated under section 1345.05(B)(2) of the Ohio Revised Code that declare certain acts unfair or deceptive and in violation of the Consumer Sales Practices Act.[163] Thus, a supplier may escape a charge of unconscionability for certain questionable acts but will find it hard to avoid ultimate liability to the consumer. This was the case in *Clayton.* The court found no per se unfair or deceptive act and no unconscionable act, but found a violation of substantive rule 109:4-3-10 of the Administrative Code entitling the consumer to a remedy under the Consumer Sales Practices Act.[164]

Ohio courts have had no trouble in finding a supplier's acts or practices unconscionable in circumstances other than the seven listed, but the acts have been fairly flagrant. One court has found that a supplier who "consistently maintains a pattern of inefficiency, incompetency, or continually stalls and evades his legal obligations to consumers, commits an unconscionable act or practice."[165] In *Santiago v. S. S. Kresge Co.,*[166] another court found the

157. *Id.* at 261.
158. *Id.*
159. 41 Ohio Misc. 57, 322 N.E.2d 367 (Hamilton County C.P. 1974).
160. *Id.* at 62, 322 N.E.2d at 371.
161. OHIO REV. CODE ANN. § 1345.01(E) (Page 1979) (emphasis added).
162. OHIO REV. CODE ANN. § 1345.02(C) (Page 1979). *See* text accompanying notes 58-60 and 93-113 *supra.*
163. OHIO REV. CODE ANN. § 1345.05(B) (Page 1979). *See* text accompanying notes 81-85 *supra.*
164. Clayton v. McCary, 427 F. Supp. 248, 260 (N.D. Ohio 1976). *See* OHIO AD. CODE § 109:4-3-10 (1977) (effective August 28, 1981, this section was replaced by § 109:4-3-16).
165. Brown v. Lyons, 43 Ohio Misc. 14, 21, 332 N.E.2d 380, 386 (Hamilton County C.P. 1974).
166. 2 Ohio Op. 3d 54 (Cuyahoga County C.P. 1976).

supplier's practice of suing individuals in a distant forum—southwestern Ohio—when the transactions took place in northeastern Ohio, to be unconscionable. The court noted the inconvenience and expense suffered by consumers not wanting to have a default judgment entered against them. The fact that the supplier-defendant usually secured default judgments effectively denied the consumer his day in court—a right that is the basis of the American legal system and the denial of which is unconscionable.[167] In both cases the courts did not examine whether the supplier had acted with intent or was actually aware of the nature of his acts and their unconscionable tendencies, although the acts themselves would allow that inference.[168]

IV. Private Remedies

The Ohio Consumer Sales Practices Act contains two basic private remedy provisions. First, section 1345.09(A) of the Revised Code grants the consumer the right to "rescind the transaction or recover his damages" where the supplier commits an unfair or deceptive act or practice, or an unconscionable act or practice.[169] Second, section 1345.09(B) allows an individual consumer to "rescind the transaction or recover . . . three times the amount of his actual damages or two hundred dollars, whichever is greater," where the supplier commits an act declared unconscionable or unfair or deceptive by a case in the Public Inspection File or by rule adopted by the Attorney General.[170] Other damages and remedies, including attorney's fees, may also be sought.

A. *Damages or Rescission*

1. *Rescission*

To rescind a transaction under either of the above-mentioned provisions, the consumer need only revoke "within a reasonable time after [he or she] discovers or should have discovered the ground for [revocation] and before [there is] any substantial change in [the] condition of the subject of the consumer transaction."[171] Identical language appears in the Uniform Commercial Code, but the Code also contains other prerequisites to revocation of acceptance.[172] These elements include the substantial impairment of value, the acceptance of the goods on the reasonable assumption that their non-conformity would be cured and that the defects have not been reasonably cured, and, if acceptance was reasonably induced by difficulty of discovery before accept-

167. *Id.* at 55–56.

168. This would add support to the contention that knowledge is only one circumstance to consider in determining unconscionability and, even if it is necessary, the Ohio courts do not dwell on this issue.

169. OHIO REV. CODE ANN. § 1345.09(A) (Page 1979).

170. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979).

171. OHIO REV. CODE ANN. § 1345.09(C) (Page 1979). Rescission is not mentioned as a remedy under the Uniform Act.

172. U.C.C. § 2-608(B) (OHIO REV. CODE ANN. § 1302.66 (Page 1979)).

ance or by the seller's assurances, then an absence of discovery of the nonconformity at the time of acceptance.

Despite the clear advantages to seeking rescission under the Consumer Sales Practices Act, the provisions of the Act are not entirely one-sided. An action to rescind must be preceded by an effective revocation—a requirement that has received substantial judicial attention. In *Peterman v. Waite,*[173] the court held the consumer must take some specific action (such as tender of possession) that unequivocally serves as notice to the supplier that the consumer is receptive to or contemplating rescission. The consumer must allow the supplier to make an intelligent decision with respect to the consumer's right to rescind.[174] In *Peterman,* the court found the plaintiff had failed to take such action. The supplier delivered an automobile to the plaintiff on November 8, 1978, and the plaintiff experienced stalling problems five days later. After repairs, this same problem occurred on two more occasions over a three month period. The plaintiff then filed the complaint to institute this action but did not tender possession of the automobile and continued to drive it for the five month period preceeding a trial on the merits.[175] This did not meet the requirements of a revocation, which is necessary "as a condition precedent to relief by way of rescission."[176] The court thus construed the Ohio Consumer Sales Practices Act in light of Uniform Commercial Code case law under section 2-608, which prohibits the interim use of goods after a suit is filed and pending the outcome of that litigation.[177]

Presiding Judge Putnam, in dissent, felt that filing the complaint within three months of the transaction date was an act of revocation within a reasonable time: "The consumer is helpless to do other than putter about with her stalling car which presumably she needs to make a living. She cannot promptly park it on her dealers' door-step and walk away. She has nothing else to drive and presumably, no money to buy a second car."[178] In addition, the judge noted that the consumer cannot be sure how the lawsuit will turn out.[179] Requiring a tender of possession under these circumstances is unduly harsh. A better rule would be to require an act of revocation reasonable under the circumstances, such as the filing of a complaint. Since the Act is remedial in nature, the consumer should not be required to go to unreasonable lengths to revoke.

The consumer must also rescind the transaction before any "substantial change [occurs] in [the] condition of the subject of the consumer transac-

173. No. 79-CA-19 (Knox County Ct. App. June 25, 1980).

174. *Id* at 7. The court relied on U.C.C. § 2-608(a) (OHIO REV. CODE ANN. § 1302.66(B) (Page 1979)) in defining revocation.

175. Peterman v. Waite, No. 79-CA-19 (Knox County Ct. App. June 25, 1980) at 8-10.

176. *Id.* at 10.

177. *See* U.C.C. § 2-608(3) and § 2-602 (OHIO REV. CODE ANN. §§ 1302.66 and 1302.61 (Page 1979)).

178. Peterman v. Waite, No. 79-CA-19 (Knox County Ct. App. June 25, 1980) at 12 (Putnam, J., dissenting).

179. *Id.*

tion."[180] In *Clayton v. McCary*, the consumer replaced the original 1967 engine (which had locked up due to a lack of oil resulting from a damaged oil pan) in a used automobile purchased from the defendant with a newer engine which later locked up due to an oil leak. This was held to be substantial change in the condition of the automobile which precluded the remedy of rescission.[181] This provision was inserted to protect suppliers from being forced to accept goods that were damaged or excessively worn.

It may not always be necessary, however, for the consumer to return the merchandise in its original condition. When to do so is impracticable or inequitable, the rescinding buyer may only be required to tender its reasonable value. The Illinois deceptive practices statute provides that a buyer may cancel a door to door sales contract by returning the merchandise "in its original condition."[182] In *Hurlbert v. Cottier*,[183] the court held the statutory purpose of this provision is to restore the *status quo ante*, and, when materials such as siding have been substantially altered in their application, this requirement cannot be observed. The consumer was required to tender the reasonable value of the siding measured as of the date of installation. The court relied on the federal Truth in Lending Act's rescission provision[184] because the Illinois legislature intended consultation with federal laws and federal court decisions when the Illinois statute appears deficient.[185] Under the Ohio Act, the tender of the reasonable value of goods when their return is impracticable or inequitable should also be allowed.

2. *Alternative Remedies*

It appears from the statutory language that the consumer must elect a remedy—rescission or damages—under the Ohio Consumer Sales Act. Sections 1345.09(A) and 1345.09(B) both refer to the consumer's right to "rescind the transaction *or* recover . . . damages."[186] In addition, the courts of at least one state have taken the view that damages are inconsistent with the remedy of rescission after a fraudulent misrepresentation. In a North Carolina case, *Taylor v. Triangle Porsche-Audi, Inc.*,[187] the buyer alleged reliance upon the seller's misrepresentation of a 1970 Porsche as a 1971 model and sought actual damages in the amount of the purchase price ($4,600). In a default judgment, the trial court awarded the consumer treble damages ($13,800) because the dealer's misrepresentation violated the state deceptive practices act. Upon satisfaction of the judgment, the consumer was ordered to tender the 1970

180. OHIO REV. CODE ANN. § 1345.09(C) (Page 1979).
181. Clayton v. McCary, 426 F. Supp. 248, 262 (N.D. Ohio 1976).
182. ILL. REV. STAT. ch. 121 1/2, § 262B (1960 & Supp. 1981).
183. 56 Ill. App. 3d 893, 372 N.E.2d 734 (1978).
184. 12 C.F.R. § 226.9(d) (1980). While there are no Ohio cases reaching this result, the appropriate arguments have apparently never been presented to an Ohio court. However, the Illinois Act is substantially the same as the Ohio Act and there is no reason why an Ohio court should not adopt the Illinois court's rationale.
185. Hurlbert v. Cottier, 56 Ill. App. 3d 893, 896–97, 372 N.E.2d 734, 736 (1978).
186. OHIO REV. CODE ANN. §§ 1345.09(A) and 1345.09(B) (Page 1979) (emphasis added).
187. 27 N.C. App. 711, 220 S.E. 2d 806 (1975).

Porsche to the dealer. The appeals court held that since it was clear that the plaintiff was seeking to rescind the sales contract and recover the $4,600 sales price, he was not damaged or injured within the meaning of the deceptive practices act so as to warrant a treble damages recovery.[188]

3. *Damages*

The "damages" referred to in section 1345.09(A) of the Ohio Revised Code most likely encompass both actual and consequential damages. This section originally allowed the recovery of "*actual* damages" and the deletion of the word "actual" by a 1978 amendment[189] indicates the legislature intended a broader meaning than restitution. The same amendment repealed the portion of section 1345.12(C)[190] of the Ohio Revised Code that excluded recoveries for damages to property other than the property that was the subject of the consumer transaction.[191] This is additional evidence of legislative intent that consequential damages are recoverable under section 1345.09(A) of the Revised Code. Finally, section 1345.09(B) of the Revised Code *still* provides the consumer may recover treble "*actual* damages."[192]

Under section 1345.09(B) of the Ohio Revised Code the meaning of the word "damages" and the appropriate measure of recovery are not clear. Some courts have measured damages by out of pocket expenses,[193] others by the reasonable costs to repair the defects in the product,[194] and still others allow a consumer to recover his out of pocket expense or the benefit of the bargain, whichever is greater.[195]

B. *Two Hundred Dollars or Treble Actual Damages*

The Act provides for the recovery of the greater of two hundred dollars or treble actual damages:

> Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination

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188. *Id.* at 716, 220 S.E.2d at 811.

189. Amended Substitute House Bill 861 (effective August 11, 1978), 1978 OHIO LAWS 3227.

190. OHIO REV. CODE ANN. § 1345.12(C) (Page 1979).

191. Amended Substitute House Bill 861 (effective August 11, 1978), 1978 OHIO LAWS 3230.

192. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979) (emphasis added). It could be argued that the failure to delete "actual" from this section in 1978 was merely a legislative oversight.

193. *See, e.g.*, Jack Criswell Lincoln Mercury v. Haith, 590 S.W.2d 616, 619 (Tex. Ct. App. 1979). *Cf.* Potter v. Dangler Mobile Homes, 61 Ohio Misc. 14, 24, 401 N.E.2d 734, 736 (Paulding County C.P. 1977).

194. *See, e.g.*, Young v. DeGuerin, 591 S.W.2d 299 (Tex. Ct. App. 1979); Harrison v. Dallas Court Reporting College, Inc., 589 S.W.2d 813, 816–17 (Tex. Ct. App. 1979).

195. York v. Sullivan, 369 Mass. 157, 165, 338 N.E.2d 341, 349 (1975); Johnson v. Willis, 596 S.W.2d 256, 262 (Tex. Ct. App. 1980). *See also* RESTATEMENT (SECOND) OF TORTS § 589 (1977). Some courts have further allowed recovery for mental distress. *See, e.g.*, Woods v. Littleton, 554 S.W.2d 662, 671–72 (Tex. 1977); Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 358, 581 P.2d 1349, 1352 (1978); Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170 (1979).

has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.[196]

One likely reason for the existence of this section is to encourage consumer enforcement of the Act by making recoveries more lucrative. At the same time, this section penalizes suppliers who commit acts or practices that are already clearly defined as unfair, deceptive, or unconscionable. The recoveries can be substantial. In *Gaughan v. Billingsley,*[197] the plaintiffs recovered $36,720.00 in treble actual damages because the supplier engaged in selling practices that had been held to be deceptive in *Brown v. Columbus Remodeling and Builders, Inc.,*[198] a decision available in the Public Inspection File.

The award of treble damages contains both a compensatory and punitive element, usually thought to be in a ratio of one-to-two.[199] The minimum two hundred dollar recovery provided in this subsection is an enforcement mechanism designed to encourage consumers to act as private attorneys general and bring suit against suppliers who violate the Act. Any damage recovery under this subsection can be said to consist of compensatory and enforcement elements, and the legislature probably intended a punitive element to recoveries in this situation.

C. *Attorney's Fees*

The Consumer Sales Practices Act provides:

The Court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this Chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has *knowingly* committed an act or practice that violates this Chapter.[200]

Ohio courts have not acted with any uniformity in deciding whether to award reasonable attorney's fees to consumers under the Act. This is especially

196. OHIO REV. CODE ANN. § 1345.09(B) (Page 1980). It may be significant that the consumer can recover only treble *actual* damages. Section 1345.09(A) of the Revised Code provides for the recovery of damages. This may mean that a treble damage recovery will not include the consumer's consequential damages. *See* text accompanying notes 188–95 *supra.*

197. No. 79 CV-05-2103 (Franklin County C.P. July 12, 1979).

198. No. 77–CV–03–1107 (Franklin County C.P. June 13, 1978).

199. Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy,* 3 N.M. L. REV. 286, 287 (1973).

200. OHIO REV. CODE ANN. § 1345.09(F) (Page 1979) (emphasis added).

troubling because the consumer's ability to recover such fees may determine whether he will seek to enforce his rights and pursue redress under the Act.[201]

In *Hamilton v. Davis Buick Co.*,[202] the court held "the word 'knowingly' in 1345.09(F)(2) must relate to knowledge that the act violates the law."[203] Under this interpretation, for the consumer to be awarded attorney's fees the supplier must not only violate the Act, but must actually be aware that his actions constitute a violation. It is hard to believe this interpretation was intended by the legislature. It is a well known common law maxim that ignorance of the law is no excuse.[204] The *Hamilton* rationale would reward suppliers who were ignorant of the existence of the Consumer Sales Practices Act and its provisions by not awarding consumers reasonable attorney's fees—even if the supplier flagrantly violated the Act. The better approach is to award attorney's fees when the supplier acts knowingly—that is, with scienter. This interpretation is more reasonable. The statutory language of this section should be interpreted to require the supplier to commit a knowing act or practice that violates chapter 1345 of the Revised Code. The language does not state the supplier must act with the knowledge that his actions violate the Act, but simply requires the supplier to commit a knowing act. Although the legislature must have intended the knowledge requirement to limit the situations in which a consumer could recover attorney's fees, it is doubtful that it intended to limit it only to situations where the supplier acted knowing he was violating the Consumer Sales Practices Act.

It would be illogical to deny attorney's fees to the consumer whenever a supplier violates a substantive rule or commits an act judicially determined to violate the Consumer Sales Practices Act after such decision is placed in the Public Inspection File. The purpose of the substantive rules and cases in the Public Inspection File is to give notice to all persons of "what is and is not an unfair or deceptive [or unconscionable] consumer sales practice when the same has not been spelled out in full by the Code itself."[205] Suppliers are liable for the greater of two hundred dollars or treble actual damages. This shows the legislature intended to hold suppliers to a higher level of responsibility for acts or practices that clearly violate the Act. Suppliers are charged with notice of these rules and court decisions whether or not they are actually cognizant

201. The possibility of recovering attorney's fees would encourage consumers to bring suit under the Act. Where a consumer seeks rescission or a small damages award, he may be deterred from bringing suit by high attorney fees. Several courts have awarded attorney's fees in excess of the consumer recovery in Truth in Lending cases for this reason, *see* Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973), and also allowed legal aid societies to receive reasonable attorney's fees, *see* Ecenrode v. Household Finance Corp. of South Dover, 422 F. Supp. 1327 (D. Del. 1976).

202. No. 79-1875 (Montgomery County C.P. June 24, 1980).

203. *Id.* at 7.

204. Mr. Justice Jackson, dissenting in Boyce Motor Lines v. United States, 342 U.S. 337, 345 (1951), said "The knowledge requisite to a knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense."

205. Hawkins v. Inland Marina Inc., 79 CV-09-4500 at 2-3 (Franklin County C.P. September 8, 1980).

of them and in that sense they may be said to have acted knowing they were violating chapter 1345 of the Ohio Revised Code. Suppliers should also be charged with such knowledge for purposes of attorney's fees. In such situations, the legislature has already manifested an intent to punish and encourage enforcement.[206] Even under the *Hamilton* rule, the award of attorney's fees to the consumer would be consistent with that purpose.

There are no Ohio cases specifically addressing the reasonableness of attorney's fees or what is to be considered when awarding them. It is likely, given the remedial nature of the Ohio Act, that attorney's fees are recoverable for work done at all court levels. In Texas, the statutory provision for "attorney's fees reasonable in relation to the amount of work expended" under the deceptive practices statute includes work done at the appellate level as well as the trial level.[207] Furthermore, since the statute lists no specific facts requiring independent proof, the judge can rely on this firsthand knowledge of the services performed before him and need not hold an evidentiary hearing as to the proper amount to be awarded. The crucial factors to be considered are the length of the trial, the difficulty of the legal and factual issues involved, and the degree of competence the attorney demonstrates. The standard of reasonableness depends on what the services were objectively worth and not on the attorney's usual charge.[208]

D. *Punitive Damages*

Given a finding of actual malice, punitive damages should be available under the Consumer Sales Practices Act since an unfair or deceptive or unconscionable act or practice is in the nature of a statutory tort. In *Brown v. Lyons*,[209] punitive damages of two hundred fifty dollars were awarded to consumer intervenors in an action brought by the Attorney General against an appliance dealer who continually stalled and evaded his legal obligations to consumers. The court found the defendant intentionally and knowingly misled and took advantage of consumers.[210] However, because this action was brought by the Attorney General under section 1345.07 of the Revised Code, there was no private remedy available to the consumer intervenors under the Consumer Sales Practices Act.

It is not clear whether a consumer can recover two hundred dollars or treble actual damages under the Consumer Sales Practices Act and also recover punitive damages. Arguments can be made to support either position. On one hand, consumer advocates argue that a consumer should be able to recover both treble and punitive damages because each damage award serves a different purpose and requires different elements of proof. Treble damages

206. *See* text accompanying notes 196–201 *supra*.
207. Volkswagon of America, Inc. v. Licht, 544 S.W.2d 442 (Tex. Civ. App. 1976).
208. *See* Heller v. Silverbrand Construction Corp., 78 Mass. Adv. Sh. 2850, 382 N.E.2d 1065 (1978).
209. 43 Ohio Misc. 14, 332 N.E.2d 380 (Hamilton County C.P. 1979).
210. *Id.* at 17, 332 N.E.2d at 384.

do not require a finding of actual malice and are designed to encourage a consumer to bring suit by expanding his recoverable damages. Punitive damages do require a finding of actual malice and are designed to punish the wrongdoer for outrageous conduct. On the other hand, opponents argue that a consumer should not be able to recover treble and punitive damages because they both punish the defendant by allowing a consumer to recover more than his actual damages. If the treble damage award under section 1345.09(B) of the Revised Code is punitive in nature, then it is not logical to tack on additional punitive damages.[211] The issue has not yet been decided in Ohio.[212]

E. *Other Remedies*

There are other remedies available to the consumer under the Ohio Consumer Sales Practices Act. The "consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter."[213] A consumer can also threaten a supplier with seeking the revocation or suspension of the supplier's license or permit.[214] This section gives consumers some bargaining power in settlement discussions because occupations with high potentials for consumer fraud are commonly licensed, including debt collectors, vocational schools, funeral directors, automobile and mobile home sellers, nursing home owners, employment agencies, television repairmen, auto repairmen, plumbers, electricians, appliance repairmen, and optometrists.

Although not expressly mentioned in the Act, there may be an additional implied remedy for consumers. The traditional common law remedy of rescission contemplates the consumer tendering goods to the seller and then seeking rescission of the contract. Rescission suggests that the two parties be returned to their original positions with neither side gaining by the transaction. Courts will thus try to return the parties to the status quo. This does not hold true, however, if a contract is found unenforceable. Illegal contracts or those involving "unclean hands" are not enforced by the courts. The parties are left to their own devices.[215] A consumer who has received his end of the bargain but still owes payments will realize a windfall if the agreement is found unenforceable. And, an agreement that violates the Consumer Sales Practices Act may be construed as illegal and thus unenforceable.

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211. *See* Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975). In a concurring opinion, three justices held that the recovery of treble damages under the state deceptive practices statute was a remedy punitive in nature that excluded the right to recover punitive damages for fraud. *See also* Singleton v. Pennington, 568 S.W.2d 367 (Tex. Civ. App. 1977). *See* text accompanying note 199 *supra*.

212. In Osai v. A & D Furniture Co., 68 Ohio St. 2d 99, 428 N.E.2d ___ (1981), the court reversed a decision of the appellate court that limited an award made by the trial court of punitive damages to three times the actual damages sustained by the consumer-plaintiffs. The Ohio Supreme Court did not decide whether punitive damages were available to redress violations of the Consumer Sales Practices Act or whether such damages were available in addition to punitive damages.

213. OHIO REV. CODE ANN. § 1345.09(D) (Page 1979).

214. OHIO REV. CODE ANN. § 1345.11(D) (Page 1979).

215. *See* Associated Press v. Taft-Ingalls Corporation, 340 F.2d 753 (6th Cir. 1965); Massilon Savings and Loan Co. v. Imperial Finance Co., 114 Ohio St. 523, 151 N.E. 645 (1926).

In *Bennett v. Hayes*,[216] a car mechanic repaired the consumer's car but failed to give him a written estimate as required by state law. The consumer refused to pay for the repairs and the mechanic brought suit on the contract and in quantum meruit. A California appellate court held the contract unenforceable and illegal because the mechanic had not given the required written estimate. Since the contract was illegal, the seller also could not recover in quantum meruit.[217] Ohio has a similar law regarding written estimates for auto repairs[218] and there is nothing to prohibit an Ohio court from applying this rationale to the Consumer Sales Practices Act. However, because such a remedy is extreme and works a forfeiture on the supplier, Ohio courts may be reluctant to adopt it.

V. CONCLUSIONS

The Ohio Consumer Sales Practices Act presents the potential for the explosive growth of consumer remedies far beyond those available under Article 2 of the Uniform Commercial Code, RISA, the Fair Debt Collection Act, the Magnuson-Moss Warranty Act, the Truth in Lending Act, and the common law of contract or tort. The Act creates new substantive rights and remedies that are not limited by privity, parol evidence, disclaimers, limitations of consequential damages, scienter, or bad faith. Therefore, an allegation of unfair or deceptive conduct should become the first consideration in raising a consumer complaint. Because conduct in violation of the Act is tortious it is possible to pierce the corporate veil and establish personal liability against individual officers or employees.

The Act, however, is not without its weaknesses. It has been effective in protecting consumers from unfair or deceptive or unconscionable sales practices and has generated much case law. However, few of these decisions have been reported and this is the main problem facing consumer enforcement of the Act. There is a low level of public awareness of the Consumer Sales Practices Act and the remedies it provides. From the consumer's standpoint, the result is some aggrieved consumers failing to seek redress under the Act.[219] From the seller's standpoint, the result is unwary suppliers finding themselves liable for treble actual damages or facing a class action for damages.[220] Both results can be avoided by more publicity of consumer rights and remedies under the Act. More decisions, at least at the appellate level, should

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216. 53 Cal. App. 3d 700, 125 Cal. Rptr. 825 (1975).

217. *Id.* at 704, 125 Cal. Rptr. at ___. *Accord* Daniel's Brake, Alignment and General Auto Repair v. Tograla, No. H79-1874 (1st Cir. Hawaii 1979); Brooks v. P.A. Clark's Garage, Inc., 117 N.H. 770, 378 A.2d 1144 (1977).

218. OHIO AD. CODE § 109:4-3-05 (1978). *See* note 84 *supra*.

219. Section 1345.10(C) of the Revised Code, OHIO REV. CODE ANN. § 1345.10(C) (Page 1979), provides a two year statute of limitation—which is more generous than most consumer oriented statutes—and allows a consumer to raise the Act as a counterclaim in a suit arising out of the same transaction at any time.

220. Damages or other appropriate relief can be recovered in a class action under Civil Rule 23. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979).

be reported, and some sort of general subject index of unreported decisions should be published and made readily available. The Attorney General's Public Inspection File is the closest such arrangement, but it contains only cases filed by attorneys and not all cases dealing with the Act are so filed. Uniform interpretation and application of the Act by Ohio courts has suffered because of the lack of reported case law. This works to the detriment of both consumers and suppliers. A uniformly applied and highly visible Consumer Sales Practices Act is in the best interest of all Ohio citizens.

APPENDIX
Prohibited State Practices

GENERAL PRACTICES

Practice	Authority
False, unfair, or deceptive acts	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.01, .02 (Page 1979)
Unconscionable acts, generally	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.01, .03 (Page 1979); U.C.C. § 2-302 (OHIO REV. CODE ANN. § 1301.09 (Page 1979))
Lack of good faith, generally	OHIO REV. CODE ANN. § 1301.09 (Page 1979) (U.C.C. § 1-203)

SPECIFIC PRACTICES (Advertising, representations)

Practice	Authority
Deceptive pricing and bargain offers	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(8), .03(B)(2), .03(B)(5) (Page 1979); OHIO AD. CODE § 109:4-3-12 (1977); OHIO REV. CODE ANN. § 1333.35-.37 (Page 1979) (bankruptcy and receiver's sales); Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.01 *et seq.* (Page 1980) (deceptive trade practices)
Use of the word "Free"	OHIO AD. CODE § 109:4-3-04 (1977)
Bait advertising, unavailability	OHIO AD. CODE § 109:4-3-03 (1977)
Disparaging goods, services or business of another	Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02(H) (Page 1980)
Misrepresentations regarding nature of manufacturer	Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02 (Page 1980); OHIO REV. CODE ANN. § 925.21-.32 (Page Supp. 1980) (packages and containers for fruits and vegetables)
Passing Off	Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02(A) (Page 1980); OHIO REV. CODE ANN. § 3741.01 *et seq.* (Page 1980) (oils and paints and gasoline)
Misrepresentations regarding sponsorship, approval, affiliation	Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02(B), (E) (Page 1980); Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(1), (9), .03(B)(3) (Page 1979)
Weights and measures, price per unit	OHIO REV. CODE ANN. § 1327.46 *et seq.* (Page 1979); OHIO REV. CODE ANN. § 911.18-.20 (Page 1968 & Supp. 1980) (bakeries) OHIO REV. CODE ANN. § 925.21-.32 (Page Supp. 1980) (fruits and vegetables); OHIO REV. CODE ANN. § 925.51 *et seq.* (Page 1968)

Other quantity misrepresentations	Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02(E) (Page 1980); Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(6) (Page 1979)
Packaging	OHIO REV. CODE ANN. § 3717.32-.34 (Page 1980) (milk); OHIO REV. CODE ANN. § 1327.46 *et seq.* (Page 1979)
Labeling, adulteration, identity	OHIO REV. CODE ANN. § 3741.01 *et seq.* (oils; paints; gasoline); 3717.51-.55 (frozen desserts); Pure Food and Drug Law, § 3716.38 (honey); Pure Food and Drug Law, § 3715.24-.27 (maple sugar and syrup); Pure Food and Drug Law § 3716.14-.20 (fruits and vegetables) (Page 1980). OHIO REV. CODE ANN. § 911.18-.20 (Page 1968 & Supp. 1980) (bread); OHIO REV. CODE ANN. § 913.22-.28 (Page 1968 & Supp. 1980) (soft drinks); OHIO REV. CODE ANN. § 925.21 *et seq.* (Page 1968 & Supp. 1980) (fruits and vegetables)
Other quality, grade, standard, ingredient misrepresentations	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(2), (3), (4), (7), (9) (Page 1979); Deceptive Trade Practices Act, OHIO REV. CODE ANN. § 4165.02 (C), (F), (G) (Page 1980)
Non-disclosure of full terms of transaction	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02 (B)(6), (8), (10), .02(D) (Page 1979); OHIO AD. CODE § 109:4-3-05, 08, 11, 13, 14 (1977)
SALES APPROACHES	
Door to Door sales	OHIO REV. CODE ANN. § 1345.21-.28 (Page 1979); OHIO AD. CODE § 109:4-3-11 (1977)
Sales representative's status	OHIO AD. CODE § 109:4-3-11 (1977)
Oral promises not in contract	OHIO REV. CODE ANN. §§ 1302.26 (U.C.C. § 2-313), 1302.29 (U.C.C. § 2-312) (Page 1979); OHIO AD. CODE § 109:4-3-16 (1981)
Unsolicited goods	OHIO REV. CODE ANN. § 1333.60 (Page 1979)
Premiums, prizes with sale	OHIO REV. CODE ANN. § 1333.01 (Page 1979) (trading stamps); OHIO AD. CODE § 109:4-3-06 (1977)
PERFORMANCE PRACTICES	
Theft through deception	OHIO REV. CODE ANN. § 2913.02 (Page Supp. 1980)
Simulation	OHIO REV. CODE ANN. § 2913.32 (Page 1975)
Substitution of inferior goods	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(5) (Page 1979); OHIO AD. CODE § 109:4-3-09 (1977)
Merchantability, fitness	OHIO REV. CODE ANN. § 1320.27, .28 (Page 1979) (U.C.C. §§ 2-314, 2-315)
Sale of used as new, prior use	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(2), (3) (Page 1979); OHIO AD. CODE § 109:4-3-08 (1977); OHIO REV. CODE ANN. § 4165.02(E), (F) (Page 1980); OHIO REV. CODE ANN. § 4505.19 (Page 1973) (motor vehicles)
Delay, nondelivery, nonexistent product	OHIO AD. CODE § 109:4-3-09 (1977)

Layaway plans, deposits	OHIO AD. CODE § 109:4-3-07 (1977)
Disposal of goods left in possession	OHIO REV. CODE ANN. § 1333.22-.26 (Page 1979) (goods left for cleaning or storage); OHIO REV. CODE ANN. § 1333.41 (Page 1979) (bailee's liens)
Repairs and services, including automobiles, home appliances, and home improvements	Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02 (B)(7), .03(B)(6) (Page 1979); OHIO AD. CODE § 109:4-3-05 and 109:4-3-13 (1978)

PAPER TRANSACTIONS

Forgery, tampering, destruction of documents	OHIO REV. CODE ANN. § 2913.31, .42 (Page 1975)
Future service contract	OHIO REV. CODE ANN. § 1345.41-.51 (Page 1979) (prepaid entertainment contract)
Adhesion contracts, warranty disclaimers	OHIO REV. CODE ANN. § 1302.16 (Page 1979) (U.C.C. § 2-302); OHIO REV. CODE ANN. § 1302.29 (Page 1979) (U.C.C. § 2-316); OHIO REV. CODE ANN. § 1345.03(A), .03(B)(1), (5) (Page 1979)
Warranties, rights, remedies	OHIO REV. CODE ANN. § 1302.26-.28 (Page 1979) (U.C.C. §§ 2-313, 2-314, and 2-315); Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.02(B)(10) (Page 1979)
Installment sales	OHIO REV. CODE ANN. § 1317.01 *et seq.* (Page 1979) (RISA)
Debt collection	OHIO REV. CODE ANN. § 1309.46–48 (Page 1979) (U.C.C. §§ 9–503, 9–504, and 9–505)
Confidential information	OHIO REV. CODE ANN. § 1333.55 (Page 1979) (Tax information)

INDUSTRY SPECIFIC PRACTICES

Insulation	OHIO AD. CODE § 109:4-3-14 (1978)
Automobile sales	OHIO AD. CODE § 109:4-3-16 (1981); OHIO REV. CODE ANN. § 4517.20-.26, .40–.45 (Page Supp. 1980)
Mobile homes	OHIO REV. CODE ANN. § 3733.09-.20 (Page 1979)
Hearing aids	OHIO REV. CODE ANN. § 4747.01 *et seq.* (Page 1977)
Funeral Practices	OHIO REV. CODE ANN. § 4717.01 *et seq.* (Page 1977)
Health spas, dancing studios, dating services, and studios of martial arts	OHIO REV. CODE ANN. § 1345.41 *et seq.* (Page 1979) (Prepaid entertainment contracts)
Motor Vehicle Rust Inhibitors	OHIO AD. CODE § 109:4-3-15 (1980)

OPPORTUNITY SCHEMES

Referral sales	OHIO AD. CODE § 109:4-3-11 (1977); OHIO REV. CODE ANN. § 1345.02(D) (Page 1979)
Pyramid sales	OHIO REV. CODE ANN. § 1333.91 *et seq.* (Page 1979)

Lotteries, prizes, contests	OHIO AD. CODE § 109:4-3-06 (1977); OHIO REV. CODE ANN. § 2915.01 *et seq.* (Page 1976 & Supp. 1980)
Employment agencies	OHIO REV. CODE ANN. § 4143.01 *et seq.* (Page 1970)